

**INDUSTRY
COMMISSION**

**Workers' Compensation
in Australia**

REPORT NO. 36

4 February 1994

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4 February 1994

Honourable George Gear MP
Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Dear Assistant Treasurer

In accordance with Section 7 of the *Industry Commission Act 1989*, we have pleasure in submitting to you the report on *Workers' Compensation in Australia*.

Yours sincerely

Helen Owens
Commissioner

Nicholas Gruen
Associate Commissioner

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ABBREVIATIONS

Main abbreviations used in this report are listed below:

AAT	Administrative Appeals Tribunal
ABS	Australian Bureau of Statistics
ACC	Accident Compensation Commission New Zealand
ACTU	Australian Council of Trade Unions
ARC	Administrative Review Council
ACM	Australian Chamber of Manufactures
ACOM	Australian College of Occupational Medicine
ACRM	Australian College of Rehabilitation Medicine
ACT	Australian Capital Territory
ACTU	Australian Council of Trade Unions
AMA	Australian Medical Association
AMCA	Australian Maritime Safety Authority
AWE	Average Weekly Earnings
CERP	Closer Economic Relations Pact (with NZ)
CFMEU	Construction Forestry Mining Energy Union
CRS	Commonwealth Rehabilitation Service
DSS	Department of Social Security
GBE	Government Business Enterprise
GPs	General Practitioners
HAGAW	Hunter Action Group Against WorkCover
HSE	Health and Safety Executive
HSR	Health and Safety Representatives
IAC	Industries Assistance Commission
ICA	Insurance Council of Australia
ILO	International Labour Office
ISC	Insurance and Superannuation Commission
MAVIS	Medical and Vocational Intervention Strategies

MTIA	Metal Trades Industry Association
NDS	National Data Set for Compensation-Based Statistics
NOHSC	National Occupational Health and Safety Commission
NSW	New South Wales
NT	Northern Territory
NTF	National Transport Federation Ltd
NWE	Normal Weekly Earnings
OECD	Organisation for Economic Cooperation and Development
OHS	Occupational Health and Safety
ORR	Office of Regulation Review
PAYE	Pay As You Earn
PCN	Preferred Care Networks
PIAWE	Pre-Injury Average Weekly Earnings
PMC	Premium Monitoring Committee
PRM	Premium Rates Committee
PTC	Public Transport Corporation (Victoria)
R&D	Research and Development
RIS	Regulatory Impact Statement
RISE	Re-employment Incentive Scheme
SA	South Australia
SAEF	South Australian Employers Federation
SCOA	Superannuated Commonwealth Officers Association
SRCA	Seafarers' Rehabilitation and Compensation Authority
TAC	Transport Accident Commission (Victoria)
TDA	Tasmanian Development Authority
UK	United Kingdom
USA	United States of America
VACC	Victorian Accident Compensation Commission
VARC	Victorian Accident Rehabilitation Commission

VECCI	Victorian Employers' Chamber of Commerce and Industry
VIOSH	Victorian Institute of Occupational Safety and Health
WA	Western Australia
WAVE	Workers Average Weekly Earnings
WCRC	Workers Compensation Rehabilitation Commission of Western Australia
WCRI	Workers Compensation Research Institution
WISE	Wage Incentive Scheme for Employers

GLOSSARY

Access	The extent to which injured or ill workers actually receive the benefits and support to which they are entitled.
Adverse Selection	Only the worst risks want to insure.
Asbestosis	A form of pneumonconiosis (which is the general name applied to a chronic form of inflammation of the lungs which is liable to affect people who constantly inhale irritating particles). It is caused by the inhalation of asbestos dust.
Catastrophe Insurance	Insurance designed to limit the purchaser's total liabilities in the case of an extraordinary event. Catastrophe insurance will meet the purchaser's liabilities after a certain threshold (usually very high) has been reached.
Centre Based Rehabilitation	Takes place in an approved rehabilitation centre, outside of the workplace. Usually involves functional assessment of the injured workers' abilities and the development of an intensive rehabilitation program for a certain period.
Common law	The system of laws developed by successive decisions by the courts and the role of precedent.
Community Rating	A system of premium rating which spreads risks more or less evenly among the community. To be contrasted with risk rating, which means that premiums are varied according to risk.
Contract	An agreement between two or more parties to exchange something of value.
Contributory Negligence	A common law defence which can be raised when the aggrieved party was also partly responsible for the loss suffered.
Coverage	The extent to which injured or ill workers are eligible to receive benefits within the legislation and terms of reference of a scheme. Coverage deals with the construction of a scheme.

Credibility Factor	The degree to which a firm's recent experience gives reliable estimates of the true risk in the workplace. This increases with firm size.
Double Dipping	Receiving both workers' compensation and other benefits (eg Social Security) for the same injury or illness.
Dynamic Cost Effectiveness	Finding the least-cost strategy to achieve a desired outcome over time.
Experience Rating	Individual firms are charged premiums which reflect as closely as practicable the level of risk to which their workers are exposed.
Excess	An amount specified in an insurance contract for which the purchaser of the insurance is liable, rather than the insurer.
Fault	Legal blameworthiness arising, for example, from a breach of a legal duty or term of contract - as opposed to the narrow legal definition of wilful or negligent misconduct in breach of a legal duty.
Fee for Service	Pays for specific medical procedures as expenses are incurred. Payments are annually.
File and Write	A regulatory mechanisms whereby insurers must file their proposed premium mechanisms with the regulatory authority before being able to write insurance contracts.
Free Time	Periods when the employee is not under the employer's direction.
Fully Funded	Levies are collected in the present period at a rate sufficient to fully cover all present and future liabilities arising from accidents or diseases which occur in that period.
Incidence Rate	The number of accidents or diseases recorded for a specified number of employed persons, say per 1000 persons.
Injury Levy Wedge	A mechanism for decoupling employer liability from actual benefits received by the worker.

Least Cost Avoider	The party who can most cheaply (in terms of time, money and effort) avoid an accident (where both parties could have).
Long-tail Insurance	Insurance under which claims are likely to involve long term liabilities.
Make-up Pay	The employer funds the difference between the workers' normal wage and statutory weekly benefits.
Moral Hazard	The incentive to take care to prevent an occurrence is weakened after insurance against that occurrence has been taken out.
No-fault	Lack of legal blameworthiness.
Nominal Insurance	A common fund designed to meet the liabilities of an insurer that fails, or to provide insurance cover for employees whose employers fail to purchase insurance. Usually funded through a levy on insurers or employers.
Notional Earnings	An estimation of the earnings capacity of a worker, unable to perform his/her previous occupation, in an alternative occupation for which he/she is fit to perform.
Out-of-pocket Expense	Expense that a participant pays for medical services. Includes deductibles, co-insurance and co-payments, but does not include monthly premiums.
Precedent	The extent to which court decisions are binding on, or at least authoritative in, subsequent decisions.
Preferred Provider Organisation	Usually PPO's refer to arrangements where participants required to seek treatment at designated providers as condition of coverage. Participants can choose any health care provider, but receive higher benefits for services rendered by designated providers.

Premium	The insured levy payment of the insured in respect of the estimated costs of that insured's workers' compensation cases for a given financial year.
Reinsurance	Insurers may themselves take out insurance to spread their risks. An employer liable for an excess may contract for an insurer to guarantee that excess through a form of reinsurance.
Right to Act	Legislative provisions which empower, for example, health and safety representatives or committees to find information on workplace hazards.
Right to Know Legislation	Legislative provisions which empower employers and employees to find information on workplace accidents.
Safe System of Work	An employer's legal duty to establish a safe method of work and working environment for employees.
Second Injury	A subsequent injury, it can be either a new injury or an aggravation of a pre-existing injury.
Self Administration	Under Comcare, certain Commonwealth authorities are declared 'Administering Authorities' or self-insurers and carry their own insurance risk and manage all or self-insurers claims internally.
Self Identify	The requirement that individuals indicate their own status.
Self-Insurers and Exempt Employers	Employers who satisfy certain requirements may be exempted from for their workers compensation liability. They take responsibility for the claims cost and injury management of their injured workers. They are subject to the same laws on benefits and conditions as insured employers. They pay a small levy to the scheme as a contribution to expenses of management, uninsured liability and other overhead expenses. Certain Commonwealth authorities are declared administration authorities and carry their own insurance risk and manage all claims internally.

Shield of the Crown	Immunity from prosecution of certain government agencies.
Statutory law	Law enacted by Parliament.
Strict liability	Liability without the need to show wilful or negligent misconduct in breach of a legal duty. An employer may be held strictly liable for a work-related accident as in the case of workers compensation arrangements, or strictly liable for the consequences of a breach of a term of a contract.
Sunsetting	Review of regulations after having been in operation for a given period.
Top-Up-Pay	Payment of weekly benefits in addition to any part-time earnings to raise a workers total income to pre-injury levels.
Tort	A private or civil wrong, independent of contract, arising from wilful or negligent misconduct in breach of a duty owed to an injured person.
Total Injury Management	Incorporates OHS, quick claim assessment and liability determination, appropriate medical treatment and rehabilitation, and workplace re-entry wherever possible, and where not possible appropriate long term compensation.
Workers' compensation	Statutory arrangements to redress loss suffered by employees as a result of work-related injury or illness.
Usual, Customary and Reasonable Charges	Standard applied to charges assessed by health care providers. Defined as not more than the physicians' usual charge, within the customary range of fees in the locality and reasonable, based on the medical circumstances. Expenses above the UCR are carried by the patient.

WORKERS' COMPENSATION IN AUSTRALIA

PART A

OVERVIEW, FINDINGS AND RECOMMENDATIONS

- 1 Overview**
- 2 Findings and Recommendations**

TERMS OF REFERENCE

I, JOHN SYDNEY DAWKINS, Treasurer, under Section 7 of the Industry Commission Act 1989 hereby:

1. refer workers' compensation arrangements in Australia to the Industry Commission for inquiry and report within fifteen months of receiving this reference;
2. specify that the Commission report on whether existing workers' compensation arrangements ensure appropriate safety and accident prevention incentives for both employers and employees and advise on any changes that should be implemented;
3. without limiting the scope of this reference, request that the Commission report on:
 - (a) the effects of current workers' compensation arrangements on incentives for safety in the workplace, subsequent rehabilitation, return to work initiatives and other activities covered by the arrangements;
 - (b) institutional, regulatory, financial or other arrangements of governments in Australia which affect the efficient provision of workers' compensation and rehabilitation services for injured workers and the scope for greater national consistency;
 - (c) the relationship between workers' compensation and other related arrangements such as accident liability insurance, remedies available in common law and the regulation of workplace safety by governments;
 - (d) the interaction between workers' compensation and other government programs including social security and health benefits and other related programs (such as personal income tax arrangements);
 - (e) differences between the various State schemes including premiums, levies and administrative costs, and the impact of these differences on the competitiveness of businesses in the public and private sectors; and
 - (f) the identification of best practice within all existing workers' compensation arrangements.
4. specify that the Commission take account of any recent substantive studies undertaken elsewhere.

John Dawkins

5 November 1992

OVERVIEW

Many Australians are killed or seriously injured at work. Many others subsequently discover (perhaps after they retire) that their illness can be traced to workplace hazards of which they were unaware at the time.

The costs of work-related fatalities, injuries and illnesses (both in human and financial terms) are high. Every year in Australia at least 500 workers die, some 200 000 suffer injury or illness sufficiently serious to be away from work for at least 5 days and an unknowable number fall ill principally because of hazards they have been exposed to at work. The costs of workplace injury and illness are estimated to be at least \$10 billion annually. These costs are borne by individuals (and their families), by employers and by society. Many of these costs could be avoided, and the depressing prospect of their year-on-year repetition argues for better occupational health and safety, workers' compensation and rehabilitation arrangements as a matter of urgency.

We can achieve healthier and safer workplaces. Well-considered occupational health and safety practices and complementary workers' compensation and rehabilitation arrangements have a vital role in reinforcing self-interest in minimising the risk of death, injury or illness associated with the jobs we do. Healthier and safer workplaces are also more productive ones — and firms with good safety records find it easier to attract good staff.

This report makes recommendations about prevention, compensation, rehabilitation and return to work, interaction with other government programs and superannuation and insurance regulation. If the recommendations are adopted it will dramatically reduce the high price necessary to support individuals and families, some of whose lives have been impoverished as a result of work-related fatalities, injuries and illnesses.

Most importantly, the Commission has recommended that a nationally agreed compensation package be developed for those suffering work-related injury and illness (no matter where they live in Australia) and the establishment of a nationally available workers' compensation scheme (to encourage open competition for the workers' compensation business of organisations wherever they are located). These recommendations are designed to focus competition on reducing costs (eg via improved prevention and rehabilitation strategies) — rather than on reducing benefits — and to generally increase the pressures on all schemes across Australia to improve their performance.

Differing perspectives

Although in principle we may all agree on the desirability of reducing work-related injury and illness, it is not a costless undertaking and the various parties with a stake in the outcome have different perspectives.

Employers want the lowest possible workers' compensation premiums, and worry about their competitiveness as the costs of insuring against work-related injury and illness escalates. *Employees* want to work in safe workplaces. However, if they are injured at work or suffer an occupational disease — they want to be appropriately compensated and, if necessary, rehabilitated and/or retrained. *Governments* want comprehensive arrangements in place which embody strong safety incentives, are fair to those who suffer work-related injury or illness, but which do not at the same time impose an unreasonable burden on either firms or taxpayers. And *underwriters/insurers* want schemes which allow them to earn an adequate return on their investment.

These desires can pull workers' compensation arrangements in different directions. Indeed, the history of arrangements in Australia bears testimony to the success of various stakeholders in influencing the specifics of individual schemes from time to time. As a result, most schemes are in more or less constant flux and can be subject to periodic financial crises which spark major reforms.

Therefore there are difficult trade-offs to be made in settling the key design features of workers' compensation schemes. For example, high compensation payouts mean high workers' compensation premiums — at least in the short term. On the other hand, low levels of compensation are seen by many as unfair punishment of victims of work-related injury and illness. Equally importantly, other key features — such as the level and duration of compensation paid — have implications for the behaviour of the various parties (because of the incentives they create).

Current arrangements can be significantly improved. The key to securing better outcomes is arrangements which embody the 'right' kinds of incentives. Incentives matter because they affect behaviour.

Role of government in regulating workplace risks

Job risks have been a principal target for government regulation around the world.

Some of the reasons for this are historical. For example, workers' compensation schemes arose in Europe in response to the difficulties injured workers usually

faced in obtaining legal remedies (often because of the prohibitively high costs involved). The statutory schemes that evolved in the latter part of the 19th century have since come to be regarded by many as an appropriate form of social support (complementing the social security system).

There are also economic grounds for government intervention. Laws sheeting home to firms responsibility for accidents in their workplaces are justified in situations in which the firm rather than the individual employee is better placed to control potential workplace hazards. Management usually has (or should have) better information about potential hazards and their likely consequences than individual workers. Holding firms liable to compensate employees for work-related injury and illness has the particular advantage of creating a powerful incentive for firms to maintain a safe and healthy working environment. Holding firms liable also means that the costs of work-related injury and illness are reflected in the costs of producing goods and services. This is as it should be.

The obvious alternative to holding firms 'strictly' liable for work-related injury and illness is to allocate costs on the basis of fault. This approach seeks to apportion costs according to the respective fault of each party. Such an approach typically involves significant costs — as each workers' compensation claim has the potential to become subject to dispute. The common law system, where legal costs can run to tens of thousands of dollars for a single case, exemplifies such a high-cost approach to workers' compensation.

The Commission endorses the 'no-fault' approach of workers' compensation systems in Australia and elsewhere which holds employers liable for work-related injury and illness. There are, however, situations in which firms are clearly not in a position to control the working environment — such as injuries which occur while journeying to and from work, and accidents happening during 'free time' where the employee is away from the workplace. The Commission considers that such situations should not be covered by compulsory workers' compensation arrangements. Where the community considers that compensation should be paid for such eventualities, other arrangements should be put in place — as with existing transport-accident schemes.

What should be the objectives of workers' compensation schemes?

Workers' compensation schemes originally focused on paying compensation to workers injured in the course of their employment. More recently, the preventive role of workers' compensation arrangements in reducing workplace injury and illness has been emphasised. So too have provisions which encourage rehabilitation and return to work.

More generally, the aim should be to significantly reduce (hopefully minimise) the costs of work-related injury and illness — being the sum of the costs incurred by:

- *workers* because of forgone earnings, any pain and suffering involved, the costs of medical treatment, rehabilitation costs, the costs of resolving disputes and the general dislocation of lifestyle;
- *employers* because of workers' compensation premiums, the cost of safety measures in the workplace including the costs of complying with occupational health and safety requirements, downtime costs following an accident, and having to replace injured workers and train their replacements; and
- *society* because of health and living costs of those suffering work-related injury and illness met by the community.

However, in seeking to reduce costs an important issue to be addressed is: *Which parties should bear what costs (and for how long)?* For example, should there be a point at which the costs of medical treatment and general support for permanently disabled workers become the responsibility of society in general and therefore taxpayers rather than employers?

Ideally, arrangements which seek to reduce overall costs should provide incentives such that:

- employers take appropriate steps to provide safe and healthy workplaces;
- employees behave in safety conscious ways at work; but that
- in the case of work-related injuries and illnesses which nevertheless occur, 'fair' compensation is paid, workers are rehabilitated to the extent that this is possible, and go back to work as soon as practicable.

The current situation

Workplace culture

Participants often commented on the importance of the culture of a workplace in creating or maintaining safe work practices. While such a culture is hard to achieve, the evidence is that — to be successful — necessary change has to be initiated and championed by management before it will be embraced by the workforce. There are clear examples where improved safety performance is part of a larger 'regime shift' within firms from a vicious to a virtuous cycle of corporate culture and performance. In the last decade, many firms have pioneered a move from a situation in which poor morale, safety, productivity

and quality performances mutually reinforced one another to one in which high morale, safety, productivity and quality performances now support each other. Many more firms need to make the change, because it is in their best interests to do so. One of the reasons for slow progress in changing attitudes is a lack of public appreciation of the seriousness of the problem.

Unsatisfactory workers' compensation arrangements

Currently, Australia has a multiplicity of schemes (at both federal and state levels) for a relatively small national workforce. Existing workers' compensation arrangements do not encourage desirable behaviour on the part of the various parties, and their inconsistencies add to the problem. The result is that work-related injury and illness cost the economy more than they should.

Differing benefit structures and cost-reimbursement policies among jurisdictions mean that the costs workers have to bear depend on where they live (and possibly for whom they work). Differing benefit regimes and the way in which they are administered also mean that costs transferred to (and from) taxpayers vary by jurisdiction. This unsatisfactory state of affairs can be exacerbated when governments create low-benefit, low-cost workers' compensation schemes in an attempt to influence firms' location decisions. Generally such schemes are paid for by others — either by other firms operating in the same jurisdiction (via 'cross-subsidies'), or by taxpayers generally (if costs are transferred to other government programs).

Unsatisfactory workers' compensation arrangements blunt rehabilitation and return-to-work incentives. What is needed are arrangements which encourage 'best practice', including maintaining the relationship between the employer and the worker, early intervention, for both parties to agree on a suitable rehabilitation program, and for programs to be workplace-based where possible.

'Healthy' and 'unhealthy' competition

Competition which erodes benefits is invidious. Competition which takes the form of shifting as many costs as possible onto other parties (eg to individuals or to the health and social security systems) is also undesirable. As one inquiry participant put it, "ultimately, someone has to pay". What needs to be encouraged is healthy competition which focuses on cutting service-delivery costs and/or provides better services.

Beneficial competition can greatly improve occupational health and safety outcomes — as when insurers actively compete with one another to provide firms with the benefit of their expertise in the use of risk-management

techniques to improve workplace safety, claims management, and superior performance in the crucial areas of rehabilitation and return-to-work.

'Quality' problems

The 'market' for workers' compensation is an unusual one for two reasons. First, workers generally do not become *major* consumers of compensation more than once in their lives. Accordingly, the incentive for insurers to deliver good-quality service to injured workers is weaker than in markets in which consumers repeat their purchases many times. Second, this problem is compounded by the fact that the employer purchases insurance on behalf of the employee. This can further blunt market incentives to deliver quality service, as well as introducing a greater than usual 'distance' between producer and ultimate consumer.

There are significant 'quality' problems in the market for workers' compensation. Quality in insurance markets — particularly in claims administration and service delivery — is important because the role it plays in conditioning workplace attitudes and its facilitating co-operative employee-employer relationships which are crucial in achieving good return-to-work rates.

Problems with occupational health and safety requirements

Quality is also a problem in the vital area of prevention. The Commission accepts that occupational health and safety requirements are necessary. Until relatively recently, such regulation was highly prescriptive and of unclear benefit in many cases. Too great an emphasis on prescriptive legislation can sometimes hinder good workplace safety performance (eg by impeding the introduction of new and better technologies). In the last decade, occupational health and safety regulation has improved although some legislation remains fragmented and inconsistent. Regulators have sought to encourage good safety performance in preference to adopting prescriptive rules.

Although performance has improved, occupational health and safety regulation continues to be managed with insufficient regard for its cost-effectiveness. For example, there is little evidence of regulators seeking to measure the outcomes of their initiatives with a view to improving their cost-effectiveness.

Also — in spite of the need for occupational health and safety rules and workers' compensation arrangements to operate as complementary and mutually reinforcing components of what should be regarded as a 'workplace injury and illness cost-minimisation system' — in some cases workers' compensation and occupational health and safety authorities continue to operate in relative isolation from one another.

What can be done?

The Commission's preferred approach involves:

- minimising the scope for invidious competition, by putting in place *agreed national* benefits and supporting arrangements to limit the extent of cost-shifting onto injured or ill workers and the community; while at the same time
- maximising beneficial competition through encouraging greater competition in the provision of insurance (and other services aimed at prevention and rehabilitation).

The Commission accepts that:

- government has an active role to play in regulating workplace risks (via workers' compensation and complementary and mutually reinforcing occupational health and safety arrangements);
- employers should be held strictly liable for compensating employees suffering work-related injury or illness; and
- employers should be compelled to make suitable arrangements to guarantee that they can meet their workers' compensation liabilities (eg by being required to insure their liability or by convincing government that they are in a position to act as self-insurers, perhaps with the backup of 'catastrophe insurance').

Other key aspects of workers' compensation arrangements which the Commission would like to see adopted uniformly throughout Australia are discussed below.

Compensation for lost income and permanent disablement

How to compensate employees for forgone earnings (lost income), for possible physical (and mental) impairment and attendant pain and suffering attributable to work-related injury and illness is contentious. But it goes to the heart of workers' compensation arrangements, since compensation for these costs represents a major component of overall scheme costs (other important costs are compensating for medical and related expenses, and for legal and related dispute-resolution costs). Who should be held responsible for what costs, how, and for how long can be approached from a number of perspectives, including:

- what is considered 'fair' in the circumstances (both from the point of view of the worker, the firm and the taxpayer); and
- what incentives are thereby created for the various parties — and their likely behavioural consequences. The focus here should be on *employers*

(in terms of the steps they are likely to take to create and maintain healthy and safe workplaces), on *employees* (in terms of reinforcing safe behaviour at work and encouraging rehabilitation and return to work), and on *workers' compensation administrators* and *underwriters/insurers* (who may allow or actively encourage the passing on of at least some costs to others).

A case could be made on fairness grounds for full compensation to be paid for lost income through to notional retirement age if the worker is unable to return to work (and indeed for meeting all other costs, bearing in mind the difficulty of monetarily compensating for things like pain and suffering). That would make employers sensitive to the potential costs of workplace injury/illness to the maximum feasible extent. However, such an approach would provide little incentive for employees to undertake rehabilitation programs and return to work. And there is some evidence to this effect. This explains why compensation for lost income is often less than full — usually falling short of pre-injury levels even initially, before reducing to even lower levels subsequently (typically involving one or more step downs in the level of support).

In thinking about compensating for the costs of work-related injury and illness, we should be mindful that *all* the costs associated with work-related injury and illness are being borne by *one or other* of the various parties *now*. For example, while employers (principally via their insurers) are paying for a significant part of lost income, medical bills and lawyers fees, injured workers are usually also suffering reduced incomes — as compared with pre-injury levels (and certainly in terms of those which were in prospect) — as well as pain and suffering (which may have become a permanent blight on their lives). And taxpayers are being asked to pay for those no longer eligible for compensation (eg via Medicare and the social welfare system).

As matters stand, the Commission is convinced that *too many of the costs of work-related injury and illness are being borne by affected individuals and taxpayers*, and that redressing some of this imbalance will create the sorts of incentives which will, over the longer term, lead to *fewer (and less serious) workplace injuries/illnesses (and therefore workers' compensation premiums)*. Accordingly, the Commission's preference is to :

- hold employers liable to pay the cost of compensating employees suffering work-related injury or illness for forgone earnings (and other costs) for much longer periods than is typically the case at present — to powerfully reinforce the incentive for employers to become more safety conscious (on grounds that employers are best placed to take preventive action to minimise workplace accidents and illnesses); and

- compensate injured/ill workers for forgone earnings starting at near pre-injury levels and stepping down to lower levels of support — depending on the nature of the injury/illness, prospects for rehabilitation/return to work, and the worker's willingness to undergo rehabilitation (on grounds that incentives should be provided for workers to regain their fitness for work to the maximum possible extent, and to return to work in whatever capacity is dictated by any remaining disability).

An illustrative benefits structure

A possible scheme which could serve as a basis for the various jurisdictions agreeing on a common benefits structure to apply Australia-wide, and one which the Commission believes would ensure strong safety, accident-prevention and return-to-work incentives for both employers and employees is the following:

- employers be held liable to pay the cost of compensating employees suffering work-related injury or illness (with their liability being discharged upon a 'reasonable' offer of employment being made to formerly injured/ill employees upon completion of any necessary rehabilitation program, or if employees 'unreasonably' refuse to undertake rehabilitation);
- employees receive periodic compensation for lost earnings while they are off work: initially at 95 per cent of pre-injury earnings for the first 26 weeks (indexed) and:
 - in the case of *partial incapacity*:
 - periodic compensation after 26 weeks would step down to 75 per cent for the next eighteen months, then to 60 per cent for a further 3 years;
 - if after 5 years the employee still does not have a job, the employer would continue to be liable to meet the cost of associated social security payments until deemed retirement age or return to work, whichever occurs first;
 - in the case of *total incapacity*:
 - periodic compensation after 26 weeks would continue at 95 per cent for a further 54 months, then step down to 85 per cent until deemed retirement age or return to work, whichever occurs first.

Importantly, such a benefit structure would address concerns over cost-shifting to the social security system and to individual workers.

An option which is attractive in terms of sharpening the *incentive effects* on employers is to break the nexus between the cost to the employer (in terms of

liability for the cost of work-related injuries and illnesses) and the compensation actually paid to employees, in particular compensation for lost income. In terms of the Commission's illustrative benefits structure, this would mean that employers would be held liable to pay the cost of compensating employees at 95 per cent of pre-injury earnings (indexed): for up to 5 years in the case of *partial incapacity* or until deemed retirement age or return to work (whichever occurs first) in the case of *total incapacity*. Employees would, however, receive benefits of less than 95 per cent where the proposed step downs in benefits occurred. This would have the effect of creating an 'injury levy wedge' (see Chapter 4), the money from which could either be rebated to employers (eg on a per-employee basis) or used to fund 'second injury' schemes or 'gradual onset' programs (where the link to work has become tenuous because of the passage of time).

The Commission contracted a firm of actuaries (Trowbridge Consulting) to estimate the likely effects on workers' compensation premiums of adopting the above proposals for a uniform benefit structure, including the 'injury levy wedge'. After assessing the possible implications for both South Australia and New South Wales, the conclusion on likely short-term impacts was: "we believe that 2.5 per cent to 3 per cent of wages could be taken as a broad indication of the average premium level required to fund the Commission's proposals." While the Commission accepts that premiums would have to rise in some jurisdictions in the short term, over the longer term it is confident that — with appropriate incentives in place for both employers and employees — the incidence, severity and average duration of work-related injury and illness will be significantly reduced over the longer term (as will overall costs). The Commission developed a simulation model of a workers' compensation scheme, whose results emphasised the significant potential for reduced premiums as better health and safety incentives induce desirable behavioural responses over time (see Appendix H).

Turning to the issue of compensation for permanent disablement, the Commission considers that remedies at common law are an unsatisfactory form of redress and represent a poor way of promoting prevention. Its preference is to remove access to common law in favour of statutory payments under an agreed 'Table of Injuries' to apply throughout Australia — with 'special cases' clearly not covered under the Table addressed on a case-by-case basis.

Medical and related expenses

Those suffering work-related injury or illness of necessity make large demands on the health system, including rehabilitation services. The costs are considerable, and unless they are covered under workers' compensation

arrangements they will be shifted to the individuals themselves or, (more likely) to taxpayers via Medicare.

The Commission's view is that *all* medical and related expenses (such as the costs of necessary rehabilitation programs) incurred by those suffering a work-related injury or illness should be met under workers' compensation arrangements. If this is not the case, the extent of transfers to Medicare should be estimated and mechanisms explored to pass the costs back.

Dispute-resolution procedures

Workers' compensation is a fertile arena for disputes. The stakes can be high, particularly for workers and their families.

The Commission's preference is for reliance on non-adversarial dispute-resolution procedures (with the emphasis on conciliation and arbitration, although legal representation should not be excluded). Judicial review should be a last resort. Procedures should be characterised by a prompt initial decision subject to non-judicial review by an independent internal arbitrator in the first instance, before appeal to external arbitration and/or resort to the courts.

Contributory negligence

The 'no-fault', employer-financed workers' compensation arrangements advocated so far avoids the issue of who is to 'blame' for an accident or conditions that lead to work-related injury or illness. How then should situations involving gross negligence on the part of the employer or the employee (whose careless actions may, for example, have caused harm to his/her fellow workers) be handled? The Commission's preference is to address these issues under applicable health and safety legislation, the provisions of which should include penalties for serious breaches or gross negligence (eg fines or gaol for employers or employees).

Implementing change

The Commission has carefully considered how best to implement what it regards as 'best practice' when it comes to providing Australian workers with appropriate workers' compensation arrangements. An option is for existing jurisdictions to voluntarily agree to common arrangements including, importantly, a uniform benefits structure and 'Table of Injuries'.

The Commission's view is that, even with agreement on key elements of uniformity, this would not be enough. What is needed are the ongoing pressures

for improved scheme performance which would be provided by open competition for the workers' compensation business of firms, wherever they are located. One way of achieving more open competition, and the one preferred by the Commission, is to have a nationally available scheme (which would compete with existing schemes).

In order to encourage greater uniformity and competition, the Commission recommends the establishment of a National WorkCover Authority to develop national standards and to regulate the nationally available workers' compensation scheme. The Authority would not be a provider of workers' compensation insurance.

For all schemes important functions of the Authority would be to:

- develop and monitor a national compensation package (including definitions of a worker and compensable injury or illness, benefits structure and associated 'Table of Injuries') which is *either* the result of agreement between jurisdictions *or* based on the Commission's suggestions;
- monitor dispute-resolution processes; and
- facilitate, in co-operation with Worksafe Australia, the collection and dissemination of information on work-related injury and illness (including their likely consequences).

Specifically for the nationally available scheme, important functions of the Authority would be to:

- license underwriters/insurers able to satisfy appropriate prudential and service-delivery requirements; and
- license firms to self-insure Australia-wide, again provided appropriate prudential requirements and service-delivery requirements are satisfied (and in this regard the Commission considers that Comcare return to its core function of managing the Commonwealth Government's self-insurance requirements).

The obvious danger is that existing jurisdictions may not co-operate, because of a preference to maintain their autonomy and/or because of a conviction that the nationally available scheme would not be viable (because it will have an 'uncompetitive' benefits structure compared with their own). The appropriate response in such circumstances is for the Commonwealth to estimate the net extent of cost-shifting to federal programs, and explore mechanisms to pass costs back. However, the Commission is confident that common sense will prevail, that we will see commonality of compensation within a few years, that existing schemes will continue — and that the vast majority of working

Australians will at last be protected by better workers' compensation arrangements than currently exist for most workers.

FINDINGS AND RECOMMENDATIONS

Prevention (Chapter 3)

FINDINGS

Evidence suggests that management must assume a leadership role in developing and maintaining a 'culture of care', but success requires the commitment of all.

The variety of statistics collected make it impossible to draw meaningful comparisons on occupational health and safety performance between jurisdictions, or even over time within a single jurisdiction. Lack of comparable measures of performance hinders 'benchmarking' within Australia.

Co-operation between existing workers' compensation and occupational health and safety authorities is inadequate to enable Worksafe Australia to fulfil its charter to develop consistent, reliable and accurate data on work-related injuries and illnesses and their causes. Availability of such data would enable much-needed comparisons to be made, both domestically and internationally.

Employers, rather than employees, are better placed to ensure that their workplaces are safe and healthy. Management is (or should be) more aware of potential workplace hazards and has more control of the workplace than the individual worker, and thus is in a better position to initiate measures designed to increase safety.

Common law is not a cost-effective means of promoting prevention.

There is little evidence of occupational health and safety authorities seeking to measure the outcomes of their initiatives with a view to improving their cost-effectiveness.

Although fines and penalties have an important role in deterring unsafe work practices, prosecution of occupational health and safety breaches is not being pursued with enough vigour. Fines and penalties are inconsistent between jurisdictions, and too low in some to be a credible deterrent. Even where maximum fines are high, courts rarely impose large penalties. Even in cases of gross negligence or wilful misconduct leading to death or serious injury, severe penalties (including gaol sentences) are often not applied. Minimum penalties may therefore be necessary.

The educative and advisory role of occupational health and safety inspectors is important. Fundamental to this role is the ability of the inspectorate to issue improvement and prohibition orders where workplace hazards or breaches of the legislation are identified. This is more effective when complemented by appropriate advice and information about how hazards could be contained or minimised.

In some jurisdictions, co-operation between occupational health and safety and workers' compensation authorities is inadequate. It is important that occupational health and safety and workers' compensation authorities work closely together, although a complete institutional merger may not be necessary to achieve this.

Enterprise bargaining can be an appropriate forum for achieving improvements in safety performance, however the Commission considers that enterprise bargaining should not be used to reduce minimum standards.

RECOMMENDATIONS

Further detailed investigation of occupational health and safety at a national level should be undertaken.

Employers should be held liable on a 'no-fault' basis for work-related injury and illness. The Commission nevertheless supports existing legislative provisions which withhold benefits in the case of serious and wilful misconduct on the part of the injured employee, except in cases of death or serious injury.

Where practicable, cross-subsidies between firms should be discouraged, as they undermine safety incentives and discriminate against firms with superior safety records.

Large firms, for whom experience is a good proxy for risk, should have their premiums experience rated. Small firms, for whom experience is not a good proxy for risk, should be subject to bonus/penalty schemes designed to provide reasonably predictable and consistent premium changes.

Premium setting should be regulated by the relevant workers' compensation authority. This regulation should be of a 'file and write' nature, encouraging:

- premium-based incentives for employers to improve their preventive and rehabilitation strategies; and
- innovation in premium setting.

Occupational health and safety authorities should measure the costs and benefits of their initiatives with a view to optimising the cost-effectiveness of those initiatives.

Government agencies should be subject to the same occupational health and safety regulations, fines and penalties as the private sector.

Compensation (Chapter 4)

FINDINGS

The absence of a consistent definition of a worker among jurisdictions is inequitable, provides scope for eroding access to workers' compensation, and exacerbates cost-shifting.

Under present arrangements, the trend towards 'contracting out' of specialised tasks to small businesses will result in an increasing proportion of the workforce being excluded from compulsory workers' compensation coverage.

In current circumstances, it is appropriate for self-employed small business people and farmers to continue to arrange their own insurance coverage for workers' compensation.

In most cases, employers have very little control over the safety of a person's journey to and from work.

There has been a tendency for legislation to limit what qualifies as a compensable injury or illness, while judicial interpretation has tended to expand coverage.

The Commission generally prefers periodic benefit payments, but recognises that in some cases redemptions may be a more satisfactory conclusion to long-term claims.

RECOMMENDATIONS

All jurisdictions should adopt a common definition of a worker for the purpose of workers' compensation coverage, to be developed (in consultation with existing schemes) by the proposed National WorkCover Authority.

All jurisdictions should adopt a common definition of a compensable injury or illness for the purpose of compulsory workers' compensation coverage, to be developed by the proposed National WorkCover Authority, in consultation with existing schemes. The definition should ensure that a significant link between work and the injury or illness is identified, and that 'normal' journey claims and injuries or illnesses occurring during 'unpaid breaks' off the employer's premises are excluded.

All jurisdictions should adopt a common benefits structure, to be developed by the proposed National WorkCover Authority in consultation with existing schemes. The guiding principles should be that:

- employers be liable to pay a significant part of the cost of compensating employees suffering work-related injury or illness for long periods; and
- compensation paid to injured or ill workers should start at near pre-injury levels (indexed), and step down depending on the nature of the injury or illness, prospects for rehabilitation and return to work and the worker's willingness to undertake suitable rehabilitation.

Weekly workers' compensation payments should be based on a worker's pre-injury average weekly earnings (including penalties and any other allowances 'normally' received).

Weekly compensation payments should be capped, for example at twice average weekly earnings in the relevant jurisdiction.

Redemptions for long-term claims should be permitted where continuing weekly compensation payments are 'low' and when the redemption is in the best interests of the worker.

Payment of employer superannuation contributions should continue while a worker is in receipt of weekly benefits.

Access to common law should be removed, with compensation for non-pecuniary loss through a common 'Table of Injuries' to be developed by the proposed National WorkCover Authority, in consultation with existing schemes. A tribunal should be established, within the proposed National WorkCover Authority, to consider exceptional cases and to periodically review the Table.

Attributable medical, rehabilitation and related expenses should be fully compensated.

Rehabilitation and return to work (Chapter 5)

FINDINGS

A range of performance indicators is required to measure the effectiveness of rehabilitation, and allow meaningful 'benchmarking'.

Rehabilitation has generally proven to be cost-effective, although returns compared to outlays can vary widely.

Existing 'make-up' pay provisions in awards are inconsistent with the return-to-work incentives embodied in the Commission's illustrative benefits structure.

However, where such provisions are negotiated at the enterprise level — rather than imposed via awards — the outcomes are likely to be in the interests of both parties.

Timely case estimates can be an effective device for providing important information to firms of likely consequential costs of work-related injury or illness.

Having to retain a job for an injured or ill worker and the advice, education and support of the occupational health and safety authority (and as a last resort, the threat of prosecution for breaching regulations) may also provide more of a preventive incentive to small employers than varying workers' compensation insurance premiums.

'Second-injury' schemes can be an important means of reintegrating workers into the workforce.

Rehabilitation is most successful when employers and employees agree on programs and treatment providers.

Rehabilitation is most effective, and costs are significantly reduced, where employers take responsibility for maintaining both contact with and support for employees suffering work-related injury or illness.

Early referral is important for the effective treatment and speedy return to work of injured/ill workers.

Workplace-based rehabilitation appears to be cost-effective, but there is a need to ensure the availability of 'quality' support services.

The provision of appropriate duties for injured/ill workers is important for their effective rehabilitation and reintegration into the workplace. Furthermore, it is important that such duties be periodically reviewed to facilitate progress towards complete rehabilitation of the injured/ill worker.

RECOMMENDATIONS

To encourage rehabilitation and return to work, compensation payments should be suspended where there is 'unreasonable' failure on the part of an employee to undertake rehabilitation. Payments would recommence when the employee agrees to undertake a suitable program.

All schemes should have arrangements which encourage employers and insurers to provide rehabilitation as soon as practicable, if necessary without any acceptance of liability. (The Commission notes that this is current practice among a number of self-insurers with good occupational health and safety records.)

Insurers should provide employers with case estimates of the costs of significant claims, and their likely implications for premiums, as soon as practicable in the claims-management process.

All jurisdictions should place legislative obligations on employers to take responsibility for the rehabilitation of their injured/ill workers. Employers should also be required to provide a job to which an injured or ill worker can return — to be kept open for a period of up to twelve months.

Interaction with other government programs and superannuation (Chapter 6)

FINDINGS

As a general principle, where cost-shifting is identified action should be taken to prevent it. This principle holds regardless of whether costs are being shifted from employers to individuals or the community, or the other way.

The potential exists for health costs to be shifted between workers' compensation schemes and Medicare. From the limited quantitative information available it would appear that the more significant problem is likely to be cost-shifting onto Medicare. However, existing arrangements of the Department of Human Services and Health are inadequate to identify the net extent of cost-shifting to Medicare.

Under existing arrangements, the incentive and opportunity exists to shift costs between workers' compensation schemes and the social security system. Although the extent of cost-shifting either way is difficult to determine with accuracy, there is likely to be a large net shifting of costs onto the social security system. Existing arrangements in relevant government agencies are inadequate to identify the net extent of cost-shifting to Commonwealth programs.

RECOMMENDATIONS

There should be no dollar or time limits on legitimate medical expenses in respect of successful workers' compensation claims.

Employer excesses for medical costs should be removed because of the ease with which these costs could be passed onto the health-care system.

Lump-sum payments for future medical expenses should be discontinued (payment of expenses as incurred is preferable).

In the event that the Commission's recommendations are not implemented, the Commonwealth should estimate the net extent of cost-shifting to Medicare and

the social security system, and explore mechanisms to pass the costs back to the States/Territories.

Insurers, in conjunction with Department of Social Security, should ensure that recipients of lump sums under existing 'Table of Injuries' (or redemptions) are aware of eligibility rules for social security.

The Commonwealth should consider removing the taxation bias favouring lump-sum redemptions of weekly workers' compensation benefits.

Relevant agencies should ensure that future superannuation arrangements are consistent with the preventive and return-to-work objectives of workers' compensation arrangements. To this end, some integration is required under which:

- workers would not be compelled to take out death and disability cover under superannuation for work-related injury and illness; and
- where workers elect to take out such coverage, arrangements should be in place to ensure that they do not receive ongoing combined payments in excess of pre-injury earnings.

Insurance regulation (Chapter 7)

FINDING

The Commission found major deficiencies in workers' compensation data. The fragmented nature of reporting systems and the resulting limited and poor-quality statistics greatly constrain the scope for analysis.

RECOMMENDATIONS

Schemes should allow excesses on income benefit payments (but not on medical benefits).

Schemes should allow flexible employer excesses, supported by arrangements such as 'reinsurance'.

Clear cases of fraud should be subject to criminal prosecution.

Schemes should adopt uniform minimum licensing criteria for prudential requirements, data collection, and 'quality of service' for insurers and self-insurers, to be developed by the proposed National WorkCover Authority.

The Insurance and Superannuation Commission's powers should be extended, with the agreement of jurisdictions, to allow it to prudentially supervise government insurers.

Schemes should develop quality standards and performance indicators, to form part of insurers' licensing requirements, and all schemes should conduct regular, published 'quality' audits of insurers.

Each scheme should come within the jurisdiction of an Ombudsman who can deal with complaints by clients of the scheme. Funding should be internal to the scheme.

Data-collection requirements should form part of insurers' and self-insured employers' licensing criteria and they should be required to supply relevant data to the proposed National WorkCover Authority. In concert with Worksafe Australia, the Authority would be responsible for establishing uniform reporting standards and the collation and publication of national workers' compensation statistics.

Schemes should offer self-insurance to suitably qualified employers under appropriate regulation.

Prudential requirements imposed on self-insured employers should be, as far as practicable, neutral compared to other insurers.

The proposed National WorkCover Authority should monitor all schemes' dispute-resolution processes, and publish performance standards to assist in identifying 'best practice' and in countering possible erosion of benefits.

Dispute-resolution bodies should be given discretion to award costs against a worker and/or the employer/insurer, particularly in cases regarded as frivolous, vexatious, fraudulent or without proper justification.

Where private insurers operate in a market there should be private underwriting of workers' compensation insurance, under adequate monitoring of premium setting, prudential supervision and 'nominal insurance' arrangements.

Comcare should return to its core function of managing the Commonwealth Government's self-insurance requirements.

The Commonwealth Government should establish a nationally available workers' compensation scheme which could operate in parallel with existing schemes. A National WorkCover Authority should be established to develop minimum national standards and to regulate the nationally available workers' compensation scheme.

For all schemes, the National WorkCover Authority should:

- develop common definitions of a worker and a compensable injury or illness;
- develop national standards relating to;
 - compensation;
 - 'quality of service';
 - reporting requirements;
 - insurer and self-insurer licensing criteria;
 - scheme-performance 'benchmarks';
- monitor scheme performance relating to;
 - dispute-resolution processes;
 - 'quality of service'; and
- collect and publish data.

For those in the nationally available scheme, the National WorkCover Authority should:

- license insurers and self-insurers;
- supervise the collection of data;
- ensure the quality of service delivery of insurers and self-insurers;
- set benefit levels and other components of compensation; and
- supervise premium setting.

The Commonwealth Government should retain the option of self-insurance. Individual agencies may:

- be part of a national self-insurance licence managed by Comcare;
- hold their own self-insurance licence; or
- purchase insurance from a private insurer under the nationally available scheme.

'Eligible' employers should be entitled to opt into the nationally available scheme, and:

- hold a licence to self-insure (and either manage their own claims or contract out claims management); or
- purchase insurance from a licensed insurer.

* * * * *

The Commission draws attention to:

- the work of the International Labour Organisation, the European Union and others in developing consistent reporting practices and internationally harmonised occupational health and safety statistics (Chapter 3).
- the low level of expenditure on occupational health and safety research and development in Australia (Chapter 3).
- the following mechanisms as a means of achieving safety incentives for small firms, given the inappropriateness of experience rating in their case:
 - a bonus/penalty scheme incorporating sufficient volatility in premium payments to create positive safety incentives, together with education for firms regarding what causes premiums to fluctuate;
 - an excess payment by small firms of, say, the first two weeks' weekly compensation payments, with options for variable excess levels; and
 - discounts on premiums for recognised reductions of risk (Chapter 3).
- the potential that exists for occupational health and safety statistics and related information included in claims forms to be used more effectively in targeting inspections. Random inspections also have a place in effective inspection strategies (Chapter 3).
- coverage of contractors, which may become an increasingly important issue. Accordingly, it may be necessary to monitor the situation regarding those not covered by compulsory workers' compensation with a view to introducing compulsory private insurance in the future (Chapter 4).
- the possibility that sub-contractors be covered by compulsory workers compensation insurance with the premium being paid by the firm letting the contract (Chapter 4).
- the possibility that inflexible work practices may impede rehabilitation and return to work (Chapter 5).
- the role 'co-operatives' or employer networks can play in facilitating the rehabilitation and return to work of injured or ill workers, particularly in small workplaces — and notes that its suggested benefits structure would create strong incentives to bring this about (Chapter 5).
- the significantly different payment rates under Medicare and the various workers' compensation schemes for the same medical treatment (Chapter 5).

- the important role that injured workers' groups can play, both in supporting workers and in generating and disseminating information. This suggests a case for some funding for these groups, through premiums, to enable them to make a greater contribution to workplace safety awareness and rehabilitation (Chapter 5).
- its comments on 'reinsurance' as a mechanism for reconciling variable excess arrangements with surety of payment of benefits (Chapter 7).
- the possibility that the Australian Tax Office and workers' compensation schemes could share information to counter non-compliance, if this could be done without compromising privacy — for example, by exchanging payroll data for individual firms in aggregated form (Chapter 7).
- the problems posed by delays in dispute resolution, and the need for mechanisms to address the potential imbalance of power between workers and employers/insurers (Chapter 7).

WORKERS' COMPENSATION IN AUSTRALIA

PART B

- 1 The Inquiry**
- 2 Existing Arrangements**
- 3 Prevention**
- 4 Compensation**
- 5 Rehabilitation and Return to Work**
- 6 Interaction with other Government Programs and Superannuation**
- 7 Insurance Regulation**
- 8 Implementing Changes**

1 THE INQUIRY

Work-related injuries and illnesses impose unacceptably large costs on affected individuals (and their families), employers, and the community generally. Many of these costs are avoidable. Minimising the costs of work-related injury and illness is the task of appropriate occupational health and safety requirements and complementary workers' compensation arrangements. Australia has a long way to go before its workforce is protected by 'best practice' in both these areas. It is the task of this inquiry to suggest more appropriate arrangements and to convince existing stakeholders (including governments, employers, employees, and existing workers' compensation authorities) of the merit of adopting them.

The task of putting in place better workers' compensation arrangements throughout Australia is a challenging one. With this end in mind, this report looks at existing arrangements in the inter-related areas of occupational health and safety (OHS), workers' compensation, access to common law remedies and relevant employment conditions more generally.¹

It is an inquiry about how to reduce costs of work-related injury and illness by implementing cost-effective ways of achieving:

- *prevention* of work-related injury and illness in the first place;
- *compensation* in cases where work-related injury or illness nevertheless occurs; and
- *expeditious rehabilitation* and *return to work* where possible.

In particular, this inquiry is concerned with achieving appropriate incentives to secure these ends and, in the process, identifying 'best practice' in each area. An important aspect of reducing the costs of work-related injury and illness is establishing an environment in which workers' compensation arrangements are subject to ongoing pressures for improvement.

For most of the arrangements under review, primary responsibility within the various jurisdictions lies with the respective government (ie the

¹ The primary focus is, however, on workers' compensation — so that, for example, this report should not be regarded as constituting a comprehensive review of OHS practices in Australia.

States/Territories² or the Commonwealth). An important issue for this inquiry is whether autonomous state-based systems are appropriate mechanisms for achieving the greatest possible reductions in the overall costs of work-related injury and illness.

This inquiry also addresses how workers' compensation arrangements ought to interact with other government programs and related arrangements, including the health-care system (in particular Medicare), the tax and social security systems and superannuation.

1.1 Why is the inquiry important?

Current workers' compensation arrangements in Australia are a long way from ideal. Major problems exist, and this inquiry aims to get better arrangements in place throughout the country.

Notable among the problems are:

- Australia's OHS performance appears to be poor in the light of (admittedly unsatisfactory) international evidence;
- the costs arising from work-related injury and illness — to individuals, to firms and to the community — are large;
- costs are shifted (both ways) between workers' compensation schemes and government programs, often to the detriment of both;
- the existing multiplicity of workers' compensation arrangements results in inequity (eg different benefits structures) and inefficiency (eg national employers must cope with different rules in each jurisdiction); and
- there appears insufficient attention to what might be termed 'quality of service' — at both the workplace and within workers' compensation systems themselves.

The very scale of the problems — in terms of people affected and costs involved — demands attention and emphasises why they should be addressed as a matter of urgency.

² Throughout this report, references to the States — New South Wales (NSW), Victoria (Vic), Queensland (Qld), South Australia (SA), Western Australia (WA) and Tasmania (Tas) — should be taken to include the Territories (the Northern Territory (NT) and the Australian Capital Territory (ACT)).

Every year in Australia there are at least 500 workplace fatalities.³ In addition, some 200 000 workers suffer a work-related injury or illness sufficiently serious to be off work for five or more days. And these are just the recorded cases. To provide some perspective, this is equivalent to having every member of the workforce in the Hunter–Newcastle district of NSW incurring a serious work-related injury or illness each year.

Moreover, an unknowable number of employees are made ill principally because of hazards they have been exposed to at work. Quinlan and Bohle (1991, p.145), for example, refer to an International OHS Conference report in 1986 which claimed at least 20 000 unrecognised cases of occupational disease arise in Australia each year as a result of exposure to hazardous substances.

Work-related injury and illness imposes unacceptably large personal and economic costs on the Australian community (see Appendix A). Some of these costs are direct and obvious — such as workers' compensation payments and the premiums firms pay to insure themselves against claims. Others are indirect and less obvious — such as some of the consequential costs to firms (eg in having to replace injured workers or from lost production due to downtime when a serious accident occurs); uncompensated (and in many cases uncompensable) costs borne by injured or ill workers; and costs which fall to the community generally (eg in the form of social security payments made to those whose current disabilities can often be traced to a work accident or hazard).

As an indication of the direct imposts involved, since 1977–78, the cost of workers' compensation claims has risen significantly in real terms — and also as a percentage of non-farm wages, salaries and supplements (see Figure 1.1).

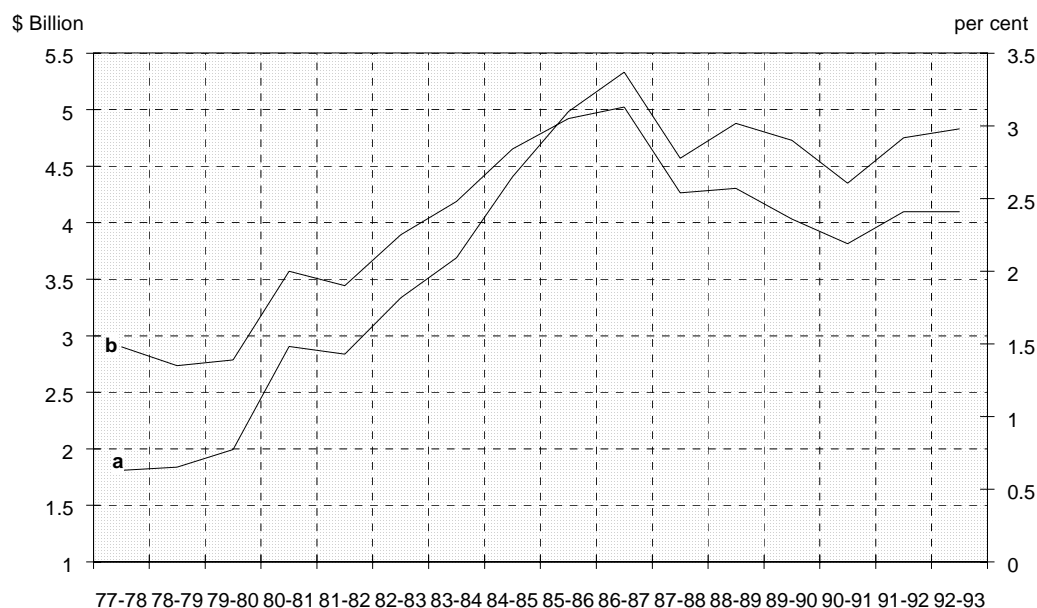
Worksafe Australia (Worksafe 1993a, p.19) has estimated that, in 1992–93, the direct cost of workers' compensation claims alone was some \$4.8 billion⁴ — or around 2.4 per cent of non-farm wages, salaries and supplements. This was

³ This does not include all of the 300 plus cases per annum added to the Mesothelioma register. It also takes little account of, for example, occupational diseases. Worksafe (Sub 176, p.2) noted that occupational cancer deaths alone are estimated at 1200 per annum. Mathews (1993 p.325), however, notes suggestions that exposure to cancer agents found in the workplace may account for between five and fifteen per cent of all cancers. This would imply between 1500 and 4500 Australians die each year from occupational-related cancers. See also Winder and Lewis (1991), 'A Thousand a Year: An Estimate of Deaths in Australia from Cancer Associated with Occupation', in *Cancer Forum*, Vol 15, pp.70–6.

⁴ Direct cost, for this Worksafe estimate, includes only the estimated cost of reported claims involving five or more working days lost. Indirect costs encompass all those non-direct costs, such as other costs incurred by employers, costs associated with limited coverage, uncompensated costs borne by individuals and costs borne by the community through, say, Medicare or Social Security. The indirect cost ratio used by Worksafe is not an assessment of indirect costs, it merely indicates that the total cost of poor OHS performance is much larger than claims costs (Sub 176, p.2).

equivalent to some 1.2 per cent of non-farm Gross Domestic Product for that year.

Figure 1.1 Workers' compensation claims: constant prices and as a percentage of non-farm wages, salaries and supplements, 1977–78 to 1992–93



a Claims in constant prices (1992–93 dollars).

b Claims as a percentage of non-farm wages, salaries and supplements.

Source: Worksafe Australia 1993a, pp.19–20

Estimated costs of this order are cause for serious concern. However, the actual situation is far worse. The \$4.8 billion significantly underestimates the costs of all work-related injury and illness, since it takes no account of the experiences of some 14 per cent of the workforce not covered under compulsory workers' compensation arrangements. Nor does the figure include the cost of claims involving less than five days off work. The estimate of the direct cost also significantly understates the cost of occupational diseases — as no claim is made in many cases.

Estimates of direct costs also take no account of the considerable costs attributable to work-related injury and illness borne by firms — for example, lost production and the costs associating with having to replace injured/ill workers who can often embody significant firm-specific human capital (eg because of their considerable knowledge and experience).

Moreover, Worksafe's estimate of direct costs makes no allowance for costs borne by individuals in terms of, say, incomplete compensation for lost earnings or unreimbursed health expenses. These can be significant. For example, case studies in a report on uncompensated personal costs — contracted by the Commission for this inquiry — found most respondents' reported post-injury income loss of the order of 25 to 50 per cent (see also Appendix H).

Nor does the direct cost estimate include workers' compensation costs shifted to the Commonwealth (such as health expenses borne by Medicare and social security payments made to individuals with a work-related injury or illness). Such costs can be substantial. For example, the Department of Social Security (DSS, Sub 80, p.23) claimed that, for each 1000 workers who transfer to the social security system from workers' compensation systems, it would incur some \$10 million in costs (much of it ongoing) (see also Appendix H). Moreover, a consultant to DSS (Ford 1992) has estimated there are at least 20 000 workers' compensation claimants a year seeking social security payments of some kind. This information suggests costs of some \$200 million per year. Representing some offset to this, though, would be savings to the Commonwealth where some of those formerly on unemployment benefits are employed to replace those off work because of a work-related injury/illness

Worksafe noted it has *conservatively* assessed indirect costs as at least equivalent in magnitude to direct costs — ie a ratio of 1:1. Using the most recent National Accounts data for 1992–93, it estimated (Worksafe 1993a, p.23) that work-related injury and illness involves total (direct and indirect) costs to the Australian community of some \$9.7 billion annually.

The real figure is not known. The Victorian Employers Chamber of Commerce and Industry (Sub 167, p.4) considered a ratio of 1:1 represented a gross underestimate. Its experience indicated indirect costs are more in the range of five to seven times direct costs. A recent study of industrial accidents in Queensland (Mangan 1993) suggested a ratio of 7:1 (Sub 4, p.39), which also supports claims for a much higher figure. Acceptance of even the thrust of such claims would put the actual figure far in excess of \$10 billion annually. To put this estimate in perspective, this is greater than the total annual value of gross production of the Australian communications industry. While compensation claim costs reflect some of the associated pain and suffering often involved in work-related injury or illness, they certainly do not reflect the full measure of costs incurred. Nor, indeed, could money adequately compensate in many cases.

Thus, while the overall cost is difficult to estimate, there is no doubt in the Commission's view that:

- it is excessive compared with what is achievable;

- it reduces the standard of living of those Australians directly and indirectly affected by work-related injury or illness (sometimes drastically so); and
- it continues to undermine the competitiveness of Australian industry.

This burden on the economy and people of Australia can be reduced. Some progress in addressing problems in workers' compensation has already been made.

Recent years have seen numerous inquiries and reviews of various aspects of workers' compensation arrangements in Australia, reflecting ongoing concerns about the need for improvement. With regard to workers' compensation schemes and the inter-related role of common law, the Victorian WorkCover Authority (Sub 89, p.2) noted:

Workers' compensation schemes in Australia have been subject to almost constant change. In the last two decades, at least 14 official inquiries into reform of workers compensation have been held and since 1985 eight new legislative schemes have been introduced. ... In addition to major legislative changes such as this, there is also a continuing process of change in scheme operations arising from judicial actions and rulings and the procedural and practical initiatives of major stakeholders ...

Co-operative arrangements are also being introduced, for example, through the Heads of Workers' Compensation Authorities forum and the recent agreement between NSW and Victoria on cross-border issues. However, there is still much to be done. And progress needs to be quicker.

OHS has been a fertile ground for reform, especially since the Report of the Committee of Health and Safety at Work (the Robens Report) in the UK in 1972. Most states have conducted a fundamental reappraisal of their OHS systems since that report, and initiated various reforms, including moves towards adoption of a more nationally consistent approach, under the *aegis* of Worksafe.

Moreover, there is growing awareness among firms of the benefits of better health and safety performance — for the well-being of their workers and enhanced productivity and competitiveness of their organisations. The Responsible Care initiative of the Australian chemical industry (Sub 187, p.1), adopted in 1989, is an example of this.⁵ Outstanding instances of the gains possible have been publicised by Worksafe in its 'best practice' case studies. Partly as a result of generally improving 'awareness' of the importance of workplace safety, the average workers' compensation cost per employee (in constant prices) for all industries has steadily declined from \$712 in 1986–87 to \$593 in 1991–92 (Worksafe 1993a, pp. 22-3).

⁵ See also Oxenburgh 1991 for examples of productivity gains associated with reducing workers' compensation costs.

Despite some progress, however, serious problems remain. For example, on its visits and in submissions the Commission was frequently informed that preventive arrangements can still be woefully inadequate. It received a good deal of evidence that major problems — involving the level of and access to compensation and the quality of service — remain. Such deficiencies raise fundamental questions on the 'fairness' of existing arrangements.

The Commission also received evidence that rehabilitation and return-to-work outcomes are still deficient and, for example, that the transfer of some workers' compensation costs to injured/ill workers and the Commonwealth is seriously distorting incentives for safety and accident prevention in workplaces.

There is also evidence that existing arrangements constrain competition between schemes, weakening pressures for ongoing improvement. For example, difference in legislative requirements among jurisdictions hinder the efficient operations of many firms. In certain cases, firms operating in more than one state are required to insure some workers under each scheme, significantly adding to costs and undermining competitiveness.

Longstanding information deficiencies remain, despite advances in collecting and collating national data on work-related injury and illness. Much remains to be done in gathering and publicising high-quality information which can better inform policy in the workers' compensation and OHS arena.

Changes arising from past inquiries and reviews have generally been confined to specific jurisdictions or to particular problem areas. A welcome exception to piecemeal progress was the Heads of Government Agreement on consistency in OHS and standards on dangerous goods in November 1991. This was part of a broader initiative for consistency aimed at facilitating microeconomic reform.

The national focus of this inquiry provides a unique opportunity to address problems and implement solutions extending beyond individual jurisdictions and beyond the immediate arena of workers' compensation (the scope for introducing a uniform benefits structure and national self-insurance licenses are examples.)

The potential for improved performance has been demonstrated. An ability to put better arrangements in place has also been demonstrated. The fact that much can still be achieved suggests that further (and more fundamental) change is still needed.

To achieve economic and social gains, improved productivity and competitiveness, and improved well-being of Australian workers, it is imperative that impediments to desirable change be removed.

1.2 The Commission's approach

The Commission has not interpreted its terms of reference to include a review of arrangements for a universal injury and illness scheme. Instead, the Commission's objective was to develop proposals aimed at reducing the incidence and total cost to all parties of work-related injury and illness. Accordingly, the proposals developed in this report have regard to their implications for the community as a whole, rather than being framed exclusively from the perspective of any particular stakeholder.

The Commission has reviewed existing workers' compensation and related arrangements and considered how well they satisfy the goals of:

- preventing work-related injury and illness from occurring in the first place;
- compensating those who nevertheless are unfortunate enough to be injured at work or contract an occupational illness;
- encouraging rehabilitation; and
- promoting return to work.

As part of its consideration of how well existing arrangements meet these objectives, the Commission has reviewed the institutional arrangements under which OHS and workers' compensation schemes operate at present. This includes the division of responsibility between State and Commonwealth governments, the scope for competition between jurisdictions and the extent of private sector involvement (including the role of self-insurance) in workers' compensation schemes.

Where interaction with other government programs occurs, the Commission focused on those programs most affected (such as health and social security) and the effects of interaction on the efficiency and equity of existing arrangements. It has proposed changes to address some of the undesirable consequences of the interactions involved.

The Commission also reviewed workers' compensation arrangements in selected countries, restricting serious consideration to those which also rely on compulsory workers' compensation insurance and OHS regulation. This information was used for comparative purposes and to help identify 'best practice'.

The Commission has attempted to assess the significance of existing arrangements in terms of their economic impact, as well as the likely effects of its proposals for change. In assessing the economic significance of workers' compensation costs, the Commission relied mainly on data from Worksafe, workers' compensation authorities and the Australian Bureau of Statistics — augmented by information from submissions. To assist in assessing the possible

effects of its proposals, the Commission developed a simulation model of a workers' compensation scheme which incorporated the possibility that both employers and employees would change their behaviour in response to increased health and safety incentives (see Appendix H).

The Commission released a Draft Report in August 1993 to elicit comment on proposals for change (including a compensation scenario embodying what it regarded as appropriate safety and accident-prevention incentives for employers and employees, and to address cost-shifting).

Options for implementing major changes to existing workers' compensation arrangements have been included in this Final Report. Among the options, the Commission's has spelt out its preferences. In addition, the Commission offers observations on what it regards as constituting 'best practice' in key areas.

This report draws on: written submissions; information tendered at public hearings; discussions with a wide range of interested parties; and the Commission's own research and analysis (including questionnaires sent to all workers' compensation and OHS authorities). In addition, the Commission contracted consultants to provide information on: the interaction of workers' compensation with superannuation and taxation arrangements; non-compensated personal costs arising from work-related injury and illness; and the estimated effects on premiums of the Commission's recommendations and compensation scenario.

A list of participants and other information concerning the conduct of the inquiry is contained in Appendix L.

The Commission has adopted an approach based on:

- establishing appropriate incentives for employers, workers, insurers and service providers;
- establishing appropriate administrative and regulatory mechanisms; and
- information and education of the various parties involved.

Its approach is intended to encourage the development of a workplace culture which reflects a commitment on the part of all parties to the need to continually improve health and safety at work.

The Commission has studied the incentives inherent in existing workers' compensation arrangements, and how best to modify those it considered to be inadequate or inappropriate. In this task it has been mindful of the special nature of the workers' compensation 'market', where the relationship between the customer (the injured worker) and the seller (the workers' compensation system) is significantly influenced by the various parties to those arrangements (eg employers, insurance brokers, insurance companies, etc).

Ideally, arrangements which seek to reduce overall costs should provide incentives such that:

- employers take appropriate steps to provide safe and healthy workplaces;
- employees behave in safety conscious ways at work; but that
- in the case of work-related injuries and illnesses which nevertheless occur, 'fair' compensation is paid, workers are rehabilitated to the extent that this is possible, and go back to work as soon as practicable.

These 'ideal' or desirable types of behaviour on the part of various parties — and the role occupational health and safety regulations and workers' compensation arrangements can play in reinforcing them — are worth elaborating on.

1.2.1 The role of employers

Employers have natural incentives to reduce employees' exposure to hazards in the workplace, so limiting the potential for work-related injury or illness. Even in the absence of occupational health and safety rules and government-mandated liability to pay compensation to employees suffering work-related injury or illness, employers can be expected to implement risk-reducing measures in order to improve safety in the workplace because of the prospect of:

- jeopardising the firm's reputation (thereby risking low worker morale, and therefore low productivity);
- incurring additional costs which result, for example, from having to replace injured/ill workers (eg down time associated with accidents and unplanned extra recruitment and training expenses); and
- being unable to attract sufficient workers to high-risk jobs.

Indeed firms can (and do) engage the services of specialists in risk-management to aid them in this important task, and this is to be encouraged.

It is the task of well-conceived occupational health and safety requirements and complementary worker' compensation arrangements to reinforce the self-interest of employers in this regard. For example — in the case of large firms — workers' compensation premiums which vary (up and down) with a firm's safety record will act to reinforce the safety consciousness of employers, by forcing them to take account of the prospect of increased/decreased premium costs when considering how seriously to take the issue of safety in the workplace. As another example, holding employers responsible for long periods for the costs borne by injured workers will encourage the implementation of OHS strategies, as well as encouraging employers to

maintain an active and ongoing interest in their injured employees, — particularly their rehabilitation and return to work.

1.2.2 The role of employees

Employees also have natural incentives to avoid being injured at work, or contracting an occupational disease. If the worst happens those suffering a work-related injury or illness will usually want to be rehabilitated (to the extent that this is possible) and return to work as soon as practicable. It would be counterproductive to risk encouraging those capable of rejoining the workforce in any capacity to become malingerers by providing overly generous compensation for lost earnings while they are off work.

As with firms, occupational health and safety and workers' compensation arrangements should reinforce the self-interest of employees to behave in safe ways in the workplace and, in the event of work-related injury or illness, to co-operate with employers/insurers/scheme administrators in order to achieve the best possible outcome when it comes to rehabilitation and return to work.

1.2.3 The role Government

Governments have an active role to play in regulating workplace risks via occupational health and safety requirements and workers' compensation arrangements. That role should focus on specifying key attributes of those arrangements, including:

- mandating the responsibilities of the various parties (including for example, who bears what costs);
- deciding on the extent (and time profile) of compensation payable to those suffering work-related injury or illness;
- specifying acceptable dispute-resolution procedures, with the emphasis on the fairness and cost-effectiveness of the processes proposed;
- spelling out prudential rules for underwriters/insurers;
- improving the collection and dissemination of information on occupational health and safety risks including their likely consequences; and
- provide a 'safety net' in cases where people nevertheless fall between the cracks.

More generally, government can promote safety consciousness in the workplace by:

- assuming a leadership role in drawing community attention to the issue and promoting a what should be regarded as a 'culture of care' in the workplace; and
- ensuring that those responsible for workplace safety — primarily firms and their employees — face incentives which encourage the best possible safety outcomes via well-designed occupational health and safety legislation and workers' compensation arrangements.

There is a close analogy between safety at work and safety on the road. After a long period of inaction, road safety has emerged as a significant social issue in recent decades. As a result of public leadership, increasing public awareness, and reinforced by stiff penalties in the courts, significant progress is being made in reducing the road toll. A similar effort is needed on the part of community leaders to focus attention on work-related injury and illness. However, as in the road safety campaign, significant culture change is unlikely unless reinforced by appropriate incentives.

1.2.4 The role of scheme administrators

Scheme administrators should be charged with the responsibility of implementing the key system-design features determined by government, including ensuring the various parties live up to their responsibilities. In particular, the behaviour of insurance companies need to be monitored to ensure that prudential requirements are being met and that an acceptable level of 'quality' is being maintained (eg the expectations of the various parties in such key areas as dispute resolution and avoidance of undue delays are being realised). Administrators should ensure that failure to perform satisfactorily on any of these counts should result in an insurer's licence to write workers' compensation business being revoked.

In order to effectively discharge these responsibilities, scheme administrators should take the lead in:

- ensuring that workers' compensation premiums reinforce natural incentives for employers to maintain healthy and safe workplaces and for employees to place safety first; and
- encouraging effective rehabilitation and return to work by, for example, ensuring that delays are kept to a minimum, facilitating dispute resolution and encouraging maintenance of constructive employer/employee relationships.

1.2.5 The role of underwriters/insurers

Underwriters/insurers should be expected to run schemes fairly and efficiently (ie at least-cost). In discharging their responsibilities, insurers should:

- abide by the 'rules of the game' as specified by government and enforced by scheme administrators, including meeting appropriate prudential requirements and competing to reduce costs rather than benefits; and in particular
- implement dispute-resolution procedures fairly.

In performing these tasks, competition between insurers for firms' workers' compensation business should be innovative in terms of the services they offer clients and the focus of competition should be on service provision rather than reducing access to benefits — for example by:

- offering to help employers in the area of effective risk-reduction strategies; and
- improving services to injured employees in terms of responsive claims management and rehabilitation/return to work.

1.3 What are the main issues?

The central issue for this inquiry is how to reduce (hopefully minimise) the incidence and total costs — personal, social and economic — of work-related injury and illness.

This raises the questions of how well existing arrangements meet the objectives of prevention, compensation, and rehabilitation/return to work — and what aspects of existing arrangements lead to preferred outcomes, including the most appropriate structure for the co-ordination and administration of OHS and workers' compensation arrangements (in particular the 'customer focus' of services delivered to injured/ill workers).

In turn, this embraces the issues of the inter-relationships between workers' compensation and other government programs, and the effects of those links — in particular, the extent, direction and impact of cost shifting.

In the context of ongoing pressures for improvement, an important issue is the level and focus of competition within and between existing systems in the provision and delivery of cost-effective OHS and workers' compensation.

Another major issue is the 'fairness' of existing arrangements for compensating workers.

Flowing from all these issues are what changes would improve the situation, the economic significance of those changes and how they may be best implemented.

1.4 Structure of the report

This report is in three parts. Part A is an executive summary of the report, containing an overview and a summary of the Commission's findings and recommendations. Part B contains the body of the report. This includes the Commission's analysis and assessment of options for improving workers' compensation arrangements in Australia. Part C comprises supporting appendixes to the report.

2 EXISTING ARRANGEMENTS

At present, Australia has ten workers' compensation schemes and ten principal Occupational Health and Safety Acts — for a workforce of some 8 million. The resulting complexity and lack of uniformity poses significant problems for firms and workers operating in more than one jurisdiction. Compensation arrangements under the various schemes also varies widely, as does access to remedies at common law for work-related injury and illness. Occupational health and safety and workers' compensation arrangements changed significantly during the 1980s and early 1990s. Participants pointed to a variety of problems with existing arrangements and made many suggestions for improvement. The Commission is convinced that further changes are needed to encourage desired behaviour on the part of the various parties and focus competition — to reduce the total costs of work-related injury and illness.

Work-related injury and illness and workplace health and safety are currently addressed within a fragmented institutional framework characterised by:

- ten sets of workers' compensation arrangements;
- ten principal Occupational Health and Safety (OHS) Acts; and
- widely varying access to remedies at common law;

as well as being influenced by:

- relevant provisions of industrial awards, employment contracts, and enterprise agreements;
- government programs and other arrangements (notably Medicare, the social security and taxation systems, transport-accident schemes and superannuation arrangements); and
- diverse insurance arrangements (ranging from a single public insurer to competitive private markets).

These arrangements/programs interact in complex — and often unintended and unknown — ways which are hardly conducive to effectively addressing the problem of work-related injury and illness in an efficient (or least-cost) way.

2.1 Workers' compensation arrangements

In Australia, each state has its own compulsory workers' compensation arrangements (with NSW having separate provisions covering coal miners). Overlaying these are two federal jurisdictions; one for Commonwealth Government employees and one for seafarers (see Table 2.1). This means that there are effectively ten main workers' compensation schemes covering approximately 5.73 million workers.¹

Table 2.1 Existing workers' compensation schemes

<i>Jurisdiction</i>	<i>Scheme Administrator</i>	<i>Legislation</i>
New South Wales	New South Wales WorkCover Authority	<i>Workers Compensation Act 1987</i>
Victoria	Victorian WorkCover Authority	<i>Accident Compensation (WorkCover Insurance) Act 1993 and Accident Compensation Act 1985</i>
Queensland	Workers' Compensation Board of Queensland	<i>Workers' Compensation Act 1990</i>
South Australia	Workers Rehabilitation and Compensation Corporation (WorkCover)	<i>Workers' Rehabilitation and Compensation Act 1986</i>
Western Australia	Workers' Compensation and Rehabilitation Commission	<i>Workers' Compensation and Rehabilitation Act 1981</i>
Tasmania	Department of State Development and Resources and the Workers' Compensation Board	<i>Workers' Compensation Act 1988</i>
Australian Capital Territory	Chief Minister's Department	<i>Workers' Compensation Act 1951</i>
Northern Territory	Work Health Authority	<i>Work Health Act 1986</i>
Commonwealth	Comcare Australia	<i>Safety Rehabilitation and Compensation Act 1988</i>
Seafarers	Seafarers Safety, Rehabilitation and Compensation Authority	<i>Seafarers Rehabilitation and Compensation Act 1992</i>

Source: CCH, *Australian Workers' Compensation Guide*, Vol. 1

¹ This figure (for the 1991–92 financial year) was obtained by dividing total workers' compensation costs by workers' compensation costs per employee (ABS, 1993c).

All schemes are based on the concept of 'no-fault' compensation in which employers are held liable for work-related injury and illness suffered by their employees. Despite a common underlying philosophy, significant differences exist among schemes (eg in their administrations, insurance arrangements, benefit levels/structures, dispute-resolution procedures and rehabilitation/return-to-work strategies and programs). The Commonwealth employees scheme, Comcare, is unique in that it covers workers Australia-wide (Box 2.1). Details of individual schemes can be found in Appendix B.

Box 2.1 Comcare Australia

Genesis

Comcare is a statutory authority established in 1988 to administer and implement the *Commonwealth Employees' Rehabilitation and Compensation Act 1988* (now known as the Safety, Rehabilitation & Compensation Act). This Act sets up workers' compensation arrangements for all Commonwealth employees. In 1991, Comcare's responsibility was extended to include the administration and implementation of the *Occupational Health and Safety (Commonwealth Employment) Act 1991*.

Structure and size

Comcare's organisational structure comprises five divisions: Business Information, Business Development and Customer Service, Risk Management, Policy Development and Secretariat, and Resource Management. The organisation services its clients through three programs: Risk Management, Regulatory and Corporate.

In 1992–93, Comcare provided insurance coverage for approximately 271 000 Commonwealth employees, and oversaw self-insurance arrangements for a further 120 500 AOTC and Australia Post employees. In the same year, OHS coverage extended to some 475 000 employees (including employees of government business enterprises and defence and military personnel).

Comcare's customer base accounted for approximately 7 per cent of premium income generated by all workers' compensation schemes in 1990–91.

Recent reforms

Comcare was reviewed after two years of operation. This review, commonly known as the Brown Review, reported to the Government in April 1991. Among the Review's major recommendations were that Comcare:

- be allowed to offer more flexible services to its customers and expand into the private sector;
- be allowed to service government business enterprises; and
- be restructured to be a commercially competitive enterprise with fund-management responsibilities.

The Government endorsed most of the review's recommendations, and has legislated for their adoption, although it has not acted to grant Comcare fund-management responsibilities. In June 1992, previous arrangements for self-administration in the case of some Commonwealth authorities were replaced with three classes of licence:

- A Class 1 licence allows a Commonwealth authority to operate as a self-insurer. The authority does not pay a premium but Comcare continues to manage the authority's claims.
- A Class 2 licence allows an authority to manage its own claims but a premium is still payable.
- A Class 3 licence allows an authority to both self insure and manage its own claims.

So far only AOTC and Australia Post hold licences, both of the third type.

The *Commonwealth Employees' Rehabilitation and Compensation Amendment Act 1992* extended the provisions of the Act to certain corporations outside the Commonwealth public sector.

Privatised employers which Comcare previously serviced or companies competing with government enterprises are eligible for two types of licence. These licences, referred to as Class A and B licences, allow for self-insurance under the Act and allow options for the provision of claims-management and rehabilitation services. A Class A licence allows a corporation to self-insure, but for its claims to be managed by a subsidiary of Comcare. A Class B licence allows a corporation to self-insure, and either self-administer its claims, or tender the claims-management function to an agent.

Performance

Indicators of Comcare's performance in 1992–93:

- average premium rate of 1.7 per cent (estimated rate for 1993–94 is 1.6 per cent;
- average return-to-work rate of 85 per cent;
- 89 per cent of 'simple' claims were determined within 2 working days;
- 82 per cent of all new claims were determined within ten days ; and
- common law payouts amounted to \$9.9 million (the previous year's total payout was \$11 million).

Source: Various Comcare sources

2.1.1 Legislation and administration

Each scheme is set up under a principal Act of Parliament plus supporting regulations. The various schemes also operate alongside other accident-compensation schemes within a single jurisdiction. An example is compulsory third-party accident insurance (which interacts with workers' compensation insurance to cover journey claims in several jurisdictions).

Each scheme is overseen by a public authority whose activities encompass: information collection and dissemination; scheme monitoring and evaluation; fraud control; and premium regulation — as well as general administration. The workers' compensation authorities in Queensland and SA actually run their own schemes, performing the additional functions of claims management, funds management and premium setting.

The Commission conducted a survey of all workers compensation authorities (except the Seafarers Safety, Rehabilitation and Compensation Authority) and all OHS authorities. Survey data compiled for this report are referred to as 'Survey A' for workers' compensation data and 'Survey B' for OHS data.

2.1.2 Insurance

Insurance arrangements vary widely among jurisdictions in terms the key aspects of coverage, provisions for self-insurance, the structure of insurance markets and premium regulation.

Coverage

Workers' compensation schemes require most employers to insure against their statutory (and common law) liability to compensate employees for work-related injury or illness. However, the extent of coverage — both in terms of who is to be regarded as a worker and what qualifies as a compensable claim — differs among schemes. For example, coverage of workers does not usually extend to the self-employed, unincorporated businesses or partnerships (with those involved expected to make their own arrangements). In addition, some schemes cover journey claims while others do not.

Workers who should have been covered but for some reason are not (eg because their employer failed to take out insurance on their behalf) can claim against a 'nominal' insurer. This is a general fund, financed by levying all employers, to cover such cases.

Self-insurance

Provisions for self-insurance exist in all jurisdictions apart from Queensland and the seafarers scheme. Eligibility usually depends on meeting 'suitability' requirements; for example, an employer's assessed ability to manage claims, discharge their liabilities (including claims which may extend far into the future), maintain a 'sound' safety and rehabilitation record, and provide required information to the administering authority (eg on claims experience). However, specific requirements vary considerably among jurisdictions such that there are, for example, approximately 100 self-insurers in SA, while Victoria (with many more firms and a much larger workforce) only has 18.

Firms which operate in more than one jurisdiction (eg national employers) must comply with the licensing requirements of each scheme if they wish to self-insure — and even then will only qualify in terms of individual jurisdictions (instead of one licence covering all their operations). However, legislative amendments which allow Comcare to extend its coverage would enable employers in competition with government business enterprises to self insure all their operations under one national licence.

Specific coverage and self-insurance details, by jurisdiction, are set out in Table 2.2.

Market structure

Workers' compensation insurance in Australia is provided on a public, private and managed-fund basis: several schemes license private insurers to provide insurance; some provide insurance through a public monopoly, while others (eg

Table 2.2 Insurance coverage and self-insurance provisions, by jurisdiction*

<i>Jurisdiction</i>	<i>Liability cover</i>	<i>Employer excess</i>	<i>Self-insurance requirements</i>
New South Wales	Full liability Ltd. journey claims ^a	First \$500 of benefits	Minimum of 1000 employees Bank guarantee of liability
Victoria	Full liability No journey claims ^b	First 10 days of benefits and first \$378 medical costs	Minimum of 1000 employees Minimum net asset base of \$200m Bank guarantee of liability
Queensland	Full liability Journey claims	No excess for federal award workers; the first day for state award workers	No provision for self-insurance
South Australia	Statutory liability ^c Journey claims	First week of incapacity per worker per year	Minimum of 200 employees Bank guarantee of liability
Western Australia	Statutory liability ^c No journey claims	No excess	Liability fund deposited with Treasury
Tasmania	Full liability Journey claims	No excess	Basic requirements only ^d
Australian Capital Territory	Full liability Journey claims	No excess	Basic requirements only ^d
Northern Territory	Full liability No journey claims ^e	Day of injury; no medical costs	Basic requirements only ^d
Commonwealth	Full liability Journey claims	No excess	Authorities and corporations in competition with GBEs may apply to self administer
Seafarers	Full liability Journey claims	Varies among insurance policies	No provision for self-insurance

* All dollar values are rounded to the nearest dollar (as at the 1 December 1993).

a Where the worker is not at fault even in part, and/or where the risk was increased due to employment related matters, the claim is covered.

b Where the worker is not at fault even in part, and/or was travelling for the purpose of employment, the claim is covered.

c Employers in Western Australia (and South Australia for claims after 3 December 1993) are not obliged to insure for common law liability.

d Basic requirements generally include the employers assessed ability to manage claims, discharge liabilities, maintain a 'sound' safety and rehabilitation record, and provide required information to the authority. e Journey accidents not occurring in a motor vehicle are still covered under the Work Health Act.

Source: CCH, *Australian Workers' Compensation Guide*, Vol. 1 and various other sources

NSW and Victoria) underwrite insurance risk and license private insurers to manage claims (and funds). Table 2.3 shows the existing situation.

Approaches to premium setting

The structure (and government regulation) of premiums varies considerably among schemes. For example, the degree of 'experience rating' and/or cross-subsidisation inherent in the premium structures of schemes differs according to how premiums are calculated.

Government involvement in premium determination ranges from directly setting the rates to considering recommendations from others about appropriate rates. The existing situation is described in Table 2.3.

2.1.3 Compensation

Compensation for lost earnings

Under most current arrangements, initial levels of compensation are based on some proxy for the worker's pre-injury earnings, for example the award wage or average weekly earnings (as published by the Australian Bureau of Statistics). Benefits are usually paid, at least for some initial period, at a 100 per cent of this approximation of pre-injury levels,² but may also be subject to a maximum weekly amount.

After an initial period, benefits paid under the various schemes usually reduce — often in one or more steps. Exceptions are the WA and Tasmanian schemes, which continue to pay compensation at initial levels until a specified dollar limit is reached.

Workers deemed to be partially incapacitated after an initial benefit period, are often entitled to the same benefits as those deemed totally incapacitated, less any earnings. Also, if a partially incapacitated worker is unable to find employment, some schemes compensate workers as if they were totally incapacitated. The NSW and Victorian schemes are exceptions to this practice, as they utilise provisions to impute 'notional earnings'³ so as to reduce benefits — regardless of actual earnings.

² Sometimes award wages (or average weekly earnings) is a poor approximation of pre-injury earnings, as would be the case for example, when a worker was earning above-award wages (or average weekly earnings) from habitually working a lot of overtime.

³ 'Notional earnings' refers to the amount an injured worker is able to earn in 'suitable employment', regardless of actual earnings (defined by workers' compensation authorities). This notional amount may be deducted from an injured workers weekly benefits.

Table 2.3 Insurance market structure and premiums setting

<i>Jurisdiction</i>	<i>Market structure</i>	<i>Premium setting</i>
New South Wales	Public/private	Partial experience rating set by WorkCover
Victoria	Public/private	Full experience rating set by WorkCover
Queensland	Public monopoly	Class rating and bonus scheme set by Workers Compensation Board
South Australia	Public monopoly	Class rating and bonus/penalty system set by the WorkCover Authority
Western Australia	Private insurers	Partial experience rating set by private insurers based on Premium Rates Committee (PRC) recommended rates (50 % max. loading – full discounting allowed) The PRC sets business classifications
Tasmania	Private insurers	Partial experience rating set by private insurers based on Insurance Council of Australia (ICA) recommended rates The Workers Compensation Board and Premium Monitoring Committee (PMC) monitors premium rates
Australian Capital Territory	Private insurers	Partial experience rating set by private insurers based on ICA recommended rates The Minister monitors rates
Northern Territory	Private insurers	Unstructured ^a — PMC monitors rates
Commonwealth	Public monopoly	Experience rating and Premium Reconciliation. ^b set by Comcare
Seafarers	Private insurers	Partial experience rating set by private insurers ^c

a Individual insurers and employers set rates competitively based on an industry or occupational class rate.

b Premium Reconciliation refers to a type of bonus penalty scheme.

c Private insurers includes protection and indemnity associations.

Source: CCH, *Australian Workers' Compensation Guide*, Vol. 1 and various other sources

The point at which benefits cease varies considerably among schemes. Some impose dollar or time limits on benefits payable. Workers may be able to redeem weekly benefits as a lump sum prior to this limit being reached, subject to various restrictions among schemes. Table 2.4 describes the differing benefit structures relating to compensation for lost earnings.

Non-economic loss

Most schemes provide for non-economic loss (eg for the pain and suffering involved in losing a limb) via so called Tables of Maims — however the losses included in such tables, minimum thresholds and award maximums vary considerably among schemes. Such approaches specify compensation according to the type of injury sustained or the estimated extent of disability. In cases of death attributed to a work-related accident or illness, all schemes pay a prescribed lump sum (which can vary according to the number of dependants). In some jurisdictions, these lump sums are reduced according to any amounts already paid. Table 2.5 describes the differing benefit structures relating to compensation for non-economic losses.

Other expenses

Schemes generally provide compensation to injured or ill workers for 'reasonable' expenses. These usually include medical and hospital costs, rehabilitation expenses, and can extend to certain other items — such as funeral, personal property damage, household and attendant-care services, legal and travelling expenses.

2.1.4 Dispute resolution

In most jurisdictions, disputes over workers' compensation matters are handled by an internal or administrative review process initially followed, if necessary, by an appeal (or series of appeals) to an external review process (or processes). The former involves the reconsideration of a decision by the board or authority or independent conciliators, while the latter usually involves an appeal to a compensation court or tribunal, and ultimately to a Supreme Court (except in the case of Queensland). In most jurisdictions, medical questions may be referred to a medical panel or tribunal, which may operate in either an advisory or a legal capacity.

Existing dispute-resolution processes differ in the emphasis they place on conciliation/arbitration and the hierarchy of appeals, and the extent to which lawyers may be involved at each stage. Table 2.6 describes the differences.

2.1.5 Rehabilitation and return to work

Approaches to rehabilitation and return to work differ among schemes in terms of aspects such as who provides rehabilitation services, and the incentives for employees and employers to become involved.

Table 2.4 Compensation for lost earnings*

<i>Jurisdiction</i>	<i>Short term benefits</i>	<i>Long term benefits</i>	<i>Restrictions</i>
New South Wales	Normal award rate Max. \$1052 per week (normal wage rate minus notional earnings if partially incapacitated)	> 26 weeks total incapacity 90% workers average weekly earnings (WAVE) Max. \$247 plus dependent allowance Partial incapacity WAVE minus notional earnings	Until retirement age ^a
Victoria	95% pre-injury earnings Max. \$603 (minus notional earnings if partially incapacitated)	> 26 weeks serious injury 90% of pre-injury average weekly earnings (PIAWE) minus current weekly earnings Max. \$603 Total incapacity 70% PIAWE Max. \$603 Partial incapacity 60% PIAWE minus notional earnings Max. \$362	Two years except for serious injury or totally and permanently incapacitated
Queensland	Normal award rate	> 39 weeks of \$271 + dependent allowance	Max. \$71 310 inc. non economic loss
South Australia	Normal weekly earnings (NWE) (minus notional weekly earnings if partially incapacitated) ^c Max. \$1220	> 52 weeks 80% NWE Max. 80% SAWE = \$976	Age at which worker qualifies for pension ^b
Western Australia	NWE	NWE	Max. \$100 000 ^d
Tasmania	The greater of ordinary time rate of pay and AWE	The greater of ordinary time rate of pay and AWE	Max. \$95 069
Australian Capital Territory	NWE	> 26 weeks base rate of \$243 plus dependent allowance	Max. \$85 581 except for total permanent incapacity
Northern Territory	NWE (less any amount actually earned if partially incapacitated)	> 26 weeks 75% of NWE Max. \$928 Min. \$309 plus dependent allowance or 90% of NWE which ever is lesser	Age 65

Commonwealth	NWE (minus notional weekly earnings if partially incapacitated)	> 45 weeks 75% NWE Max. 150% average weekly earnings (AWE) Min. \$255 plus dependent allowance	Age 65
Seafarers	NWE	> 45 weeks 75% NWE Max. 150% AWE Min. \$255 plus dependent allowance	Age 65

* All dollar values are rounded to the nearest dollar (as at the 1 December 1993).

a Restriction is cross referenced to qualification for social security aged pension.

b Restrictions are the lesser of the pension age or the normal retiring age for the kind of employment from which the disability arose (or 70 years whichever is lesser).

c Notional earnings is rarely applied in practice in South Australia.

d An additional amount of \$50 000 may be granted at the discretion of the Conciliation Review Directorate.

Source: CCH, *Australian Workers' Compensation Guide*, Vol. 1 and various other sources

Rehabilitation programs

Rehabilitation services can be provided in-house, usually overseen by rehabilitation coordinators employed at the workplace, or by external providers accredited by the workers' compensation authority, or a combination of both. Both external and in-house providers are subject to various guidelines and review by the authority in their jurisdiction. Workers' compensation authorities co-ordinate and oversee the rehabilitation process to varying degrees. This ranges from the contracting of case managers and advisers to plan rehabilitation programs for injured workers, to the implementing of specific return-to-work programs. There is now an increasing emphasis on employers assuming responsibility for rehabilitation in some jurisdictions. The ACT scheme makes no legislative provision for rehabilitation — relying on Commonwealth Rehabilitation Services (CRS) centres for the provision of rehabilitation.

Employer and employee incentives

Incentives for both employers and employees to become involved in the rehabilitation and return-to-work process vary among schemes. All schemes suspend an employee's benefits if they do not undertake rehabilitation once directed to do so by the scheme administrator. Employees are protected under some schemes from losing their compensation entitlement in the event that their return to work is unsuccessful. Some schemes also enhance weekly benefit limits for injured workers while they are undertaking rehabilitation.

Table 2.5 Compensation for non-economic losses*

<i>Jurisdiction</i>	<i>Maximum payment (\$)</i>	<i>Minimum incapacity</i>	<i>Method of calculation</i>	<i>Death benefit (\$)</i>
New South Wales	Impairment = 158 000 Pain and suffering = 65 000	Pain and suffering 10% of max. Table of Disabilities	Table of Disabilities	222 900 plus dependent allowance
Victoria	Impairment = 93 080 Pain and suffering = 50 000	Pain and suffering \$10 000 under Table of Maims	Table of Maims	119 180 plus dependent allowance
Queensland	71 310 ^a	No	Table of Injuries	94 730 ^a plus dependent allowance
South Australia	157 450	No	Table of Disabilities	157 450 plus dependent allowance
Western Australia	100 000 ^a	No	Table of Maims ^b	100 000 ^a plus dependent allowance
Tasmania	178 087	No	Table of Maims	95 069 plus dependent allowance
Australian Capital Territory	85 581	No	Table of Maims	85 581 plus dependent allowance
Northern Territory	128 731	>5% whole person impairment	AMA Guide	96 548 plus dependent allowance
Commonwealth	138 986	10% assessed impairment except for fingers, and toes taste or smell	Approved guides	151 621 plus dependent allowance
Seafarers	138 986	10% assessed impairment except for fingers and toes	Approved guides	151 621 plus dependent allowance

* All dollar values are rounded to the nearest dollar (as at the 1 December 1993).

^a Less any weekly benefits already paid.

^b If the Table of Maims is not applicable, the WA Medical Association Disability Assessment Guide is used.

Source: CCH, *Australian Workers' Compensation Guide*, Vol. 1 and various other sources

Table 2.6 Dispute resolution procedures

<i>Jurisdiction</i>	<i>Internal - Administrative review</i>	<i>External appeals</i>
New South Wales	Independent WorkCover Officer	Compensation Court ^a Supreme Court ^b
Victoria	Independent Conciliation Officer	Administrative Appeals Tribunal (AAT) or Magistrate or County Court ^a Supreme Court ^b
Queensland	Medical Assessment Tribunal (medical questions only)	Industrial Magistrate ^a Industrial Court of Queensland ^b
South Australia	Internal review by Corp.	Independent Review Panel ^a Workers Compensation Appeals Tribunal ^a Supreme Court ^b
Western Australia	Independent Conciliation Officer Review Officer	Compensation Magistrate ^b Supreme Court ^b
Tasmania	None	Workers Compensation Commissioner ^a Supreme Court ^b
Australian Capital Territory	None	Magistrates Court ^a Supreme Court ^a
Northern Territory	Medical Review Panel (medical questions only, concerning incapacity)	Work Health Court ^a Supreme Court ^b
Commonwealth	Internal reconsideration by Comcare Australia or licence holder	AAT ^a Federal Court ^b
Seafarers	Internal reconsideration - use of industry panel or Comcare officer	AAT ^a Federal Court ^b

^a Review of questions of fact and law.

^b Review of questions of law only.

Source: CCH, *Australian Workers' Compensation Guide*, Vol. 1

Most schemes require employers to establish a general rehabilitation program, usually in accordance with authority guidelines (the exception being the ACT scheme). In addition, the WA and Tasmanian authorities reserve the right (but do not require all employers) to establish such a program. In addition, requirements in NSW, Victoria, SA and under Comcare provide for work-trial

subsidies and/or 'second injury' schemes as an incentive for employers to employ injured workers. Table 2.7 describes the differing legislative provisions for rehabilitation and return-to-work.

2.2 Occupational health and safety regulation

OHS regulation is a preventive tool designed to regulate workplace risk by, for example, establishing minimum standards and defining maximum acceptable risks. There are ten principal OHS Acts, governing each of the States, both Territories, Commonwealth employees and seafarers. In addition, there are a myriad of industry-specific Acts, regulations and codes. Also, industrial awards often incorporate OHS provisions separately from legislation. (For a detailed review of OHS legislation, see Appendix C.)

2.2.1 Legislation and administration

Recent reform of OHS legislation has seen the gradual introduction of performance-based standards, approved codes of practice and worker participation in preference to prescriptive 'process-oriented' requirements. Despite general reform, legislation remains fragmented and inconsistent. OHS legislation is generally administered on a tripartite basis by regulatory authorities in each jurisdiction. Tripartite administration of OHS legislation involves regulators, employers and employee representatives. The authorities are charged with the responsibility of enforcing and targeting accident prevention in addition to the functions of providing OHS information and monitoring OHS performance. The administration of OHS award provisions is conducted within the State and Federal industrial relations systems.

The degree of integration between OHS and workers' compensation administration varies among jurisdictions. For example, in the NT, a single Act contains legislation for OHS and workers' compensation, while prevention and compensation legislation is administered by a single authority in NSW, and under the same State departments in Tasmania and Queensland. Moreover, there are arrangements for the coordination of administrative activities in most jurisdictions. This co-ordination includes funding of prevention activities from compensation levies, and sharing of information and computer facilities.

Table 2.7 Legislative provisions for rehabilitation and return to work

<i>Jurisdiction</i>	<i>Legislative provision for Rehabilitation</i>	<i>Legislative provision for Return to Work</i>	<i>Employee based incentives</i>	<i>Rehabilitation provider</i>
New South Wales	An employer is obliged to establish an approved program ^a	Employers are obliged to provide suitable duties/ employment and job search benefits Job Cover placement program ^b	Participation in a program is voluntary and benefits may be reduced or enhanced	Providers are accredited by the Authority
Victoria	Prescribed employers are obliged to establish an approved occupational rehabilitation program	Obliged to keep job open and provide suitable employment for the first twelve months on weekly payments WorkCover incentive scheme for employers ^c Employers are not liable for second injuries ^d	Rights to compensation are suspended upon refusal to undergo program or assessment	Providers are approved by the Authority
Queensland	A general rehabilitation program established by the Board - no requirement for employers to establish their own	No specific provision for return to work	Rights to compensation are suspended upon refusal to undergo program or assessment	Provided through a network of rehabilitation staff and private providers state-wide
South Australia	The Corporation is obliged to establish or approve programs for employers and provide advisers if necessary	Obliged provide suitable employment Re-employment incentive scheme ^c Second disabilities are not included in premium adjustments	Rights to compensation are suspended upon refusal to undergo program or assessment	The Corporation. makes arrangements with approved providers
Western Australia	The Commission develops individual programs for injured workers and may require employers to establish rehabilitation services	No specific provision for return to work	Rights to compensation are suspended upon refusal to undergo program or assessment	Providers are approved by the Commission

Tasmania	The Board (reserves the right) may impose programs on employers	No specific provision for return to work	Rights to compensation are suspended upon refusal to undergo program or assessment	The Board maintains a register of qualified providers
Australian Capital Territory	No provision	No provision	None	No accredited rehabilitation providers ^e
Northern Territory	Employers are obliged to provide rehabilitation	Employers are obliged to provide suitable duties/employment	Rights to compensation are suspended upon refusal to undergo program or assessment	There are no accreditation requirements for rehabilitation providers
Commonwealth	The Rehabilitation authority (usually the employer) is required to assess, and if necessary, to arrange for an employee to undertake an approved program when the injured worker has or is likely to have 10 days incapacity	Obliged to take all reasonable steps provide or assist in finding suitable employment Re-employment incentives for a new employer	Rights to compensation are suspended upon refusal to undergo program or assessment	Providers are approved by the Comcare Australia
Seafarers	Employers are obliged to provide rehabilitation	Obliged to take all reasonable steps provide or assist in finding suitable employment	Rights to compensation are suspended upon refusal to undergo program or assessment	Employers are obliged to use Comcare approved providers

a WorkCover NSW has set up a standard rehabilitation program for small employers (20 or less employees).

b The Job Cover placement program applies to second employers and includes an employment/training allowance, 12 month premium exemption, and 6 month excess exemption.

c The re-employment incentive scheme essentially offers second employers a retention bonus and wage subsidy of up to 80 per cent in SA, and a wage subsidy of up to 60 per cent in Victoria.

d An employer is not liable for initial payments where a worker previously receiving benefits, is injured within 12 months of returning to work. Nor are employers liable for the initial amount if an injury be the result of pre-existing injury.

e Rehabilitation arrangements are made by insurers voluntarily on a case by case basis.

Source: CCH, *Australian Workers' Compensation Guide*, Vol. 1 and various other sources

2.2.2 Compliance and enforcement

OHS legislation generally provides for safety inspections, penalties, and notification of accidents as a means of ensuring compliance with the legislation.

Safety inspectors have a dual role: to educate and advise employers about safety in the workplace; and to enforce compliance with certain provisions of the Act. All schemes have provisions for safety inspectorates to operate in this manner.

As a last resort, criminal actions may be brought against employers, punishable by fines or imprisonment. However there has never been an imprisonment in Australia for breach of OHS legislation. Penalty structures vary considerably among jurisdictions.

Provisions requiring the notification of accidents to assist the monitoring and statistical requirements of OHS Authorities, applies in some (but not all) jurisdictions.

Employee participation in OHS usually takes the form of employee safety representatives and joint labour/management safety committees. The extent to which these are provided for within jurisdictions varies considerably.

2.3 Trend towards national uniformity

The considerable diversity among jurisdictions in workers' compensation and OHS regulation has led to initiatives to reconcile differences.

2.3.1 Workers' compensation

The Heads of Workers' Compensation Authorities (HWCA) are considering areas where greater consistency across jurisdictions might be achieved. Among the main issues on their agenda are resolution of cross-border claims; consistent approaches to medical and rehabilitation issues; fraud control; consistency of definitions; and the interface of workers' compensation with social security and the health system. The group has made substantial progress in resolving some of these issues, and has set up a secretariat to develop a five year national workers' compensation strategy.

In addition, a task force has been established by Worksafe Australia to review accreditation standards for vocational rehabilitation providers — with a view to achieving national consistency.

2.3.2 Occupational health and safety

In 1985, the Commonwealth Government established the National Occupational Health and Safety Commission (Worksafe Australia) as a national body (comprising employer, employee and government representatives) in order to encourage community awareness, and serve as a national focus for public debate on OHS issues.

Following the commitment of the Heads of Government at the 1991 Special Premiers Conference, considerable reform has been initiated under the *aegis* of Worksafe Australia.

Worksafe's present and future role is one of a catalyst for national uniformity and best practise in OHS, consistent with broader objectives of micro-economic reform.

2.4 Common law

Recourse to the common law of tort⁴ may provide injured workers with an alternative avenue to compensation, distinct from statutory workers' compensation. Common law actions may be brought directly against employers for their own actions, against employers for the actions of third parties, or directly against third parties.

2.4.1 Employer liability in tort

There are two types of tortious actions that may be brought against employers: breach of a general duty of care and breach of statutory duty.

Breach of general duty of care

Employers are now generally regarded as having a general duty to provide their employees with a 'safe system of work'⁵. Where an employer fails to do this (ie is negligent) and an employee suffers loss as a consequence, where recovery is not blocked by legislation, the employee may be able to recover that loss as damages. Employers may be held directly liable for their own acts or omissions, or vicariously liable for the acts or omissions of employees or third

⁴ Tort is a private or civil wrong, independent of contract, arising from wilful or negligent misconduct in breach of a duty owed to the injured person.

⁵ Although of relatively modern formulation, one of the most important facets of the employer's duty is to establish and enforce a 'safe system of work'. Little of such a claim was heard prior to the case of *Wilson and Clyde Coal Co Ltd V English* [1938] AC 57 (Fleming 1987, p.484).

parties (eg contractors).

Breach of statutory duty

Workers may also have a right to claim damages where an employer is in breach of a statutory duty, where such a right is the intent of OHS regulation. This is distinct from a criminal action under OHS regulation against an employer. Breach of statutory duty will often be easier to prove than negligence.

2.4.2 Employer liability in contract

Although seldom applied, employment contracts can provide the basis for a common law action against an employer. Under contract law an employer will be held liable for the consequences of a breach of that contract. This may be breach of an explicit term of the employment contract, such as an OHS provision of an award, or a term implied into the contract by the courts. Unlike actions in tort, generally damages for breach of contract will not be reduced to take account of contributory negligence on the part of the injured employee. But it may be difficult to establish that the breach of contract caused the loss suffered by the employee.

2.4.3 Third party liability

Injured workers may also have a right to claim damages in an action in the common law of tort against non-employers. Examples include where a third party supplies defective products to be used in a workplace or provides negligent advice. However, usually an injured worker will seek to hold the employer liable for the actions of third parties. The employer (or the employer's insurer) may then seek compensation from the third party.

2.4.4 Jurisdictional differences

Workers' compensation reforms since the mid-1980s have severely restricted the private right of workers to sue their employers for damages. This does not, however, apply to actions against non-employers, nor (necessarily) breach of statutory duty under OHS legislation.

Common law restrictions range from complete abolition in the NT and SA, to limited access under the NSW, WA, Victoria, Commonwealth and seafarers schemes, to unlimited access in Queensland, Tasmania and the ACT. Third-party claims are not restricted in any jurisdiction.

Damages are generally awarded as lump sums for economic and/or non-economic loss, including psychological impairment and all reasonable medical and like expenses. Some workers compensation schemes restrict claims for certain types of loss. Access may also be limited by minimum impairment and entitlement thresholds, and maximum benefit levels. Restrictions vary greatly among schemes.

Common law and workers' compensation are generally mutually exclusive avenues to compensation, that is, workers are generally unable to recover damages and simultaneously qualify for compensation in respect of the same injury or illness. However, the stage at which an injured worker must elect one avenue over the other differs significantly among schemes.

Table 2.8 shows differing common law restrictions among schemes.

2.5 Employment contracts

Employment contracts affect working conditions through provisions established in industrial awards with respect to OHS standards (and enforcement provisions), accident pay and sick pay. Moves towards enterprise bargaining provide greater scope than do awards for incorporating firm-specific accident-prevention and compensation clauses into contracts of employment.

2.5.1 Role of industrial awards

Occupational health and safety provisions

Industrial awards allow health and safety issues specific to certain groups of employees, industries and workplaces to be covered in greater detail and updated more regularly, than is typically the case with OHS legislation. Commonwealth OHS award provisions cover workers of a particular type Australia-wide. State OHS award provisions apply to workers of a particular type in that state only. Commonwealth awards take precedent over state awards, while no award may contradict OHS legislation in a particular jurisdiction.

Make-up pay provisions

Make-up pay provisions in awards are designed to bridge the gap between statutory benefit levels and award rates of pay. Since initial weekly benefit levels have been increased to equal pre-injury earnings in many jurisdictions,

Table 2.8 Common law restrictions among schemes*

<i>Jurisdiction</i>	<i>Compensable losses</i>	<i>Minimum thresholds (\$)</i>	<i>Maximum damages (\$)</i>	<i>Election of avenues</i>
New South Wales	Economic and non-economic loss	Economic loss only for serious injury = 25% of max. amount Non-economic loss; no award < 37 900	214 650	Irrevocable decision to sue, relinquishes right to statutory lump sum benefits
Victoria	Economic and non-economic loss - no medical costs	Serious injury = 30% impairment or if found to have a serious injury No award < 29 860	Economic loss 671 960 Non-economic loss 184 740	May pursue both concurrently until damages awarded
Queensland	Economic and non-economic loss	None	Unlimited	May pursue both concurrently until damages awarded
South Australia	Abolished	Not applicable	Not applicable	Not applicable
Western Australia	Economic and non-economic loss	Non-economic loss 30% whole person impairment Economic loss > 100 000	economic loss unlimited Non-economic loss 200 000	May elect after damages have been awarded, but not ascertained
Tasmania	Economic and non-economic loss	None	Unlimited	May pursue both concurrently until damages awarded
Australian Capital Territory	Economic and non-economic loss	None	Unlimited	May pursue both concurrently until damages awarded
Northern Territory	Abolished	Not applicable	Not applicable	Not applicable
Commonwealth	Abolished for economic loss	10% whole person impairment	110 000	Irrevocable decision to sue, relinquishes right to statutory benefits
Seafarers	Abolished for economic loss	Not applicable	138 571	Irrevocable decision to sue, relinquishes right to statutory benefits

* All dollar values are rounded to the nearest dollar (as at the 1 December 1993).

Source: CCH, *Australian Workers' Compensation Guide*, Vol. 1 and various other sources

make-up pay clauses have been deleted from some awards. In several jurisdictions workers' compensation legislation actually prohibits or discourages the inclusion of any make-up pay in award agreements.

More generous make-up pay provisions have been retained in some jurisdictions to maintain a workers pre-injury earnings beyond the initial benefit period. NSW coal miner awards, for example, provide for full make-up pay for up to 78 weeks (although it rarely applies longer than 52 weeks in practice).

Sick pay and paid leave provisions

Sick pay and paid leave are designed to maintain a workers income for a relatively short duration while they are absent from work. These provisions may also act as temporary income support for injured or ill workers who do not claim (or who are ineligible) for workers' compensation benefits.

Injured or ill workers are generally not entitled to workers' compensation benefits and sick-pay and paid leave concurrently. However, both sick pay and paid leave award entitlements are generally preserved while an injured or ill worker is on workers' compensation.

2.5.2 Role of enterprise bargaining

In terms of accident compensation and prevention, enterprise bargaining provides significant potential for workers and employers to bargain for: health and safety conditions; employee and employer bonus and penalty incentive schemes; rehabilitation and return-to-work strategies; and insurance coverage and benefits, over and above those stipulated in awards.

2.6 Interaction with other government programs and superannuation arrangements

There is considerable interaction between workers' compensation arrangements, other government programs and superannuation arrangements. Work-related injury and illness will bring the worker into direct contact with the health system and, to the extent that the individual's income is affected, there is scope for interaction with social security, taxation and superannuation arrangements. Work-related transport accidents may lead to an interaction with state-based transport-accident insurance.

2.6.1 The health system

Work-related injury and illness are treated within the general health system. The potential exists for Medicare (and private health insurance in some circumstances) to cover some injured workers for emergency treatment and/or long term care and some aspects of rehabilitation. Such treatment costs are generally, but not always, met by workers' compensation insurance.

2.6.2 The social security system

Interaction occurs when a worker, whose inability to earn an income is work-related, is receiving compensation from social security. Several schemes do not provide income support for workers during the determination and/or dispute resolution process, and cut weekly benefits well before retirement age. Social security acts as a safety net for workers in these situations.

The reverse also applies when a worker's inability to earn an income is not work related, but income maintenance is being provided via workers' compensation. For example, when injuries occur outside the workplace but are claimed as being work related.

2.6.3 The taxation system

Taxation arrangements have implications for the incentives faced by employers and employees and hence the magnitude of workers' compensation costs borne by both parties and society. For example, taxation arrangements may affect a compensation recipient's preference for lump-sum or weekly benefits. Commonwealth taxation revenue is also affected by work-related injury and illness.

2.6.4 Superannuation arrangements

Workers' compensation and superannuation may provide benefits for the same injury. Many superannuation policies — including insurance schemes under the *aegis* of superannuation — provide death and disability coverage for policy holders. An injured worker may therefore be eligible for compensation through workers' compensation and superannuation arrangements.

Different treatment of superannuation contributions while a worker is receiving benefits may result in some workers being disadvantaged when they retire.

2.6.5 State-based transport-accident insurance

Interaction with state based transport accident insurance, occurs when a worker suffers an injury while travelling to or from work or in the course of their employment. Although accidents involving motor vehicles are generally covered by state transport-accident insurance schemes, some journey claims may be deemed work-related and subsequently covered by workers' compensation. Access to benefits and benefit levels often vary between transport-accident schemes and workers' compensation schemes. Under some schemes, provision exists for compensation to be recouped from state transport-accident schemes.

3 PREVENTION

The costs of work-related injury and illness are significantly influenced by the extent and effectiveness of preventive measures. This chapter analyses incentives to prevent work-related injury and illness. The Commission's approach is that a 'culture of care' needs to be developed in the workplace, with government support in three areas: creating financial incentives through workers' compensation premiums; creating regulatory incentives through occupational health and safety legislation; and sponsoring education and safety promotion. The Commission recommends, among other things, maintaining a 'no-fault' workers' compensation scheme; continuing to move towards firm-specific risk-based workers' compensation premiums; and paying greater attention to cost-effectiveness and performance monitoring of occupational health and safety requirements.

3.1 What drives prevention?

Prevention has a major role in reducing the overall costs of work-related injury and illness. Australia needs effective policies to promote workplace safety and a commitment by both employers and employees to create a 'culture of care' at work. This would involve employers acting decisively to reduce the risk of injury and illness, and encouraging employees to put the safety of themselves and their workmates first. Key factors encouraging effective preventive activities are discussed below.

A major role of government in the area of prevention, apart from prescribing workers' compensation schemes, is occupational health and safety (OHS) regulation. The main focus of this report is workers' compensation, with the Commission's terms of reference requiring it to look at the interaction of OHS and workers' compensation. As a consequence, while OHS regulations were reviewed, there are many issues which have not been dealt with in depth by this inquiry. However, it is clear to the Commission that a comprehensive evaluation of Australia's OHS arrangements is necessary.

The Commission recommends further detailed investigation of occupational health and safety at a national level be undertaken.

Government can influence key factors encouraging prevention, and effective OHS regulation is just one such area. As the Victorian WorkCover Authority argued (WorkCover Victoria, Transcript, p.2485):

... you need to drive the economic incentives as far as you can. You need to drive education. You need to drive regulation. You need to drive enforcement. You need to drive all these things as far as you can.

The Commission agrees with this approach, and advocates:

- encouraging better management practices;
- using financial incentives;
- using regulation backed by enforcement; and
- furthering education about OHS.

3.2 Natural incentives

Even in the absence of compulsory workers' compensation and OHS arrangements, workers and employers have natural incentives to avoid work-related injury and illness.

Workers have an obvious incentive to avoid injury and illness. Nevertheless, their actions to ensure their own safety may be affected by a number of factors. For example, some may be insufficiently informed of workplace hazards (and more particularly, their possible health consequences). Others may take risks because they believe that, as far as accidents are concerned, "it won't happen to me".

Employers also face strong natural incentives to prevent accidents. Apart from the costs of compulsory workers' compensation insurance, there are many indirect costs they will bear when accidents occur in their workplaces. Mend (Sub 15, p.3) argued that the insured costs are "just the tip of the iceberg". The incentive effects of these costs can be dulled by an inadequate appreciation of their significance, as when cost-control systems do not even identify them, let alone associate them with the relevant work area. For example, AMCOR (Sub 46, p.5) argued that "indirect costs are too obscure to generate any real incentive and are frequently regarded with a high degree of scepticism."

3.3 A 'culture of care'

A 'culture of care' may be characterised by a commitment by management and workers alike to health and safety in the workplace. Such a culture is exemplified by employers who organise work in safety-conscious ways,

promote health and safety awareness within the organisation, and recognise that caring about the health and safety of employees is good for morale and leads to a more productive and competitive firm. The emphasis is on mutual trust and obligation between employers and employees, and among work groups. It is also characterised by a climate of consultation and participation within the firm.

CIG Gas Cylinders' response to the Commission's Best Practice Survey¹ encapsulated such a philosophy:

In a quality environment, we adopt a similar approach to overcoming either quality, safety, or productivity problems. Often you fix a safety problem and quality and productivity automatically follow.

As the Self Insurers Association of Victoria (Sub 49, p.3) argued:

Culture change is the key [to safety within the firm]. Cultural acceptance of safety in the workplace is ... self funding and self perpetuating ...

Some firms deliberately cultivate a 'culture of care' within their workplaces. Good employers understand the desirability of having a reputation for safety because of the effects on morale, absenteeism, and productivity. For example, the Australian Earthmovers and Road Contractors Federation and Council of Small Business Organisations of Australia (Sub 47, p.3) argued that a safe workplace culture tends to be initiated by the employer, but eventually becomes a matter of pride in all the workforce.

Workplace culture is a powerful force for prevention. There are clear examples where a 'culture of care' has been integral to improving quality and productivity.

The 1972 Report on the Committee of Health and Safety at Work in the UK (the Robens Report) noted that large firms, with better information about workplace hazards, may pay more attention to health and safety — regardless of regulation.

Toyota Motor Corporation (Toyota, Sub 23, p.2) argued that large firms are often already committed to strategies for prevention, and have the expert staff to oversee them, an advantage possibly not shared by many small firms. The strategies that Toyota uses include a company philosophy of “kaizen”, or continuous improvement. Quality circles are also used to encourage employees to identify safety hazards and develop remedial strategies.

Box 3.1 provides a good example of how management can affect the occurrence and duration of claims in the case of stress. It shows that management intervention can decrease the costs of stress to both the individual and the agency.

¹ The Commission conducted a survey of companies involved in the Australian Manufacturing Council's Best Practice Programme. Companies surveyed were asked about the relationship between safety, total quality management, and productivity.

Box 3.1 Stress claims and the role of management

Rising trends in stress-related claims have proved a concern for most jurisdictions in recent years. In the USA, for example, stress-related compensation claims tripled from 5 to 15 per cent of all claims between 1980 and 1989, at an estimated cost of \$US150 billion a year. This has provoked responses such as that in Oregon, where legislation was changed to restrict stress claims to those arising out of real and objective employment conditions not generally inherent in every working situation, and then only where there is “clear and convincing evidence” that the mental disorder arose “out of and in the course of employment”. These changes reduced the numbers of stress claims dramatically (Department of Insurance and Finance (Oregon) 1993, p.10).

A recent study commissioned by Comcare (Toohey 1993) identified that stress-related claims were a significant and disproportionate cost to Commonwealth agencies. In the period July 1989 to April 1991, stress claims accounted for 4 per cent of claims but accounted for 16 per cent of the cost of claims, and were still rising. High claims costs, averaging \$29 700, were attributable mostly to lengthy periods of incapacity.

Traditionally, the treatment of individuals suffering from stress has concentrated on the alleviation of stress after the event. However, there is increasing awareness that attention should be focused on the prevention of stress by addressing problems in the way in which work is organised and how workers are managed.

Analysis of the precipitating factors affecting stress-related claims in Commonwealth agencies showed that workload, trauma, conflict with supervisors and forced relocation or redeployment were factors that were frequently associated with the onset of claims. In addition, research found that staff who were often in contact with the public were often more likely to experience trauma and therefore take leave.

Toohey concluded that these results implied that stress-related conditions are mostly a function of human resource management and intervention. Prevention of stress-related injuries and illnesses therefore requires that management consider strategies that acknowledge workload, responsibility, job design, conflict, client contact and organisational changes have a significant impact on employee stress.

Development of a 'culture of care' which promotes communication between management and staff is essential for minimising feelings of distress and conflict in the workplace. Management styles and strategies have a significant role in affecting these factors and hence minimising the incidence of stress-related claims.

Industry associations have an interest in collectively improving their industries' OHS performance. This will not only lower their workers' compensation premium rate, but improve productivity across members in the whole industry. The Australian Chemical Industry Council (Sub 187, p.2) gave evidence of its "Responsible Care" initiative, designed to improve health, safety, and environmental performance. The Victorian Employers' Chamber of Commerce and Industry (VECCI) is negotiating a joint venture between carpet manufacturers and WorkCover Victoria to provide financial incentives for employers to invest in safety. Employers from the Carpet Institute represented a reasonably homogeneous group of small to medium sized employers (whose incentives to take safety seriously under the Victorian experience rating scheme are fairly muted). The proposal is for employers committed to a risk management program to receive a premium discount and subsidy from WorkCover Victoria.

Government's role in encouraging a 'culture of care' includes not only creating the appropriate economic, legal and administrative framework and in collecting and disseminating information on workplace hazards, but in helping to educate the whole community about OHS issues. Many of these functions are outlined in greater detail below.

3.3.1 'Quality' management

The Else Report to the Minister for Industrial Relations into Enhanced Cohesion and Co-Ordination of Occupational Health and Safety Training in Australia (Else, 1992) noted that senior management commitment is vital to ensuring health and safety success. The Report also argued (Else 1992, p.25) that the two most common ways that a lack of senior management commitment is demonstrated is by:

- failing to integrate OHS into the systems that it develops and uses to ensure the enterprise missions are completed; and
- failing to ensure the accountability for OHS at all management levels, such as including OHS as part of job specifications and performance appraisals.

Examples

The Victorian Safety Council advised the Commission of several firms which had adopted a management approach known as the Five Star Programme. Five Star is just one of a range of available accident-prevention programs, and the Commission cites it as an example of an approach incorporating the features of prevention, consultation, and integration of OHS into management systems – identified by the Else Report (1992, p.11) as integral to developing safer workplaces.

One example is Hendersons Industries Pty Ltd, a leading supplier of seating to the automotive industry, employing 700 people. In 1984, the firm decided to change the way it looked at OHS, in response to high workers' compensation costs which were undermining profitability. The first strategy centred on rehabilitation. As claim costs came under control, the company placed more emphasis on accident-prevention. Preventive activities included:

- in depth investigating of accidents;
- using experts for advice on strategies for prevention;
- introducing a medical program to monitor and prevent injury and illness;
- a comprehensive induction program, to ensure new recruits have adequate health and safety knowledge;
- careful recruitment, to ensure staff were physically able to safely carry out their tasks; and
- identifying training needs in the area of OHS.

Importantly, line management was made accountable for OHS performance. OHS was incorporated into annual performance appraisals and job descriptions, and remuneration for plant managers and their subordinates became partly dependent on their commitment to and performance of their unit in health and safety.

Hendersons believes that involving all employees complements their “waste-eliminating” principles of lean manufacturing.

Nissan Castings is another firm which has adopted the Five Star Programme. The plant manager recognised that the company's accident rate was unacceptably high and extremely costly. It commenced the program in February 1993. It has meant large amounts of documentation (especially in the early stages), attention to detail, and regular inspections. Gains have come in the form of improved safety performance, staff involvement, reduced workers' compensation premiums, and increased labour productivity.

The results of Nissan Castings' preventive efforts have been impressive. The number of injuries per month dropped from 15 in 1991–92 to 6 in 1992–93. From April to October 1993, the average number of injuries per month fell to three. Lost-time injuries have shown a similar decline, falling from 2.6 per month in 1991–92 to 1.7 in 1992–93, and averaging 0.7 per month from April to October 1993.

The Commission also conducted a survey of firms involved in the Australian Manufacturing Council's Best Practice Programme. Firms were asked about the relationship between total quality management and safety.² The responses, some of which are reported in Box 3.2, highlight some key features of a 'culture of care': good employer/employee relationships; and a recognition that accidents are not compatible with quality and high productivity. The responses consistently emphasise that quality, safety and productivity are all closely inter-related in best practice firms.

Box 3.2 Quality and safety: responses from the best practice survey.

Coates Brothers: "Apart from the human cost of work-related injury, accidents are pure waste — they divert resources from the job at hand. These resources include not only the injured worker, but management, administration, machine down time etc." and "Quality = doing it right. Productivity is the result of doing it right. Accidents have no place in things done right."

Mobil Refining: "Workplace safety is a matter of people, not programs. Culture will be the key element in any program" and "it has to do with culture ... an employee with a good relationship with his/her employer will produce high quality safe work."

CRU-Cyanimid Aust: "Workplace health and safety is a process that is made most effective by a proactive and co-operative partnership between

² 17 companies responded to the survey. While the Commission realises that this is far from a statistically reliable sample, the results are still of interest. Of the 17 respondents, 14 companies indicated that prevention measures were most important to OHS, and three companies indicated that they were very important to OHS. 10 companies considered employer/employee relationships to be most important to OHS, and the remaining 7 companies ranked this as important or very important. Total Quality Management was considered by 5 companies to be most important, and 10 companies considered it to be important or very important.

all levels of people in the organisation” and “...quality is about continually improving processes to facilitate greater productivity. Safety is a process and is also a fundamental part of most other processes. All involve a 'customer focus'”.

Miss Maude: “...quality and productivity improvements include a safety aspect, ie declines in safety would mean a decline in quality and productivity.”

Du Pont (Australia) Ltd: “Typically where poor quality and low levels of productivity exists, workplace safety will be wanting. [You] can't have high quality and productivity in an environment where people are being injured at work.”

Evidence suggests that management must assume a leadership role in developing and maintaining a 'culture of care', but success requires the commitment of all.

3.4 Information on workplace hazards

In Australia, information on which to base public policy decisions regarding safety and accident-prevention is generally inadequate. What is needed is more accurate, timely, and helpful information on workplace hazards, as well as statistics on work-related injuries and illnesses which are collected on a consistent basis. Increasing our knowledge about the nature of risks, their causes and likely consequences is important for designing cost-effective preventive strategies and setting research priorities.

As the Victorian Trades Hall Council argued (Transcript p.2540):

Information available in the hands of workers and in the hands of employers and supervisors and so on is absolutely vital [to reduce workplace injury and disease].

Because information can be costly to collect, and even more costly to get into the right hands, careful thought should go into what kinds of information to collect in the OHS field. Much easily accessible information is often wasted. For instance, the Commission was informed that the lessons about workplace hazards arising from accidents are frequently ignored by management. The Commission attended a meeting of injured workers at the Victorian Injured Workers Centre.³ Out of 27 workers who participated in an informal survey,

³ The Commission met with members of the Victorian Injured Workers Centre on May 17, 1993.

only five had the circumstances of their accident investigated, and only one felt that a satisfactory outcome arose from the investigation (that is, the original problem was fixed).

Various stakeholders should ensure that not only is information collected on injuries and illnesses, but the information is used to address the original problem. The system should be responsive to information as it becomes available about injury or illness. Sometimes management and employees in the firm can solve the problem based on existing information, but at other times effective action may require the combined efforts of employee representatives, employer groups and governments.

A role for government in providing information (or creating financial or other incentives for the private sector to do so) is justified where:

- markets fail to provide sufficient information, which may result in an inadequate knowledge of risks;
- information may be of a public good nature and has significant positive externalities, for example, information into the causes and consequences of hazards such as back strain, chemical poisoning, dust disease and stress; or
- access to such information is necessary for developing effective regulation and targeting preventive efforts.

Worksafe Australia has a leading role in the co-ordination of data and research and its dissemination on a national basis (see Box 3.3).

Insurers, risk-management experts, unions and employer groups also have a role in the creation and dissemination of information. Research conducted by the WorkCover Authority of NSW (WorkCover NSW, Sub 92) indicated that small businesses regarded insurance companies as the most readily identifiable source of preventive information, while many employees considered unions to be the most useful source.

3.4.1 Statistics

The Commission's concern at the lack of information on causes and consequences of workplace hazards, and statistics on the incidence and severity of work-related injury and illness echoes the problems described by the Report of the Committee of Enquiry into the Victorian Workers' Compensation System 1983–84 (the Cooney Report, para 3.2.1):

A cri de coeur which appears as a recurrent chorus throughout this Report concerns the lack of reliable statistical information. Nowhere is this cry more desperate than in the area of information regarding industrial injuries. As a result we have only a sketchy

picture of the numbers of persons injured in the workplace, the types of injuries sustained, the severity of these injuries, the circumstances in which they were inflicted and a host of other data necessary to engage in a meaningful programme of accident prevention.

It is disheartening to find that the same problems exist a decade on.

Statistics on industrial injuries, illnesses and fatalities are necessary for identifying and managing risk as well as developing, monitoring and evaluating preventive strategies. The Commission received submissions emphasising the importance of comprehensive, reliable and accurate statistics at both the jurisdictional and national levels. Telecom (Sub 72, p.9), for example argued that:

Without reliable and accurate integrated accident and injury data there is a significant risk that an employer's investment, and a regulator's remedial action, may be misdirected and fail to achieve the prevention gains required.

WorkCover Victoria (Sub 89, p.18) stated that a comprehensive information system:

... is vital for early detection of significant emerging cost drivers in the compensation system and the ability to take timely remedial action; a task which is very difficult, if not impossible, under a fragmented information system. A well constructed and maintained data system is a powerful management tool both for future planning and for fine tuning aspects of the compensation system to enhance its operation and effectiveness in achieving system goals.

Recently, most schemes have undertaken to adopt Worksafe's *National Data Set for Compensation-Based Statistics* (NDS) which has sought to improve the quality and consistency of data across jurisdictions. However, the NDS will still not overcome all inadequacies (see Box 3.3).

The Commission experienced considerable difficulty in obtaining comparable injury and illness statistics from each jurisdiction to enable it to fully understand the extent and cost of workplace injury and illness. The available data generally were not comparable between states, nor was there comparability over time within jurisdictions. Identifying trends was thus extremely difficult. Data provided to the Commission by the relevant authorities are summarised in Appendix K. Note that *no comparisons can validly be made* using these statistics, and the Commission has not attempted to do so, since the data use different definitions, coverage, and reporting methods.

Box 3.3 Worksafe Australia's information role
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Established in 1985, Worksafe Australia's functions include collecting, interpreting and disseminating information on OHS matters and co-ordinating research on a national basis

The development of the National Data Set for compensation-based statistics (NDS) has significant potential to achieve consistent, reliable and accurate data across jurisdictions. To date, all but two jurisdictions have implemented the NDS.

However, Quinlan and Bohle (1991) noted significant inadequacies of the NDS, including:

- the data are restricted to compensation-based statistics;
- injuries and illnesses resulting in less than five days off work are not recorded;
- injuries and illnesses of self-employed, volunteer and many rural workers are not included; and
- hours of work are poorly accounted for (eg shift workers and part-time/casual workers).

There is a need to ensure that alternative sources of data and information are used to complement the data set to overcome these inadequacies.

As the Victorian Institute of Occupational Safety and Health (VIOOSH, Transcript, p.2439) argued:

the new national data set ... in my professional opinion isn't really going to do a great deal other than standardise the data between states. We will now be able to get fairly inaccurate nationalised data as opposed to being able to not compare inaccurate data from the states.

The Australian Chamber of Manufactures (ACM, Sub 150, p.1) pointed out the necessity for statistics to be meaningful before activities such as targeting can be carried out.

Davidson (1993) suggested that deficiencies in existing workers' compensation based statistics exist primarily because:

- most injuries to self-employed workers — particularly in the rural sector — are excluded;
- injuries which do not result in successful claims are also excluded; and
- occupational diseases — particularly those with long latency periods — are poorly covered.

Such deficiencies hinder the identification and targeting of risks.

Most OHS administrations have undertaken a reassessment of their information needs and have adopted or developed improved database systems. For example, the SA Government complements coded numerical data with narrative accounts of incidents (and near-misses) which assist in developing preventive strategies.

Davidson (1993) considered other options for improved data collection. These include:

- extension to rural areas of the National Injury Surveillance and Prevention Project (information collected by hospitals on accident victims);
- greater use of coronial records;
- strengthening the requirement for the notification of serious injuries or accidents; and
- greater use of surveys and case studies.

Larsson (1991) also argued that targeted prevention should be aided by more specific information regarding the accident, not just the injury. Knowing how many injuries there were to fingers and hands in one year is not very helpful. Rather, one needs to know what job the worker was doing, and how the accident occurred. In this way, processes and equipment may be designed to avoid the accidents which produce the most common injuries and illnesses.

In relation to disease, Davidson suggested that hospital and death records could be improved by requiring consistent recording and coding of a patients' employment history. In addition, better use of information collected on claims forms could also greatly enhance decision making. In this way, the good start that the NDS represents in improved data collection may be built upon. Worksafe Australia (Sub 176, p.4) is examining the feasibility of supplementing the National Data Set with information from:

... hospital in-patient admission forms, registrations of births and deaths, cancer registries, coroners' records, ABS population Survey Program Data. In the future we plan to consider other potential OHS data sources such as insurance company records for information on disability and life insurance taken out by the self-employed. Development work in this area has been constrained while the compensation-based statistics data-base has been developed.

Worksafe Australia appears to experience difficulty in extracting information from workers' compensation authorities. For example, Worksafe Australia is still unable to publish recent NDS data for all jurisdictions. Its latest comprehensive publication (Worksafe, 1993a, p.ix) contains the following telling remark:

Data from ... Victoria, Queensland, and the Australian Capital Territory and Telecom Australia ... were not included as they had not been supplied to Worksafe Australia either in a form which could be automatically aggregated with data from other

jurisdictions or in sufficient time to allow for their incorporation into the report manuscript.

The variety of statistics collected make it impossible to draw meaningful comparisons on OHS performance between jurisdictions, or even over time within a single jurisdiction. Lack of comparable measures of performance hinders 'benchmarking' within Australia.

Co-operation between existing workers' compensation and OHS authorities is inadequate to enable Worksafe Australia to fulfil its charter to develop consistent, reliable and accurate data on work-related injuries and illnesses and their causes. Availability of such data would enable much-needed comparisons to be made, both domestically and internationally.

Insurers' data needs

Insurers also require accurate and comprehensive information on which to base their risk assessment of firms. The Insurance Council of Australia (Sub 177, p.5 and Transcript pp.2865-7) suggested that a central agency could collect a common set of data directly from insurers, which all insurers could access to aid in risk management, rehabilitation, premium setting and fraud control. Such access should respect privacy. Currently, there is no such central authority, and each authority gathers data (with varying success) and passes it on to Worksafe Australia. If a central data collection agency existed, insurers could provide data directly to the central agency, which the states may then also access if they wish. This suggestion is discussed more fully in Chapter 7.

3.4.2 The international scene

Internationally, there is a dearth of comparable, reliable and consistent statistics on work-related injury and illness. Even among advanced countries, the standard of data is frustratingly poor.

International comparisons are important as a benchmarking tool. Accident and illness rates affect the productivity of business, and are often an indication of uncompetitive management practices. This information is an important element in assessing Australia's international competitiveness. As yet, Australia is not in a position to compare performance among schemes, let alone with other countries.

Since Worksafe Australia is charged with collecting OHS data on a national basis, it is the appropriate body to benchmark Australia's performance with other countries. Worksafe Australia considers that such benchmarking falls

within its charter, but is of a lower priority than producing statistics for domestic use.

As yet, Worksafe Australia has published little information comparing Australia's safety performance with countries overseas. One major study (Stout, Frommer & Harrison, 1990) undertaken by Worksafe Australia compared Australia's work-related fatality rate with that of the USA. The study extended beyond workers' compensation records, using death certificates and coroners' records. The study concluded that US fatality rates were slightly lower than Australia's, but that the US figure was more likely to be an underestimate than Australian figure. The study found that from 1982–84, work-related fatality rates in the employed civilian workforce were 5.9/100 000 in the USA and 6.7/100 000 in Australia.

International comparisons are notoriously problematic. Differences in reporting requirements, reporting compliance, coverage, and definitions all affect statistical outcomes. However, other countries accept that comparisons and benchmarking are important, and attempt to produce comparable statistics. In 1989 and 1990, the OECD published work on occupational injury and disease. While data from several major competitor countries were included, Australia's were not, because they were not available. Similarly, in 1991, the Health and Safety Executive in the UK published a study comparing its accident statistics with those of France, West Germany, Italy and Spain.

The issue of undertaking similar research projects in Australia, and how they should be funded, requires further investigation.

There are currently several international efforts to harmonise data to enable international comparisons. The European Union report *Methodology for the Harmonisation of European Occupational Accident Statistics* outlines the changes necessary to achieve uniformity in data collection for member states. The International Labour Office (ILO) is establishing a Code of Practice on notification and reporting for adoption in 1994 and to be put on the agenda to be ratified as a Convention in 1997. Australia should take note of and co-operate in these efforts.

The Commission draws attention to the work of the International Labour Organisation, the European Union and others in developing consistent reporting practices and internationally harmonised OHS statistics.

3.4.3 Research

There is a need to educate employers and workers about the causes and consequences of work-related injury and illness. Research can play a critical

role in this, particularly in the case of occupational diseases. Worksafe (Sub 94, p.2) suggested that:

Research and development underlies any significant advances and will therefore be a crucial component of future improvements in occupational health and safety with associated economic gains through workers compensation and indirect savings.

Worksafe Australia (Sub 94) argued that Australia's annual expenditure on OHS research of \$10 million lags behind that of other economies. For example, expenditure in selected economies with smaller populations is \$30 million in Finland, \$50 million in Sweden and \$12 million in Quebec (Canada) (Worksafe Australia, Sub 94, p.32). High levels of private research expenditure in countries such as Sweden may reflect a higher proportion of domestic parent companies. Subsidiaries of multinational firms in Australia may be less likely to conduct their own research, but rather draw on the research undertaken by their parent. This may represent an ability of Australia to 'free ride' on research done elsewhere.

Worksafe further argued that Australia's expenditure on OHS research relative to the cost of injury and disease (0.1 per cent) is substantially less than that spent on health-related research (1.4 per cent).

Funding of OHS research should be carefully targeted. The Review Committee of OHS (1990) pointed out that:

In the case of mesothelioma, research findings already available were not applied to the workplace, and in the case of occupational overuse syndrome, there had been inadequate research on the full impact of new technology on the workplace, although a similar condition in telegraph operators had been identified in the 1960s.

Not only is there a need for more research to be done, but there is an even greater need to make better use what is known already. The results of research should be readily available, and employer associations, unions and OHS regulatory authorities should all be active in their application.

Information should also be made available to those in the field who require it. To help disseminate information including the results of research more efficiently, Worksafe Australia has developed Worksafe-Disc (a CD-ROM database system). This system can provide users with information regarding Australian and New Zealand OHS publications, Worksafe Australia's national material safety data sheets, approved exposure standards for atmospheric contaminants, and the US register of toxic effects of chemical substances (Worksafe Australia 1993e, p.7).

The Commission draws attention to the low level of expenditure on OHS research and development in Australia.

3.5 Liability rules

Whoever is forced to bear costs faces an incentive to reduce them. Thus, the attribution of liability for work-related injury and illness has major implications for prevention.

Since different liability rules will alter incentives for prevention, it is important to choose the right rule in order to minimise total costs. Swan (1984, p.94) recognised that:

... liability rules can be regarded as prices which are paid after the accident which nonetheless alter pre-accident behaviour.

Options include:

- 'no-fault' liability; and
- tort liability (negligence or breach of statutory duty).

There is a third option of making employees bear all of their own costs and compensating them for risk, before the event, through higher wages. The Commission does not consider this to be feasible, due essentially to substantial information failures.

3.5.1 'No-fault' liability

Workers' compensation legislation in all Australian jurisdictions employs a 'no-fault' (strict) liability rule. So long as an injury or illness arose "out of or in the course of employment," it is compensable. All compensation paid is funded by employers. Employees make no co-payment to the insurer. It should be noted that 'no-fault' liability does not denote any element of 'blame'.

There are two main economic arguments for holding employers (rather than employees) liable:

- employers generally have better information and greater control over their workplaces than employees — so that employers are generally more able to prevent work-related injury and illness (ie they are 'least-cost' avoiders); and
- if employers are forced to bear the costs, product prices will reflect the full costs of production (which should properly include the cost of work-related injury and illness) — so that resources will be allocated more efficiently than would otherwise be the case.

Exceptions may be found to both these arguments, but generally they hold.

Some believe there is also an ethical reason why employers should be liable for the costs of work accidents. As Kemcor Australia argued (Bisley, 1993):

Why do we concern ourselves with workplace safety? Obviously, the human factors come first. As individuals we have the right to take risks when we control the risk, and so we ski, hang glide, climb rockfaces, smoke, and even drive cars. However, as individuals we resent other individuals placing us at risk, even if the risks are much smaller. That is why every employee has the right to expect to not be exposed to unacceptable workplace risks (that are controlled by others). And it is why management must accept a leadership role in establishing a safe workplace. Our employees, correctly, expect it of us.

Employer care under a 'no-fault' rule

Compared with fault-based systems, under a 'no-fault' workers' compensation scheme, three factors increase employer incentives for preventing injury and disease:

- greater certainty that they will be held liable;
- greater certainty of the amount for which they will be liable (statutory benefits); and
- the speed with which costs are assessed and benefits paid.

There are exceptions to all three of these factors, but in general, 'no-fault' schemes perform better in this regard than do fault-based mechanisms.

The more of the worker's loss the employer has to bear, the greater the incentive to prevent such costs through, say, risk-management strategies. Also, if the costs are to be borne quickly (even if indirectly through workers' compensation premiums) then this acts as much more of an incentive than if payment to injured workers were to be delayed for years — as would likely be the case if fault is required to be established before payment to workers commence.

These arguments hold only to the extent that the costs of injury and disease are accurately reflected in insurance premiums of individual firms. Premiums are discussed later in this chapter, and more fully in Appendix G.

Employee care under a 'no-fault' rule

Workers' compensation schemes are often reported to experience increased claims numbers and durations after a benefit increase. This phenomenon, known as moral hazard (see Chapter 4), is well documented, particularly in the USA.⁴ However, studies have failed to differentiate between an increased accident and illness trend, and an increased reporting trend.

⁴ See, for example, Butler & Appel, 1990; Butler & Worrall, 1985 and 1991; Chelius & Kavanaugh, 1988; Dionne & St Michel, 1991; Kneisner & Leeth, 1989, Krueger, 1990; Smith, 1989; and Welland, 1977.

There are obvious reasons why workers are unlikely to become significantly less careful simply because workers' compensation benefits will be paid in the event of a work-related accident or illness. Individuals face an obvious desire to avoid pain and suffering, disfigurement, and impairment. Money will never be adequate to compensate for many – perhaps most – injuries. This means that the natural incentive to avoid personal harm is the dominant incentive in most cases.

An increased incentive to report claims is a much more plausible explanation. Workers who might not bother lodging a claim when benefits are low may claim under a more generous benefit schedule. Higher claims rates under these circumstances may simply be evidence of prior under-reporting of accidents and illnesses. Higher benefits may also induce some workers to exaggerate, or even fraudulently invent claims. Chapter 7 discusses the issue of fraud more fully.

Some submissions called for acknowledgment of 'contributory negligence' in workers' compensation. For example, the South Australian Employers Federation claimed (Sub 30, p.10) that:

Major difficulties are experienced in South Australia in relation to the equitable sharing of health and safety responsibility in the workplace. It is a reality that many accidents are caused by employees failing to properly comply with reasonable health and safety instructions.

Toyota suggested (Sub 23, p.3) that there be scope for reduced benefits “where it is clear that improper action(s) on the part of the employee directly led to the occurrence of their injury”.

Such an approach would negate many of the advantages of strict liability. Wrangling over fault on the employee's behalf would mean further delay and increase legal costs. Legal costs already represent a significant part of workers' compensation costs (see Appendix D).

More cost-effective ways of promoting safety among workers are likely to be found at the workplace level. Management is in the best position to create an environment in which workers take prevention more seriously. An example is where serious breaches of company safety rules could lead to dismissal.

There are already provisions in each jurisdiction which bar a worker from receiving benefits if the injury was a result of “serious and wilful misconduct” on behalf of the employee. This does not apply in the case of death or serious injury. The exceptions of death and serious injury are supported for two reasons. First, the fact that such misconduct occurred with such dire consequences may be evidence of a lapse in management supervision. Second, it may offend notions of fairness to further penalise a worker and his or her family when many will feel they have arguably suffered enough.

The Commission recommends that employers be held liable on a 'no-fault' basis for work-related injury and illness. The Commission nevertheless supports existing legislative provisions which withhold benefits in the case of serious and wilful misconduct on the part of the injured employee, except in cases of death or serious injury.

3.5.2 Common law and prevention

In some jurisdictions, common law (through the law of torts) provides an alternative route for compensation, and may have preventive implications. Common law is discussed more fully in Chapter 4; this section concentrates solely on incentives for prevention.

The prospect of being sued for negligence can create positive incentives for both employees and employers to be careful — since employees will have their damages reduced by the proportion of their own negligence in causing harm; and employers will be liable for harm to employees due to employer negligence.

Where common law damages are insured against — as in compulsory workers' compensation insurance — these incentives are considerably lessened.

Even in experience-rated premium systems, the time lags between the incident and the increase in insurance costs to the employer weaken incentives for prevention. For example, Queensland Glass Manufacturers (Transcript, pp. 2106–7) told the Commission that despite the company's present efforts in comprehensive risk management, their premiums are still being influenced by old common law claims. Incentives are further diluted for those employers who are not fully experience-rated.

Another major disadvantage of common law claims is that proving negligence can involve significant costs. As Carroll and Kakalik (1993, p.266) argue in the context of motor vehicle insurance:

The traditional approach to compensation is based on fundamental common-law principles. Its critics rarely dispute these principles on their merits. However, they argue that the traditional approach is overly expensive, inefficient, and slow; that the compensation it provides is too often inadequate; and that, in any event, the compensation is inequitably distributed among claimants.

Chapter 4 and Appendix D discuss the costs of common law in each jurisdiction more fully.

Common law may inhibit an employer's preventive activities. Between an accident and the time the case is resolved, an employer may not rectify the cause of the accident because "any improvement implemented by an employer is

viewed by the legal fraternity as an admission that previous systems of work were inadequate” (AMCOR, Sub 46, p.3). At common law, the degree of negligence is, among other things, a function of the practicability of taking precautions. Accordingly, correction of a problem after an accident may be used as evidence that preventing the accident was practicable. The correction of a safety problem after an accident does not of itself furnish proof of negligence, as there are other elements which must be proved. As Luntz (1981, p.389) has argued:

On occasion employers, conscious of the importance of discovering the true cause of an accident, will make an immediate investigation, but will then destroy the memoranda recording the results of the investigation in order to avoid having to produce the documents if the matter should come to trial. If a method of avoiding harm is discovered, the precautions may not be taken, since their installation provides evidence of their practicability and thus enables the worker to overcome difficulties such as those faced by the plaintiff in *Vozza v. Tooth Breweries*. In the nineteenth century it was said that ‘people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident’, otherwise it would have ‘to hold that, because the world gets wiser as it gets older, therefore it was foolish before’. Yet Australian courts have repeatedly held that evidence of subsequent precautions is admissible to prove the practicability of those precautions.

The Commission found that common law is not a cost-effective means of promoting prevention.

3.6 Workers’ compensation premiums

With the exception of self-insurers, employers do not pay directly for their workers’ compensation liabilities. Rather, payments are made by insurers, to whom employers pay premiums (or levies).

Premiums should be higher for higher-risk employers to create the right incentives for safety. If a firm faces high workers’ compensation premiums, it is likely to try to reduce its costs via appropriate preventive strategies.

3.6.1 Premium setting

There are several methods used to calculate and adjust premiums. Each has implications for prevention. Methods include:

- class rating;
- experience rating;
- bonus/penalty schemes; and

- up-front premium discounts.

More details are contained in Appendix G.

While there are several methods of adjusting premiums *at the margin*, the actual *level* of premiums is also important for prevention. The general level of premiums will be higher if employers are required to bear more of the costs of work-related injury and illness, unless the resulting safety incentives lead to fewer claims. Employers are more likely to be concerned with safety if their workers' compensation costs reflect as near as possible the full cost to the injured worker and society of an accident.

The small firm problem

Premium setting methods often affect small and large sized firms differently. Small firms suffer from the problem known in the insurance industry as a lack of "credibility" of their claims experience. Analysis of claims statistics shows that *as a group*, small firms are expected to have a certain number of claims, with a small proportion of large claims. These ratios are relatively stable. However, *individual firms* face a far more erratic claims experience. It is difficult for an insurer to know how to interpret a small firm's claims data. This is described by actuaries as the small numbers problem. Say a small firm in a particular industry is statistically likely to have two lost-time injuries every ten years. If the firm happens to have three lost time injuries in one year, does this mean that the firm is riskier than others in the industry, and so deserves to pay a higher premium, or is it that the likely accidents for the next fifteen years all happened to come at once, and the firm will have no more claims? Both answers are reasonably plausible, which makes setting premiums difficult.

Finding premium setting methods which will enhance preventive incentives to small firms is important, as 51 per cent of the Australian non-agricultural private sector workforce is employed in small businesses,⁵ although a little over a third of these are people working in their own small business, either as employers or self-employed persons (ABS 1993a, Cat. no. 1321.0)

The problem is essentially a conflict between running workers' compensation as an insurance scheme, which requires risk pooling, and as a mechanism to encourage workplace health and safety which requires 'user pays' principles. Both are legitimate concerns.

⁵ ABS defines a small business as a non-manufacturing establishment employing fewer than 20 people; or a manufacturing establishment employing fewer than 100 people (ABS Cat. no. 1321.0).

Premium volatility

A degree of premium volatility is necessary to transmit signals and incentives to employers about their safety performance and its costs. By volatility, the Commission has in mind consistent and predictable decreases or increases in premiums as a result of claims performance. Improved safety performance should be rewarded with lower premiums. Likewise, premium increases should prompt employers to review the need for OHS improvements. However, most workers' compensation schemes expressly constrain the amount of volatility that employers — particularly small employers — may experience.

Volatility may be suppressed either directly or indirectly.

Direct volatility suppression involves some form of arbitrary capping on premiums. Caps are found on the amount that a premium can increase in a year (to a limit of twice the industry rate in NSW, and a sliding scale in Victoria), the maximum penalty a firm can receive (none in Queensland; 50 per cent — or 100 per cent for large firms with a particularly bad record — in SA) and limits on the amounts that private insurers may charge (a maximum loading of 50 per cent on the gazetted industry rate in WA).

Alternatively, a more indirect approach is to suppress volatility through low credibility factors in experience rating. This places a strict limit on the extent to which an employer's experience is reflected in its premium. Examples are found in NSW and Victoria, where premium formulae feed very little of a small employer's recent claims experience into premium calculations.

The effect of both direct and indirect volatility suppression is that incentives for prevention are muted. The cost of volatility suppression in terms of potentially worse OHS performance must be balanced against the benefits of maintaining relatively stable premium levels. Small businesses, in particular, may not generate sufficient cash flow to withstand large fluctuations in premium levels.

It seems, however, that the scales have been tipped too far in favour of premium stability, leaving too few strong financial incentives for OHS performance, particularly for small firms. It is difficult to justify a situation whereby a consistently poor OHS performer is never required to pay the full cost that it is bringing to other premium payers.

An example may be drawn using NSW's direct volatility capping measure (the so-called '2T' formula according to which premiums cannot exceed twice the industry rate). Say a small business employs five people, each with a payroll cost of \$50 000, resulting in a total payroll of \$250 000. If wages are half of costs, turnover must be at least \$500 000. Yet assuming premiums are 1.8 per cent of payroll, premiums cannot increase in one year by over \$4 500, which is very small in relation to turnover and probable capital value of the enterprise.

A better formula might be some proportion of turnover — say, 2 to 5 per cent of turnover — with some arrangement to pay in instalments. It should be borne in mind that greater volatility will mean significantly lower premiums for some small businesses in most years.

Premiums should be as volatile as is tolerable. Over time, at least, penalties should exist which reinforce the message that occupational accidents are costly. In addition, a firm should bear a greater proportion of those costs at the time of an accident, rather than averaged over a longer period.

3.6.2 Class rating

Under class rating (or manual or industry rating), premiums are determined according to industry category.

Of themselves, class rates do not provide good incentives for prevention. This is because the preventive actions of an individual firm will not necessarily reduce the claim costs of the group. However, if all firms in the same category act in concert to reduce claims, their premiums will fall. The Workers' Compensation Board of Queensland cited the meat industry as an example (Transcript, p.1042). However, the potential for firms to 'free ride' on the efforts of others means that in practice, safe firms are subsidising unsafe firms.

Cross-subsidies

Cross-subsidies occur when a firm's premium rate does not reflect the underlying risk, so that the premiums of other firms have to be increased (or decreased) to compensate. This can occur between classes of firms, within classes of firms, and between small and large firms.

Cross-subsidisation has obvious implications for prevention. This will occur between industries when class rates are artificially compressed. Then, low-risk industries pay higher premiums than is actuarially necessary, and high-risk industries pay less. When this happens, high-risk industries not bearing the full costs of their claims have lessened incentives to improve safety. Low-risk industries, already paying more than their share, also face little incentive to improve.

Industry cross-subsidies may be considerable. Table 3.1 shows estimates of the amount by which several industries are cross-subsidised in SA. The maximum levy rate in SA is capped at 7.5 per cent (not taking into account penalties, which may significantly increase some firms' premiums). If no such cap existed, levy rates would be much higher. The uncapped levy rate column in Table 3.1 shows the estimated levy rate if the cap was removed. The table also

shows the greater claim frequency experienced by these industries, compared to the scheme average.

Cross-subsidies within classes will occur if the class lumps together firms with different underlying risks. These intra-pool problems are similar to those described above. Classes could be broad for legitimate insurance reasons. The nature of insurance is, after all, to pool risks — and an insurer must balance the need to maintain credible premium pools against the need to charge employers a premium closely aligned to their own risk.

Cross-subsidisation can also occur between different-sized employers. For example, under Victoria's previous scheme, WorkCare, the bonus/penalty system resulted in small employers as a group paying less in premiums than the costs they brought to the scheme (while large employers were paying more than their share) (WorkCover Victoria 1992).

Table 3.1 Cross-subsidisation by industry in South Australia, 1992

<i>Industries with highest WorkCover claims</i>	<i>Annual cross-subsidy \$^{a b}</i>	<i>Levy rate per cent</i>	<i>Uncapped levy rate^c</i>	<i>Claim frequency^d</i>
Meat products manufacturing	2 304 000	7.5	14.6	32.8
Non-ferrous casting or forging	873 000	7.5	12.7	24.3
Bacon, ham and smallgoods	624 000	7.5	10.3	17.9
Brooms, brushes and coir matting	577 000	7.5	11.3	15.7
Garbage disposal	492 000	7.5	11.4	21.0
Ship building and repairing	492 000	7.5	11.7	17.3
Structural steel	418 000	7.5	8.7	19.1
Sheep shearing	370 000	7.5	12.3	9.8
Iron and steel products	358 000	7.5	10.8	18.5
Steel casting	312 000	7.5	11.4	22.8
Concreting	306 000	7.5	8.7	12.3
Manufacturing industry average	-	-	-	11.5
Scheme average	-	-	-	6.8

a The average annual cross-subsidy is derived from the Projected Remuneration multiplied by the difference between the uncapped levy rate and the capped rate (7.5 per cent). Annual cross-subsidy does not take into account any reduction of the cross subsidy by the Bonus/Penalty Scheme, which can impose a penalty of up to 50 per cent of the premium, with an additional 50 per cent penalty for large employers with very poor accident records.

b Rounded to the nearest \$1000.

c Rounded to the nearest 0.1 per cent.

d Number of claims per \$1m remuneration., rounded to the nearest 0.1 per cent.

Source: Data from WorkCover SA, 1992

Cross-subsidisation may also occur within a multi-insurer setting between different classes of insurance business. An example may be an insurer who is

prepared to wear losses on some clients' workers' compensation business in order to secure the more lucrative business of insuring their capital equipment.

3.6.3 Experience rating

Experience rating generally takes a base rate (either the class rate or last year's premium) and adjusts it according to a firm's recent experience (usually 3-5 years).

The preventive incentives involved in experience rating mean that employers will try to improve their safety performance in order to lower their premiums. These incentives will be greatest for large employers, for whom the largest weight is given to experience. For small firms, for whom little of their experience is incorporated into their premiums, experience rating creates few incentives to improve health and safety performance. This is discussed more fully below.

Experience rating is also unlikely to work as a good incentive mechanism for the prevention of occupational diseases. These are often characterised by a long latency periods, a poorly understood causation and uncertain prognosis. These factors create lags and uncertainties, which weaken preventive incentives. For example, WorkCover NSW (Sub 92, p.4) argued that:

... because of the long latency of cancer, and the lack of documentation regarding the relationship between cancer and workplace exposure to hazardous substances, the costs of cancer are usually borne by the public health system rather than through workers' compensation premiums.

Another criticism of experience rating is that it encourages claim suppression rather than actual risk reduction. Mr Barry Durham (Sub 117, p.1), former Chairperson of the Victorian Accident Compensation Commission, the Victorian OHS Commission, and the Victorian Accident Rehabilitation Council, argued that experience rating encourages employers to deny liability, to actively discourage workers to submit claims, and to restructure their organisations so that more hazardous work is contracted out. Any premium structure which forces employers to pay for the results of their risky workplaces creates an incentive to transfer liability. However, the opportunity to create positive incentives for prevention should not be missed because of the risk that some employers will try to avoid paying rather than making their workplaces safer.

3.6.4 Bonus and penalty schemes

Bonus/penalty schemes are more likely to create positive incentives for prevention than class rates alone. For example, the WorkCover Corporation of SA stated (WorkCover SA 1992, p.4):

Since the commencement of the bonus/penalty scheme in July 1990 there has been an almost continuous improvement in the performance of the scheme. A similar improvement in the occupational health and safety performance of employers was also experienced in Victoria when that State introduced its bonus/penalty scheme.

A study by the Corporation (1993b) estimated that the bonus/penalty scheme has reduced the number of claims by about 1200 per month.⁶

However, bonus/penalty schemes can have their problems. For example, bonuses and penalties awarded on the basis of comparative intra-pool performance may see a firm's premiums increase even though it improves its performance on previous years. This would happen, for example, if the firm had improved its performance, but its experience was still inferior to that of others in its class. Incentives for prevention are lessened where a firm manages to reduce the level of injury and disease but fails to be rewarded for better performance.

Best practice in bonus/penalty schemes should incorporate:

- reasonably predictable and consistent bonus/penalty premium outcomes;
- the bonus/penalty should not be funded from within small sub-pools, but should rather be funded over a large enough pool to generate stability and predictability in bonuses/penalties;
- the scheme should not involve systemic cross-subsidisation of any employer or class of employers; and
- the scheme should incorporate sufficient possible volatility to encourage better safety performance.

3.6.5 'Up-front' premium discounts

Several submissions called for 'up-front' discounts for adopting safer work practices. Their main advantage is their immediacy — employers know that if they implement certain safety initiatives, their premiums will fall now, rather than later.

⁶ WorkCover SA has since recognised that this may be an overestimate, due to a greater influence of the recession than accounted for in its analysis.

Such discounts can, however, have their problems. First, they may be difficult and expensive to administer. Second, there may be only 'paper compliance' rather than actual reductions in risk, so that accountability for results should be an important element. WorkCover NSW (Sub 205, p.7) supports 'up-front' discounts in principle, but cautions against schemes creating:

- rewards for good luck rather than good management (ie rewards should not be based primarily on having no claims, because approximately 90 per cent of all businesses do not have a claim during the year and an even greater percentage of small businesses would have no claim, even though their operations may be unsafe in some cases);
- unnecessary administrative burdens for Schemes or individuals;
- payments to employers for undertaking what they are legally required to do anyway; and
- rewards for reducing claims though suppressing notification of accidents and injuries.

An alternative to offering bonuses for adopting safe work practices is to give employers bonuses subject to achieving specific safety targets. An example is the SA Safety Achiever Bonus Scheme.

3.6.6 Premium setting methods and small firms

The premium setting methods described above will have different impacts on small firms, including incentives for prevention.

Small firms often only receive class rates from insurers. This may be reasonable from an insurance perspective, since a small employer has very little credible experience. However, such an approach to setting premiums does not generate much in the way of preventive incentives.

Existing experience rated systems offer few incentives to small firms. As the experience rating formulae used in NSW and Victoria mean that small firms are not experience rated to any significant degree, the effectiveness of experience-rated premiums as a preventive tool is limited. Regardless of the firm's safety performance, there will be little corresponding reward or penalty reflected in premiums, since the industry rate will outweigh the experience rated component.

The amount of experience which feeds into an experience rated premium is determined by the 'credibility factor'. The credibility factor, derived from system-wide experience, suggests how much of an employer's claims experience can be taken as a reliable estimate of the employer's true risk. The credibility factor is very low for small firms, and increases with firm size.

As shown in Table 3.2 and Figure 3.1a, most employers in Victoria face a very low credibility factor. For example, Figure 3.1a shows that 86 per cent of employers have a credibility factor of less than 0.025 (ie 2.5 per cent of the premium is determined by the firm's own experience). However, as shown in Figure 3.1b and Table 3.2, only 20 per cent of total remuneration relates to a credibility factor of less than 0.025, while 21 per cent relates to a credibility factor of above 0.80. Remuneration in these tables may be used as a proxy for number of workers.

Table 3.2 **Distribution of credibility, Victoria 1993***

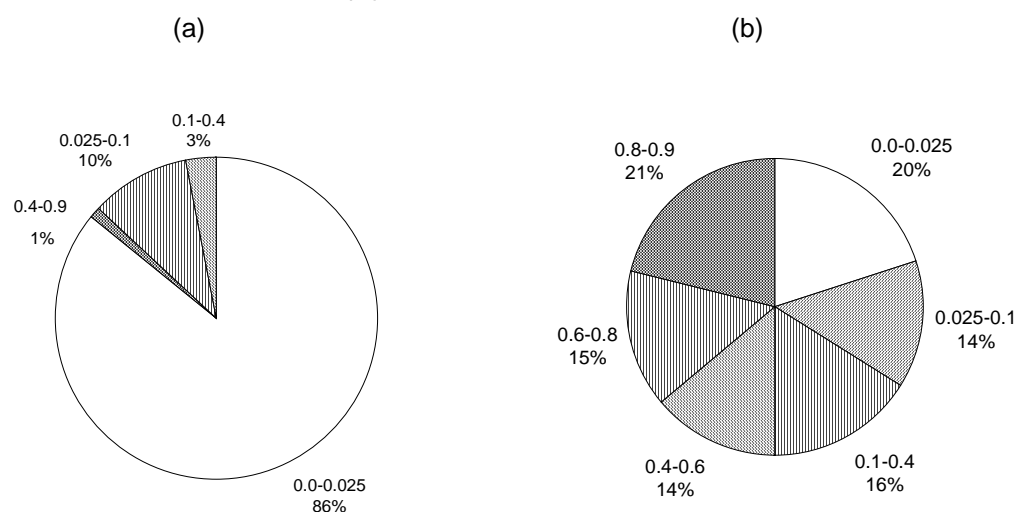
<i>Credibility factor</i>	<i>Number of employers</i>	<i>Remuneration (\$m)^a</i>	<i>Per cent of total remuneration</i>	<i>Approximate payroll size (\$'000)</i>
up to 0.025	120 941	7 447	20	171
0.025 - 0.05	9 536	2 724	7	353
0.05 - 0.075	3 481	17 017	4	545
0.075 - 0.1	1 997	1 317	3	750
0.1 - 0.2	3 190	3 820	10	1 714
0.2 - 0.3	1 100	2 467	6	3 000
0.3 - 0.4	527	2 026	5	4 800
0.4 - 0.5	300	1 643	4	7 500
0.5 - 0.6	247	2 075	5	12 000
0.6 - 0.7	190	2 549	6	21 000
0.7 - 0.8	131	3 713	9	48 000
0.8 - 0.9	59	7 995	21	5 394 000
All	141 699	39 477	100	

* The approximate payroll size column represents an estimate of the size a firm's payroll would have to be to have the corresponding credibility factor. The payroll figures are indicative only. They have been derived by the Commission for a firm facing an industry rate the same as the Victorian average premium rate (excluding deficit surcharge) of 2 per cent. An employer with a higher (lower) industry rate would need a lower (higher) payroll to achieve the same credibility rating.

a Figures may not add due to rounding.

Source: WorkCover Victoria, unpublished data, November, 1993

Figure 3.1 Victorian credibility factor distribution 1993: by percentage of employers (a) and by percentage of total remuneration (b)



Source: Victorian WorkCover Authority, 1993, unpublished data

Experience-rating formulae may be changed to express the view that the incidence of claims may be more representative of true risk than the cost of claims. The National Safety Council (Transcript, pp.2061-2) argued that it was largely luck which determined the severity of the injury, while it was certainly not luck but bad management which allowed the risk to exist.

'Up-front' discounts for adopting accredited safety programs, or direct assessment of risk⁷ — suggested by Mr Barry Durham (Transcript, p.2439) and Mr Robert Buchanan (Sub 151, p.4) (see Appendix G) — are alternative ways of assessing premiums for small- to medium-sized firms. Their advantage is that they abstract from experience, which is erratic and unpredictable in small firms. However, it may be difficult to create practicable methods of applying these alternative approaches.

The Commission recommends that:

- cross-subsidies between firms and the artificial suppression of premium volatility be discouraged where practicable, as they

⁷ Direct assessment of risks by safety audit, rather than claims experience, may be used as the basis for setting premiums.

undermine safety incentives and discriminate against firms with superior safety records;

- **large firms, for whom experience is a good proxy for risk, be experience rated; and**
- **small firms, for whom experience is not a good proxy for risk, be subject to bonus/penalty schemes designed to provide reasonably predictable and consistent premium changes.**

Given the inappropriateness of experience rating small firms, the Commission draws attention to the following mechanisms as a means of achieving safety incentives in their case:

- a bonus/penalty scheme incorporating sufficient volatility in premium payments to create positive safety incentives, together with education for firms regarding what causes premiums to fluctuate;
- an excess payment by small firms of, say, the first two weeks' weekly compensation payments, with options for variable excess levels; and
- discounts on premiums for recognised reductions of risk.

3.6.7 Should premium setting be regulated?

The argument for the regulation of premium setting is that, if left to themselves, insurers may charge premiums which are based on factors other than risk. The Commission has found little evidence in those states where private insurers may set their own premiums that premium-setting methods of the types advocated above are employed. This problem is largely confined to the small- to medium-sized firms. If this occurs, employers do not face the correct financial incentives to improve their safety performance. Also, it leads to cross-subsidisation between safety-conscious employers and those less so within the industry group. A possible reason why insurers might not closely relate premiums to risk (especially for small employers) is that the costs of doing so are too large. Other possible reasons are impediments to competition among insurers, and a lack of bargaining power possessed by small firms. The problem may be manifested by:

- an insurer spreading the windfall gains (or losses) of investment policy to its customers (so premium changes would be unrelated to risk);
- an insurer cross-subsidising a large firm's workers' compensation business with its more profitable insurance, when it has the market power to do so;

- an insurer reducing the premiums it charges certain firms in a bid to gain or maintain market share (eg rather than from a reduction in risk); and
- insurers employing incentive-creating premium structures for large customers, but not small employers who have less bargaining power.

The Commission considers that there is scope for some type of regulation of premium structures (as distinct from levels). Regulation which encourages insurers to base premiums on risk and to provide strong safety incentives is appropriate. Other forms of regulation, such as caps, or forced cross-subsidisation, are inimical to creating appropriate incentives for prevention.

The Insurance Council of Australia (Sub 65, p.11) has recommended an approach to regulating premiums as follows:

Each insurer would file with the appropriate authority the rates and rating methods it wishes to use in calculating the premiums for each employer. Each insurer would apply those rates and rating mechanisms in calculating the premium rates for employers and could only vary them within set parameters agreed with the central authority.

This approach is sometimes known as 'file and write'. This means that the insurer files with the appropriate regulatory body for approval the details of its proposed premium-setting mechanisms. If the regulator considers the rating mechanism to be acceptable (for example, with appropriate experience rating and bonus/penalty schemes in place) the insurer can then write premiums for employers. A scheme could be created wherein insurers would compete on administrative costs, risk management, premium levels and innovative premium-setting methods (so long as they adhere to the principles of full funding, no cross-subsidisation, and incorporate other incentives for prevention). Insurance contracts could be structured so that the employer can clearly see which component of the premium is based on risk, and how claims experience will affect this.

The Commission envisages the bulk of the regulator's activity in this regard would be purely monitoring. However, it would possess a veto power, which it could use in cases where the insurer makes insufficient effort to vary premiums according to individual firms' risk or claims experience.

The regulatory situation should be reviewed at regular intervals. Regulation may become unnecessary as the insurance market becomes more sophisticated in its approach to premium setting and incentive-creation for all firms, especially small- to medium-sized firms.

The Commission recommends that premium setting be regulated by the relevant workers' compensation authority. This regulation should be of a 'file and write' nature, encouraging:

- **premium-based incentives for employers to improve their preventive and rehabilitation strategies; and**
- **innovation in premium setting.**

3.6.8 Self-insurance

Self-insurers meet their own workers' compensation costs and administer their own claims (although they may also take out 'catastrophe insurance'). The regulation of self-insurance is discussed in Chapter 7.

Self-insurers face particularly strong incentives to prevent injury and illness, since they bear all of their workers' compensation costs. These firms experience none of the dilution or delays in bearing costs associated with insuring their liabilities. The consequences of poor OHS are borne directly by the firm, which encourages top management to focus on safety. The evidence is that the commitment of management at all levels is essential to developing a 'culture of care'.

The Australian Chamber of Manufactures (Transcript, p.2296) argued that self-insurers are able to adapt compensation schemes to the culture of their workplaces through greater participation in prevention, and that this flexibility was denied to employers insuring through authorised insurers. This sense of management empowerment is an important element in creating a 'culture of care'.

Several self-insurers emphasised the greater safety incentives inherent in self-insuring. For example, BHP Steel argued (Sub 37, p.2) that:

Self insurance means that the employer bears the actual cost of workers' compensation claims with generally considerable savings over external (to the employer) insurance. It also provides ... a mechanism by which costs can be directly reduced through improved occupational health and safety performance.

If firms could choose to meet their own compensation costs up to a nominated figure, having to cover these excesses provides an incentive to take appropriate preventive action. This is likely to be an additional way of creating incentives for small firms to take more care. However, WorkCover NSW (Sub 205, p.7) note that in its experience, the number of claims does not appear to be sensitive to changes in excess requirements. Excesses also create incentives which may reduce injury reporting. Chapter 7 explores this option further.

3.7 Occupational health and safety policies and practices

3.7.1 Current legislation

OHS regulation sets minimum standards through state-specific legislation. OHS policies and practices are intended to reduce the incidence and severity of work-related injury and illness, and resulting total costs.

Australian OHS requirements were originally based on British legislation. Initially legislation relied on prescriptive standards, which restricted workplace adaptation in the face of changing technology. Following the Robens Report in the UK, most of the Australian states began a slow process of reform. The Robens approach stressed a more consultative framework to deal with health and safety matters. The report recommended replacing prescriptive rules with performance-based standards, supported by codes of practice.

Government intervention through health and safety regulation is justified where markets are unable to achieve adequate levels of safety. For example, regulation may be necessary to:

- address difficult-to-identify causes of occupational diseases (which are often characterised by long latency or gradual onset);
- minimise the probability and consequences of large-scale disasters (the effects of which will spill over into the general community); and
- ensure that all employers attain some minimum standards of safety.

Even where government can potentially improve workplace health and safety outcomes, extensive regulation may still not be justified. Market mechanisms will generally deliver less than optimum levels of OHS, but regulation itself is seldom perfect. To the extent that it is possible to do so, the costs of regulation need to be compared to the likely benefits to test for the appropriate form of regulation for certain outcomes and whether non-regulatory approaches might provide superior outcomes.

3.7.2 Criticisms of existing approaches

Existing approaches to OHS regulation were criticised by inquiry participants on the following grounds:

- legislation is largely inconsistent across states;
- legislation is still far too prescriptive;
- it is sometimes difficult for employers to ascertain their responsibilities; and

- compliance costs are too high.

In Australia, there are ten principal OHS Acts and over 170 separate accompanying regulations and codes of practice (see Appendix C). Staggered and selective implementation of reforms by each jurisdiction has contributed to a fragmented and inconsistent system.

The South Australian Employers Federation claimed that existing legislation is still far too prescriptive and is a direct disincentive to improving employer commitment to health and safety initiatives. It argued (Sub 30, p.12) that:

It is a fact that many of the new regulations and codes of practice are now becoming so prescriptive as to invite attention to be given to compliance with the technical detail whilst avoiding a commitment to the principle of the code of practice or indeed, to looking for ways of avoiding obligations of this kind.

Brooks (1991) argued that most employers are not aware of their obligations. She suggested that this may be the most serious inadequacy of OHS law because:

However sure and painful punishment may be, it is a poor result if we are punishing those who *would* have provided a safe and healthy workplace, had they been shown, or guided to determine, what was required (p.733).

Firms operating across jurisdictions may encounter difficulties complying with several OHS Acts. Worksafe (1993c) identified the potential costs as:

- inhibiting mobility of labour and capital;
- leading to inconsistencies in standards, detrimental to workplace health and safety, which may contribute to the costs of workplace injury and disease;
- having to comply with different requirements; and
- discouraging investment as a result of having to meet different standards.

The Metal Trades Industry Association (MTIA, Sub 71) estimated that compliance with OHS legislation in 1992 represented 0.14 per cent of total costs, but maintained this was likely to be an underestimate. The Queensland Law Society (Sub 50) and the South Australian Employers' Federation (Sub 30) also emphasised that compliance costs are considerable.

3.7.3 Effectiveness of occupational health and safety rules

Several authors (Quinlan & Bohle 1991; Brooks 1988, 1991) argued that OHS legislation has largely failed to reduce the incidence of work-related injury and illness.

The attribution of reductions in compensation costs and accident rates in Australia to increased efforts in OHS is difficult as there are other factors influencing these variables. For example, the Australian Council of Trade Unions (ACTU, Sub 45) said that although the cost of workers' compensation schemes has generally fallen, this could largely be explained by better rehabilitation outcomes, competition among insurers and reduced benefits and eligibility — rather than better prevention.

Compounding the problem is inadequate information on workplace hazards (see Section 3.4).

3.7.4 Administration of occupational health and safety regulation

The aim of an OHS administration should be directed to reducing the costs of occupational illness and injury. To effectively meet this aim, OHS administration should be managed and run according to modern management principles. Just as businesses strive constantly to improve overall profitability, so OHS administrators should strive for continuous improvement in the cost effectiveness of all their activities.

Ideally, OHS administrators should regard themselves as part of a 'total OHS cost minimisation system' with all the costs of OHS — such as firms' compliance costs and even the OHS budget — being considered, as well as the personal and broader financial costs of occupational injury and disease. In practice, no such ideal will be possible, not least because some costs are unquantifiable. However, seeking to measure and deliver 'dynamic cost effectiveness' for OHS interventions would improve OHS outcomes. It would involve significantly greater attention to optimising the cost-effectiveness of OHS initiatives — in terms of measured safety outcomes — on an ongoing basis.

The Commission found little evidence that OHS bodies measure the effect of their initiatives with a view to their continuous improvement. For example, the South Australian Occupational Health and Safety Commission (Transcript, pp.1685-6) did not do any micro- or firm-level ongoing evaluation of its activities. It may be appropriate for OHS bodies to give themselves 'targets' upon which they report, as a number of workers' compensation authorities have done. For example, WorkCover SA sets itself targets in areas such as claims determination time, compliance with policy/procedure as sampled by quality and internal audits, and percentage of determinations upheld at review (WorkCover Corporation 1993).

There are a range of analytical approaches that can be used to quantify the costs and/or benefits of OHS regulation. These include cost-benefit, cost-

effectiveness, and regulatory budgets. However, these approaches require a significant amount of data, some of which can be speculative. Consequently, their value in trying to determine the cost-effectiveness of OHS regulation may be limited. Other mechanisms used in some jurisdictions include Regulatory Impact Statements and 'sunsetting' clauses.

OHS administrators should also give greater emphasis to educating the small business community. Overseas this is regarded as an important issue: for example, the European Union is placing more emphasis on assessing the impact of OHS regulation on small- to medium-sized employers. Australian jurisdictions have also found this a difficult group to reach. The Engineering Workers' Union and the Queensland Branch of the ACTU (Transcript, p.2009) and the Queensland Confederation of Industry (Transcript, pp.2042-3) both gave examples of a pilot project to educate a community of small employers after the introduction of the 1989 *Workplace Health and Safety Act*. Letters were sent inviting employers to meetings giving an overview of the Act given by representatives of government, employers and workers. The theme of the meeting was about advice and education. Despite this, very few employers attended the meeting, and according to the Union and the Confederation, the vast majority of those who did attend were apparently only interested in what fines were contained in the Act. Examples such as these suggest that small employers may be a difficult group to reach, requiring innovation and perseverance on the part of the administrator.

The Commission found little evidence of OHS authorities seeking to measure the outcomes of their initiatives with a view to improving their cost-effectiveness.

The Commission recommends that OHS authorities measure the costs and benefits of their initiatives with a view to optimising the cost-effectiveness of those initiatives.

3.7.5 Enforcement

Historically, enforcement has emphasised the punitive and deterrent effect of penalties. As a result, as argued by Robens and participants in this inquiry (see below), employers resented inspectors because of their perception that inspections resulted in penalties.

However, following the Robens Report, the emphasis in OHS legislation changed to more participatory and consultative processes, based on self

regulation. Part of this change sought to increase the inspector's role in the provision of risk advice and information.

Modern OHS enforcement techniques involve an escalation of penalties. The first stage of enforcement is advice and warnings. The next stage is a formal improvement notice, or a prohibition notice for serious threats to workers which require instant cessation of activity. As a last resort, the next stage should be fines (of increasing severity). In some jurisdictions, gaol sentences represent the ultimate penalty.

However, there is little evidence that OHS enforcement in Australia operates in this manner. Tables J8, and Tables J11–J25 in Appendix J show the numbers of improvement notices, prohibition notices, the levels of fines (potential and applied), and the numbers of imprisonments for OHS regulatory breaches. The tables show large numbers of lower-level activities, but very few large fines being imposed (note that fines are usually imposed by courts), and no imprisonments in any jurisdiction.

Fines and penalties

Fines and penalties provide an incentive to comply with OHS legislation. However, there are two general arguments against the use of fines and penalties, namely:

- they create a punitive system which works against the educative and advisory role of inspection; and
- employers have incentives to conceal workplace accidents to avoid penalties.

There have been a number of specific criticisms of the existing penalties structure. First, the structure of fines and penalties is inconsistent across jurisdictions. Second, several participants argued that the structure does not act as a sufficient deterrent to non-compliance.

As Attachment C.2 in Appendix C shows, maximum penalties range from \$25 000 in Victoria to \$250 000 in NSW. However, the maximum and average fines imposed by courts (see Tables J15, J18–J19, and J24–25 in Appendix J) are considerably lower. Despite the much higher potential maximum in NSW, the maximum fine imposed has only been \$80 000 (in 1990–91, the average fine in the Industrial Court has only been \$20 000, and only \$3000 in the magistrates' and local courts). There is no clear evidence that courts are becoming stricter with their penalties for breaches of OHS regulations. There has been no clear increase in either maximum or average fines imposed.

Since fines are not used to their full potential as a means of deterring breaches of the regulations, the Commission looked to gaol sentences as an alternative 'last resort' mechanism. No gaol sentence has ever been imposed in any jurisdiction for a breach of OHS regulation, despite at least 500 deaths a year from work-related injury and illness, and an unknown number from occupational diseases (Sub 176, p.3). (see Tables J13–25 in Appendix J). A Melbourne University study into workplace deaths (Polk, Haines, & Perrone, 1993, p.10) has argued that:

Pyramid approaches to enforcement presume that there is, in fact, a peak to the pyramid. The failure of the legal system to take exceptionally negligent work death seriously raises questions about the integrity of these modes of regulatory enforcement, and about the integrity of the justice system itself. ... Any society with a commitment to basic principles of social justice and equality before the law must question its tolerance of a privileged class of criminal homicide where corporate offenders repeatedly are able to evade being held even minimally accountable for their grossly negligent behaviour which results in serious injuries and death of their employees.

There are a number of problems with gaol sentences for OHS breaches, one of the most important being the ability to choose the right person to prosecute. This person must be the "controlling mind" of the company, and yet must have been involved in the negligent act or omission. There are also evidentiary problems (eg related to the different way evidence is gathered by the police and by OHS authorities) and difficulties with public perceptions of OHS offences as being somehow different than, say culpable driving, and how this affects juries and judges.

Penalties on employees may also act as an incentive to act safely, especially in cases of gross negligence or wilful misconduct. Some jurisdictions have introduced on-the-spot fines for employees for breaches such as not wearing safety helmets or protective goggles. Tables J18–19 in Appendix J show maximum and average fines for employees. It appears that a very light-handed approach is taken to fining employees for breaches of OHS regulations.

There is some evidence from overseas which suggests that a more rigorous approach to OHS regulation enforcement can bring positive results. For example, Oregon in the USA tripled the amount it received in penalties from 1987 to 1992. This was part of a strategy which included:

- 1) increasing the safety and health enforcement, training and consultative staff; 2) using penalties to the fullest extent against employers who violate state safety and health regulations; 3) requiring insurer loss prevention consultative services; 4) providing employer and employee training opportunities through a training grant program; 5) requiring employer safety committees; and 6) targeting safety and health inspections more effectively (Department of Insurance and Finance (Oregon) 1993, p.i).

The results from the increased emphasis on OHS in Oregon are impressive. From 1988 to 1992, claims decreased by over 30 per cent and fatalities fell by 22 per cent (although employment increased by over 10 per cent). The lost workday cases incidence rate fell by over 21 per cent from 1988 to 1991. Workers' compensation premiums fell by over 30 per cent from 1991 to 1993, taking Oregon from the sixth most expensive US state for workers' compensation premiums in 1986 to the twenty-second highest in 1986. However, it is unclear the extent to which other factors such as changes in claimant eligibility, in the economy and industry mix, and insurer claims management practices also contributed to the accident downturn (Department of Insurance and Finance (Oregon) 1993, p.2).

The Commission found that:

- fines and penalties have an important role in deterring unsafe work practices;
- fines and penalties for OHS violations are too low in some jurisdictions to be a credible deterrent to unsafe practices;
- even where maximum fines are high, courts rarely impose large penalties, which may mean that minimum fines may be necessary in some cases;
- vigorous prosecution to the fullest extent of the law for OHS regulatory breaches is not a strategy being pursued in Australian jurisdictions;
- fines and penalties are inconsistent between jurisdictions, providing scope for harmonisation; and
- in cases of gross negligence or wilful misconduct leading to serious injury or death, severe penalties, including gaol sentences, are often not applied.

Inspections

Some participants suggested that the role of inspectors has been confused in the process by being both advisers and enforcers. MTIA (Sub 71) suggested that employers perceive these as conflicting roles, which often act as a barrier to co-operation in achieving safety objectives. MTIA (Transcript, p.774) suggested that, in some cases, employers felt uneasy about approaching inspectors for advice, because of the threat of a potential fine.

The Commission found that the educative and advisory role of inspectors is important. Fundamental to this role is the ability of the inspectorate to issue improvement and prohibition orders where workplace hazards or breaches of the legislation are identified. This is more effective when complemented by

appropriate advice and information about how hazards could be contained or minimised.

Another criticism of the inspectorate is that there are insufficient inspections of workplaces. Table J8 in Appendix J shows trends in the number of workplace inspections in the years 1987–88 to 1990–91 in Australian jurisdictions. All jurisdictions have shown an upward trend in the number of inspections carried out.

The Commission notes that not all OHS bodies collect such basic data as the number of workplaces in their jurisdiction. This would suggest that the authorities do not have a full list of the places wherein workers may be injured. While it is acknowledged that problems may arise in the awkward definitions contained in some jurisdictions' legislation, the Commission does not believe that effective targeting and inspection can be carried out when not all the workplaces in the jurisdiction are known.

Tables J9–10 show the number of inspectors and the costs of conducting inspections in each jurisdiction. WA was not in a position to tell the Commission how many inspectors they employ, and Tasmania, NT, and SA could not say how much they spent on inspections. Knowing how much an activity costs is an important part of accountability, as well as being important for assessments of the cost-effectiveness of the activity.

However, resource constraints in government inspectorates imply that not all workplaces may be inspected frequently. The Tasmanian Confederation of Industry (Transcript, p.68) acknowledged that scarce inspection resources meant inspections had to be targeted. As noted earlier, successful targeting depends on the availability of information (including statistics) which identify significant workplace hazards and accidents.

Worksafe Australia (Sub 176, pp.11-2) adds a note of caution to targeting based on statistics:

We support the principle of targeting activities (not just inspections), as long as the statistics are valid. Inspections could be used to test the validity of statistics. Statistics are only a tool, and should never over-ride successful inspection programs which have improved performance to a level where current statistics indicate low incidence of OHS problems. The shortcomings of compensation based statistics (eg. long latency diseases) should also be taken into account in targeting.

There is a place for some random inspections, to ensure that all employers know that they may be inspected, whatever their safety record. Also, statistics may not be useful indicators of risk in some cases (such as rare disasters, or gradual-onset illnesses).

The Commission draws attention to the potential that exists for OHS statistics and additional narrative information included in claims forms to be used more effectively in targeting inspections. Random inspections also have a place in effective inspection strategies.

Government agencies

Government agencies may not be bound by OHS legislation or, even if bound, may not be subject to prescribed penalties. They may have partial or total immunity in three ways:

- the Crown is presumed not to be bound by legislation unless Parliament indicates that it is ('Shield of the Crown'). For example, Hopkins (Sub 4, p.29) suggested that Comcare's ability to ensure compliance with this Act is severely limited by the fact that Government departments are immune from prosecution. (This immunity from prosecution does not extend to Government Business Enterprises and their employees);
- Commonwealth, State or Territory Parliaments may partially apply specific legislation to their own bodies, regardless of whether they are part of the 'Crown'; and
- the enabling legislation of the government body may confer some specific immunity, either deliberately or incidentally, even if it is unlikely to be considered part of the 'Crown'.

The various exemptions enjoyed by Government bodies reduce the effectiveness of OHS regulations. There is general consensus that such immunities should be removed. The Trade Practices Commission (1992) suggested that the importance of the 'Shield of the Crown' doctrine may be receding because of the general move to put the government on the same footing as the private sector. Indeed, the report of the Interim National Occupational Health and Safety Commission (1984) recommended that Crown immunity for OHS legislation should be removed in areas of Commonwealth jurisdiction.

The Commission recommends that government agencies be subject to the same OHS regulations, fines and penalties as the private sector.

3.7.6 Safety committees and representatives

Robens emphasised the importance of workplace participation in OHS. Safety committees and representatives have an important role in identifying and disseminating information about hazards. Their functions are to facilitate co-

operation and consultation to develop OHS programs and reduce workplace hazards.

Requirements for safety committees and representatives vary widely across jurisdictions. To the extent that such deviations represent departures from best practice, the Commission would expect that states would move towards consistency.

In particular, training programs are important to assist both employers and employees in identifying hazards in the workplace and fulfilling their objectives. Powning (1992) suggested that provision for continued training of health and safety representatives is one of the significant strengths of the SA legislation.

The Else Report addressed the issues of responsibility for providing training, and its funding. The report concluded that employers had a responsibility to provide training to workers (including managers and supervisors) as a way of ensuring their workplaces are safe. Government also had a role in co-ordinating and facilitating such training. Training could be funded from workers' compensation premiums.

The Else Report was concerned also with the fact that information and training given to safety representatives, committees, and managers lacked uniformity even within jurisdictions, let alone nationally. This situation seems to have improved. Worksafe Australia (Transcript, p.2790) gave evidence of its new training package named "Everyone's Business", which was developed in conjunction with unions and employers to ensure all parties work from the same information base.

Increasingly, safety representatives are demanding access to better-quality information to assist them in their duties. There have been strong expressions from safety representatives in SA regarding the need for more information about legislative requirements and hazards particular to their workplaces (Powning, 1992). 'Right to know' and 'right to act' legislation has a role in disseminating this information.

3.7.7 Integrating occupational health and safety and workers' compensation

The functions of regulating workplace risk and workers' compensation are obviously related, since the former determines a large part of the latter's costs. Consequently, there is great scope for co-operation which will improve the effectiveness of both activities.

A number of arguments suggest a co-operative approach, co-ordinating prevention, compensation and rehabilitation:

- all three functions have, within different frameworks, the same overall objective, to reduce the overall incidence and costs of work-related injury and illness;
- it facilitates developing better statistics and research;
- it allows potential economies of scope to be realised; and
- it improves accountability.

OHS and workers' compensation is jointly administered within one authority in the NT, NSW and Comcare. Workers' compensation and OHS administration are under the same department in Tasmania and Queensland. Elsewhere, these functions are administered separately.

Overseas, functional integration is rare. For example, in the US and in Europe, it seems unusual for compensation systems to have a strong preventive focus. Exceptions that the Commission has noted are Germany and the US state of Oregon.

However, the Queensland Division of Workplace Health and Safety (Transcript, pp.1054-9) rejected this approach arguing that, although it considered there to be administrative efficiencies in merging the two functions, it would be inappropriate to rely on the workers' compensation scheme to achieve preventive outcomes. It suggested that the workplace health and safety agenda is much wider in its coverage. In addition, Hopkins argued (Sub 4, p.5) that:

The concerns of compensation and prevention agencies are not the same ... thus compensation concerns are likely to take priority over those of prevention whenever a choice between the two has to be made.

Equally it could be argued that where there is joint responsibility for compensation and prevention within the one authority, there is an incentive to ensure appropriate regard is paid to both functions.

Hopkins further argued (p.6) that:

... compensation data provide a systematically distorted view of the incidence of occupational injury and disease. Thus any prevention agency whose activities were driven entirely by these data, though they might be contributing to the minimisation of compensation costs, would not necessarily be dealing with the most serious injury and disease problems.

On the other hand, WorkCover NSW (Sub 205, pp.3-4) argued that some of the advantages of an integrated approach include:

- improved client access to OHS, rehabilitation and workers' compensation information service

- general increase in understanding by government, insurers and employers of the relationship between effective risk management and rehabilitation and lower premium levels
- potential for a stronger link between effective risk management and premium setting in high risk areas such as major hazardous installations, dangerous goods storage etc.
- integration of workers' compensation claims data and accident notification requirements under the Occupational Health and Safety Act, providing more effective prevention related data capture and cutting down requirements placed on employers regarding notification
- potential for reduction in public service costs through the provision of an integrated advisory service where front line inspectors provide impartial advice on occupational health and safety, rehabilitation and workers' compensation, backed by specialist support
- potential for increased detection on non-payment or inadequate payment of workers' compensation, and inadequate attention to rehabilitation, during the process of regular targeted inspection of workplaces
- potential for greater economies of scale in producing information aimed at particular groups, such as migrants, who are over-represented in accident and injury statistics because of their concentration in high risk sectors of industry
- potential, through more integrated systems and better data capture, for more effective cost-benefit analysis to aid effective evaluation of the impact of new nationally uniform occupational health and safety regulations such as Hazardous Substances and Plant Safety
- implementation of the user pays principle through ensuring taxpayers are not expected to meet the cost of risk and injury management services over which they have no control
- because of its funding source, greater accountability of government authorities such as WorkCover to the requirements of industry, in a manner consistent with the public interest

WorkCover NSW (Sub 205, p.5) is also in the process of integrating data relating to premiums, workers' compensation claims, accident notifications, workplace locations, and hazard identification.

On balance, it seems that in most jurisdictions there is room for ongoing strengthening of the linkages between OHS administrations and workers' compensation systems.

The Commission has been unable to judge whether complete integration is necessary to achieve better OHS results, or whether functional integration and co-operation is sufficient. The starting point in proving the superiority of either system would have been accident rates which were falling more quickly in one jurisdiction than in another. Unfortunately, OHS statistics in this country are far

from being at a standard at which this judgment could be made. Further investigation of the issue could be made at a later date when better information is available.

In some jurisdictions, co-operation between OHS and workers' compensation authorities is inadequate. It is important that they work closely together, although a complete institutional merger may not be necessary to achieve this.

3.7.8 National uniformity

One of the most oft-heard criticisms of existing regulation is that it is still largely inconsistent between jurisdictions.

The Special Premiers' Conference in 1991 directed relevant Ministers to achieve national uniformity in the regulation of OHS, goods (including dangerous goods) and occupations, by the end of 1993. Worksafe has largely been responsible for this task. In the process, Worksafe aims to achieve fewer regulations, a consistent approach to controlling hazards and, where possible, approaches which are compatible with those overseas.

Progress has been frustratingly slow. As Mr Warburton, Chairman of Worksafe Australia, explained tripartism is an extremely slow method of achieving progress.⁸ However, all parties were concerned with "getting it right", which was better than rushing and creating inappropriate standards.

Progress has been made in the area of standardising OHS information. As the South Australian Occupational Health and Safety Commission has pointed out, considerable information-sharing has occurred where OHS authorities have waived copyright and have allowed other jurisdictions to circulate the same information using their own logos.

Appendix J outlines the responses of OHS administrators in each jurisdiction when asked what they have undertaken in the process to achieve national uniformity.

3.8 Awards and enterprise bargaining

Industrial awards may contain provisions relating to OHS, intended to enhance rather than supplant OHS legislation.

⁸ CEDA conference, October 19, 1993, Melbourne.

The ACTU (George 1992) suggested that OHS issues are now receiving greater attention in workplace reform. Opportunities for integrating OHS into award provisions exist in such areas as:

- consultative committees;
- job design and career paths;
- work systems and processes; and
- multi-skilling and training arrangements.

However, the Queensland Division of Workplace Health and Safety (Sub 63) argued that there are significant problems with including OHS matters in awards. For example, the process of updating awards is usually slow and may give rise to industrial disputes. Also, the states may lack the capacity to enforce award provisions.

Another problem with incorporating OHS matters into awards is that solutions to a particular problem may be different in each workplace. For example, individual firms may arrive at different agreements on issues like committee representation or safety training to suit their own workplaces. Blanket provisions in awards may be inflexible. Enterprise bargaining may overcome the inflexibility of awards and provide a stronger orientation towards OHS matters.

The South Australian Employers' Federation (Sub 30, p.11) stated that:

The current focus on enterprise bargaining initiatives brings with it real potential for business and industry to enshrine a more holistic approach to workplace health and safety and accident prevention issues.

Quinlan and Bohle (1991, p.370) argued that:

If OHS is not considered as an integral and significant part of the bargaining agenda; if management and unions fail to accept the principle that OHS standards must be maintained and improved through such negotiations over time; and if governments fail to facilitate this process, the outcomes of these changes are likely to entail long-term and entirely unavoidable costs, including an additional burden on already stretched workers' compensation schemes.

There is evidence that OHS issues are becoming more prominent in some enterprise agreements. The Department of Industrial Relations (Sub 114) indicated that of the 1000 workplace bargaining agreements which had been ratified by the Australian Industrial Relations Commission by June 1993, about 400 made significant use of OHS provisions to advance safety concerns.

Of around 3000 federal awards, detailed OHS provisions appear in about fifty. In addition, provisions relating to protective clothing and first aid exist in almost 500 agreements.

Sydney Electricity has incorporated half-yearly wage increases into enterprise agreements in return for, amongst other things, reductions in lost-time injuries.

Australia Post (Sub 100, p.5) pointed out that:

... staff have included safety improvement as one of the seven criteria which must be met under our Enterprise Agreement (1992), to enable a workplace to be formally accredited as meeting quality management targets.

However, the Tasmanian Trades and Labour Council (Sub 35) raised the concern that employers may attempt to shift the burden of responsibility for safety onto employees, especially during recessions.

As general support for enterprise bargaining grows, the Commission expects a safer working environment will become an issue for discussion during negotiations.

As the co-ordinated submission from Commonwealth Departments (Sub 180, pp.20-1) pointed out, it is important that Federally certified enterprise agreements seek to build on State legislative provisions rather than try to supplant them. This is because certified enterprise agreements become in effect Federal law (they are defined as being awards under Section 4 of the Industrial Relations Act 1988). This Federal law overrides state law where it is clear that the agreement “completely encompasses” matters covered by State legislation. If, however, the certified agreement does not completely supplant the State legislation, then State law will prevail on those areas not completely covered. Not only will enterprise bargains which seek to supplant State regulation cause legal confusion, but they will threaten national uniformity. Enterprise bargains should thus complement regulation, not seek to supplant it.

<p>The Commission found that enterprise bargaining can be an appropriate forum for achieving improvements in safety performance, however the Commission considers that enterprise bargaining should not be used to reduce minimum standards.</p>
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4 COMPENSATION

Even with 'best practice' preventive programs, work-related injuries and illnesses will still occur — raising the questions of what compensation should be paid and what expenses met, by whom and for how long? To answer these questions it is necessary to consider not only what is 'fair' in the circumstances, but also what creates appropriate incentives for encouraging prevention, rehabilitation and return to work. Depending on the nature of the injury or illness and prospects for rehabilitation and return to work, the Commission's preference is to hold employers liable for the cost of work-related injury or illness for long periods, but to compensate workers for lost earnings at rates which step down over time.

Following a work-related injury or illness, workers' feelings about the adequacy of compensation will condition their attitudes towards (and likely success of) efforts to rehabilitate them and return them to work. Equally importantly, how employers feel about the 'justice' of the situation also matters, because this may colour their attitudes (and commitment) to injured or ill employees.

Attitudes are clearly important; shaping them in ways which will lead to better behavioural outcomes is the challenge — and both cultural and financial incentives have a role to play in this regard. Building 'a culture of care' is as much about securing the goodwill and commitment of both parties as it is about formal requirements — although getting incentives right will have powerful reinforcing effects.¹ Compensation arrangements are central to getting incentives right.

Workers' compensation only compensates for injury and illness deemed to be work related. This raises issues of eligibility, including:

- compensation for what? (eg lost earnings, attendant medical and legal costs and pain and suffering);
- who should pay? (eg the employer, the employee or society);

¹ It is like evolving attitudes to drink-driving in this country. Drinking then driving is now no longer considered acceptable behaviour — a view shaped by opinion leaders but also strongly reinforced via penalties which reflected a 'get tough' approach to the problem.

- how best to compensate for lost earnings, attendant costs and pain and suffering? as well as
- what to do about 'second injuries' and occupational diseases characterised by long latency periods or gradual onset.

4.1 Eligibility issues

Eligibility issues include:

- who should qualify as a 'worker' for the purposes of workers' compensation (especially when coverage is compulsory)?; and
- what injuries and illnesses should be compensable (ie how 'work-related' does an injury or illness have to be to qualify)?

Existing legislation already addresses these questions. Answers vary, but the self-employed are usually excluded from coverage; and the nexus between the workplace and the injury/illness has to be strong (in order to justify holding employers liable to pay compensation).

4.1.1 Who should be regarded as a worker?

Although workers' compensation is compulsory throughout Australia, not all 'workers' are covered by a scheme. This is because the various legislative provisions tend to restrict the definition of who qualifies. The major group usually omitted is the self-employed (including farmers, small business and contractors — although sub-contractors are sometimes included).² As a result, some 14 per cent of the workforce is not covered by compulsory workers' compensation insurance (Department of Social Security (DSS), Sub 80, p.12).

Technical definition of a worker

Exclusion of small business people and farmers from coverage was of little concern to most participants. Such groups generally make their own insurance arrangements. The Council of Small Business Organisations (Sub 47, p.4) argued that:

² Sometimes this is an operational fact rather than a legislative requirement. For example, the South Australian Chamber of Commerce and Industry noted (Sub 51, pp. 15–6) that, in respect of that State:... the Act allows WorkCover to provide for self employed persons. The Corporation has refused to provide this coverage on the basis that it is too difficult to establish levy rates and the calculation of weekly payments would be too hard.

For approximately one-eighth of the civilian workforce, which is generally not recognised as workers under workers' compensation Acts, private insurance against injury represents a very cost effective means of insuring against injury.

However, of greater concern to many participants was the status of some contractors, particularly sub-contractors who enter into long-term arrangements (eg on building projects). The Tasmanian Confederation of Industry (Sub 22, p.6) claimed that under that State's scheme:

The only problems have been with the status of 'contractors' who are self employed but on occasions have attempted to lodge claims through a principal contractor or company.

However, the National Insurance Brokers' Association noted (Sub 148 p.1) that distinguishing between employees and contractors is "a long-standing source of confusion and dispute, where in many cases gaps in coverage occur, or premium is paid twice over, just to be sure".

The definition of a worker is likely to assume increasing significance as more workers fall into the 'contractor' area. The Department of the Prime Minister and Cabinet (PM&C, Sub 180) noted the increasing tendency for employers to 'contract out' the provision of services. PM&C suggested two options to deal with the problem:

- require contractors and sub-contractors to take out private insurance; or
- extend the definition of a worker under the relevant workers' compensation Act to cover contractors and sub-contractors.

Apparent anomalies in coverage were also drawn to the Commission's attention. For example, MEND (Sub 15, p.7) highlighted the position of some builders:

Many house builders are sole traders or partnerships, who work without the benefit of workers' compensation cover. Due to the Builders Licensing Act, related to corporations, they are unable to form themselves into Pty Ltd companies and thus make themselves an employee of their own company. The inequities are thus: sole traders and partnerships are required to provide workers' compensation for their employees, but have no right of coverage for themselves.

Schemes have, in some cases, demonstrated sufficient flexibility to deal with problems as they arise. While in general basing scheme coverage on the principle of employer control, when faced with evolving trends towards home-based work the Victorian WorkCover Authority argued (WorkCover Victoria, Sub 89, p.9) that:

... the principle of employer control as a touchstone for scheme coverage is one which must sometimes yield to other considerations, for instance the abrogation of the former exclusion from scheme coverage of outworkers in part sprang from a recognition that, in many circumstances, the employers of an outworker, for instance the working directors of a clothing company, were entitled to workers' compensation benefits in the event of injury whereas the outworker was statutorily excluded from such coverage.

Differing definitions in jurisdictions

Current definitions a 'worker' for workers' compensation purposes vary among jurisdictions. For example, the NT limits coverage only to employees for whom an employer deducts PAYE taxation. The NT Work Health Authority (Sub 43, p.7) stated:

This is a simple definition which is readily understood and able to be proven without recourse to the courts. Workers' compensation was designed to cover those who are in the employ of others rather than those in business for themselves.

In WA the definition of a worker extends to contractors and sub-contractors if they are engaged by another person to do work which is for the purpose of the other person's trade or business and are paid in substance for their personal manual labour or services.

The NSW Workers' Compensation Act specifies 17 categories of 'deemed' workers, which include various types of sub-contractors. The Victorian Accident Compensation Act similarly deems some sub-contractors to be 'workers'.

Cost shifting

Some participants noted that the more restrictive the definition of a worker the greater the possibility that the costs of workplace injury and illness could be shifted onto the community. The NSW WorkCover Authority (WorkCover NSW, Sub 205, p.10) argued that one of the advantages of broad scheme coverage is the:

... avoidance of cost-shifting to taxpayers when people injured at work are not covered by workers' compensation or other adequate insurance.

The Commission's view

The Commission is concerned that the definition of a worker for the purposes of workers' compensation coverage varies significantly among jurisdictions. In addition, each jurisdiction has the power to alter the definition of a worker. By adopting a restrictive definition of a worker a jurisdiction can shift some of the cost of workplace injury and illness onto the community.

The Commission is also concerned that the self-employed may choose not to insure and instead rely on the social security/health safety net in the event of injury, thereby again shifting the cost of injury or illness onto the community.

The absence of a consistent definition of a 'worker' among jurisdictions is inequitable, provides scope for eroding access to workers' compensation, and exacerbates cost-shifting.

Under present arrangements, the trend towards 'contracting out' of specialised tasks to small business will result in an increasing proportion of the workforce being excluded from compulsory workers' compensation coverage.

In current circumstances, it is appropriate for self-employed small business people and farmers to continue to arrange their own insurance coverage for workers' compensation.

In the case of self-employed contractors, the Commission's view is that, rather than forcing firms letting contracts to arrange coverage, contractors should make their own arrangements on grounds that they are generally aware of the risks involved in the jobs they bid for. The Commission is concerned, however, that not all contractors are adequately aware of the risks or would be prepared to privately insure. Any consequential cost-shifting to the community could only be prevented by making private insurance compulsory.

The Commission draws attention to the coverage of contractors which may become an increasingly important issue. Accordingly, it may be necessary to monitor the situation regarding those not covered by compulsory workers' compensation with a view to introducing compulsory private insurance in the future.

The Commission is of the view that the definition of a worker is a 'technical issue' involving substantial case law which the Commission has been unable to fully consider. Defining a worker for the purposes of workers' compensation coverage should be resolved by the proposed National WorkCover Authority, with the resulting definition adopted by all jurisdictions.

The Commission's view is that sub-contractors should be considered as workers and covered by compulsory workers' compensation, with the insurance premium paid by the firm letting the contract, as is currently the case in NSW.

In addition, issues such as what qualifies as a 'contract of labour' are best left to the courts to determine in contentious cases. The more substantial point is that, as long as excluded workers are aware of their exempt status, taking out private insurance cover should be a satisfactory substitute to compulsory workers' compensation.

The Commission recommends that all jurisdictions adopt a common definition of a worker for the purpose of workers' compensation coverage, to be developed (in consultation with existing schemes) by the proposed National WorkCover Authority.

The Commission draws attention to its view that sub-contractors should be covered by compulsory workers' compensation insurance with the premium being paid by the firm letting the contract.

4.1.2 What should qualify as a work-related injury or illness?

What qualifies as a work-related injury or illness can determine access to compensation (on the part of employees) or liability for compensation costs (on the part of insurers or employers). Definitions of compensable injury and illness can significantly affect the incentives facing employees, insurers or employers.

The extent to which an injury or illness is work-related ranges from the clear-cut (eg when an injury is directly caused by equipment failure) to the problematic (eg when a habitual smoker who formerly worked in a dusty environment subsequently contracts lung cancer). Disentangling cause and effect can be difficult, and experts may differ in their attribution of causes in particular cases. There is no avoiding this; getting the opinion of numerous medical specialists will certainly raise the cost, but may not resolve the 'work-relatedness' dispute in any satisfactory way.

Arguing about the extent to which a particular injury or illness is 'work-related' is moot in circumstances where the only guidance is the common (or court-determined) meaning of words like "arising out of or in the course of employment".³ As the Australian Chamber of Commerce and Industry (ACCI, Sub 83, p.2) noted:

Some injuries or diseases are notoriously difficult to relate specifically to an employment cause or aggravation, and difference of medical opinion can occur. For example the very existence of a back injury can be a matter on which different medical opinions can be offered, let alone whether that injury related to employment. Similar comments can be made regarding mental illness or stress, or in some circumstances aggravation of pre-existing injuries by work.

Participants' views

A number of employers criticised what they argued to be a trend towards increasingly liberal interpretations of what qualifies as a work-related injury or illness. By contrast, unions have tended to oppose any moves to tighten the definition.

³ Attribution of causality for injury or illness is often genuinely contentious. Many injuries (and especially disease) may be subject to multiple causation (by work-related and non-work factors).

The Australian Chamber of Manufacturers (ACM, Sub 29, p.16), argued that the definition of compensable injury or illness has been expanded over time by legal precedent. Telecom (Sub 72, p.6) claimed that evolving interpretations of 'injury' have been used to lay responsibility for a range of conditions on the employer, arguing that the definitions should be clearly legislated.

The definition of what constitutes a work-related injury (let alone illness) also raises problems for data collection. For example, WorkCover NSW (Sub 92, p.23) noted that the term 'injury' means different things to Worksafe Australia, the Australian Bureau of Statistics and the Authority. The Authority argued that:

The development of consistent legislative and statistical responses under the Occupational Health and Safety Act and the Workers Compensation Act requires that these definitional issues are clearly resolved.

Participants generally agreed that there should be a consistent definition of compensable injury/illness among jurisdictions. While supporting a consistent definition, some participants warned against leaving interpretation to the judiciary. The Australian Workers' Union of Employees, Queensland Branch (Sub 149, p.11) argued that:

Unless a consistent definition is well developed and clear in its intent, a concern exists that the efficacy of the definition could be eroded by various interpretations as has been experienced over recent years.

Many participants supported the principle that a compensable injury or illness should be one over which the employer can exercise some influence/control over the circumstances which led to it. For example, the Tasmanian Chamber of Mines Ltd argued (Sub 99, p.1) that:

Under no circumstances should a workers' compensation system cover accidents arising from circumstances entirely beyond the control or influence of the employer

Journey claims

Participants often distinguished between journey claims and other claims. Journey claims are workers' compensation claims made for injuries sustained while the employee is travelling to or from their place of work.

A number of employers argued for the exclusion of journey claims from workers' compensation coverage. The Commonwealth Bank for instance stated (Sub 42, p.6) that:

...journeys to and from work should not be eligible for inclusion in workers' compensation claims as these are circumstances outside the control of the employer.

The South Australian Employers' Federation (Sub 133) argued that, in accepting the principle of a 'no-fault' scheme, only injuries which were demonstrably

work-related should be compensable. The Federation argued that journey claims did not have a direct causal connection with work and should therefore be excluded from workers' compensation coverage.

Unions argued for retention of journey claims. The Automotive, Metals and Engineering Union (AMEU, Sub 158) presented the following arguments for the retention of such claims:

- the journey would not have been undertaken if it were not for the contract of employment;
- Australia has ratified International Labour Organisation Convention No. 121 (1964) which defines industrial accidents to include commuting accidents;⁴
- even if the worker is compensated through a transport-accident scheme, time off work is sometimes considered to be abandonment of work which may result in termination — if the claim is compensated through workers' compensation there is a requirement for rehabilitation and re-employment;
- rehabilitation through transport-accident schemes may not be directly linked back to the workplace; and
- the cost of journey claim cover is low — approximately \$15 per worker per year.

Some participants noted that journeys are often integral to the work performed. For example the Chairman of the ACTU Queensland OH&S Committee (Transcript p.1991) gave the example of goldminers in remote areas who are flown into and out of the site. Oil riggers may also be required to travel to remote or offshore work locations. The Aged Services Association of NSW (Transcript pp. 2657–8) gave the example of nurses who must travel to provide services for the frail aged in the patient's own home.

'Free-time' claims

Participants also commented on 'free-time' claims, that is claims made for accidents during lunch times and other unpaid breaks. The Reserve Bank of Australia (Sub 48, p.2) argued that:

... there should be no compensation liability for injuries incurred during an employee's lunch break. ... lunch breaks are typically unpaid breaks and an employer has little or no

⁴ The AMEU (Sub 158, p.9) quotes Article 7 of ILO Convention No. 121 (1964) which states:

Each member shall prescribe a definition of "industrial accident", including the conditions under which a commuting accident is considered an industrial accident

control over staff activities during the break. An employer is not responsible for the actions of staff after working hours and we feel lunch breaks should be treated similarly.

Unions supported inclusion of 'free-time' claims under workers' compensation insurance. The AMEU (Sub 158, p.11) argued that:

A worker sustaining a back injury as a result of a fall taken in the company dining room when a chair collapsed should be entitled to workers' compensation.

The Labour Council of NSW (Sub 175, p.4) argued in support of such claims:

... workers would not be at work if not for the benefit of the employers. Workers are entitled, pursuant to contracts, agreements and awards, to designated times away from their job, while remaining on the employers premises. The employer still has control over the standard of health and safety during this time and accordingly should still be responsible for employees during any 'free time'.

The Commission's view

Guidance on what should qualify as a compensable injury/illness should depend on who is to be held liable to pay compensation. Since the Commission agrees with the view that employers should be held liable (see Chapter 3), a relevant test is the extent to which the employer was in a position to exert control over the circumstances associated with a particular injury or illness.

Journey claims

The Commission sees merit in some of the arguments in favour of retaining coverage of journey claims. While the Commission accepts the argument that the journey to work is undertaken because of the contract of employment, the employer has limited, if any, influence over the safety of employees when they travel to and from work. For example, the employer may have no control over the road-worthiness of an employee's private car. It is therefore inappropriate to hold the employer liable for the costs of any injuries which may result from unsafe private vehicles.

Where journey claims are compensable, defining where the journey begins and ends matters. For example, is it leaving the front door, the gate or at some other point? The issue of deviations from the journey to/from work also need to be considered. For example is the accident still covered if there was a minor deviation from the usual journey home?

The average cost of insuring employees for journey claims is relatively low. However, the fact that the cost may be low is not an argument for employer payment of the cost.

The Commission found that, in most cases, employers have very little control over the safety of a person's journey to and from work.

The Commission is of the view that it would be more appropriate for employees to take out private insurance for journey claims or, alternatively, to negotiate at an enterprise level for coverage of journey claims.

In some cases journeys are an integral part of work. Journeys made during the workday or when work starts from home (as, for example, in the case of some nurses) should remain covered by compulsory workers' compensation.

'Free-time' claims

The Commission accepts that the employer's ability to exert control over free-time activities will vary depending on the circumstances. The employer is able to control the level of safety in the workplace, and is therefore responsible for all injuries occurring on-site.

Employer responsibility therefore should extend to injuries occurring during employee's free-time breaks on-site. Following the principle of employer control, the Commission concurs that such accidents, for example that cited by the AMEU, should be covered by workers' compensation.

However, the employer has little, if any, control over accidents occurring outside the workplace. Injuries occurring during free-time breaks outside the workplace should not be covered by compulsory workers' compensation.

This approach has the advantages of ease of understanding and administrative simplicity, thereby minimising delays and the scope for disputes.

Other issues

Injuries occurring during social outings have, in some cases, been accepted as compensable. The ACCI (Sub 83) gave the example of an employee injured while playing football with a work team. The injury was deemed compensable because of employer participation in organising and promoting the game.

The ACM raised the issue of pre-existing injuries which were exacerbated at work. They cited the example of an asthma attack occurring at work. Although the employer may not be directly responsible, the employer may be liable for compensation.

These examples illustrate that some workers' compensation schemes may, through judicial and administrative interpretation, be evolving into more general compensation arrangements — the costs of which are borne by employers. This is not the function of workers' compensation insurance. Such arrangements break the nexus between the cost of work-related injury and illness and those best placed to take preventive action.

However, in other cases legislative changes have tended to limit coverage, for example, journey claims have been excluded in some jurisdictions. In some jurisdictions legislative changes limit access for particular conditions. SA, for example, has limited access for stress claims under workers' compensation.

The degree and extent of employer control can be used as a practical principle to guide decision-making in this area. The Commission believes it appropriate for the proposed National WorkCover Authority to develop, in consultation with existing schemes, what should qualify as a compensable condition for the purposes of workers' compensation.

The Commission found that there has been a tendency for legislation to limit what qualifies as a compensable injury or illness, while judicial interpretation has tended to expand coverage.

The Commission recommends that all jurisdictions adopt a common definition of a compensable injury or illness for the purpose of compulsory workers' compensation coverage, to be developed by the proposed National WorkCover Authority in consultation with existing schemes. The definition should ensure that a significant link between work and the injury or illness is identified, and that 'normal' journey claims and injuries or illnesses occurring during 'unpaid breaks' off the employer's premises are excluded.

4.2 Compensation for what?

Currently all schemes compensate workers suffering work-related injury or illness for lost earnings, non-pecuniary losses and for medical and related expenses. However, the schemes differ widely in terms of access, level and duration of benefits. Compensation may also be available under actions in tort, and sometimes through employment contracts or awards.

When someone suffers a work-related injury or illness and has to take time off work, he or she:

- not only ceases to contribute to production (but now compensation costs are incurred, as well the costs of having to replace injured workers);⁵ but
- also generates other costs (eg for medical and occupational rehabilitation).

⁵ Luntz (Sub 210 p.5) argued that production may not necessarily cease if the injured worker can be replaced from a pool of unemployed workers.

There are also other (non-economic or hard-to-quantify) costs, such as pain and suffering and the costs borne by an injured or ill worker's family. In some cases the consequences can be horrific. For example, during the course of this inquiry the Commission was told of cases of marital breakdown, family dissolution, wrecked careers, repossessed homes, hocked possessions, and debilitating assaults on basic human dignity — all flowing from work-related injury or illness. For a discussion of the personal costs of injury and illness see Box 4.1.

There are many 'victims' of inadequate workers' compensation arrangements — many of them transformed by the 'system' into permanent dependency. This is a high price to pay in both human and economic terms.

Fully compensating those unfortunate enough to suffer work-related injury or illness (to the extent that a monetary value can be placed on the associated costs) would require complete compensation for:

- lost earnings (starting at pre-injury levels, with payments adjusted to mirror earnings the worker would otherwise have expected to received);⁶
- pain and suffering (in so far as this is possible);
- medical and related expenses (eg for rehabilitation and pharmaceuticals);
- costs generated by any dispute-resolution processes involved; and
- any other attributable costs.

No existing arrangements are so generous, and there are several reasons why 'full' compensation is inappropriate.⁷ While such a regime would significantly increase the incentive on employers to maintain safe and healthy workplaces, it would also dampen incentives for injured employees to return to work.

⁶ For example an apprentice injured at work. While current pre-injury income may be low, the apprentice has the expectation of higher wages when fully qualified.

⁷ Luntz (Sub 210, pp. 6–7) rejected this approach. He argued that injured workers should be compensated according to needs. He argued that it is inappropriate to compensate fully for lost earnings as these earnings already incorporate 'compensation' for the danger, unpleasantness and inconvenient hours etc involved in work. He argued further that “... it is absurd to provide compensation measured in part by what was previously paid as compensation.” (p.7)

Box 4.1 The personal cost of injury and illness

The Commission contracted Mr Don Stewart to conduct a study of the personal costs of occupational injury. The study involved interviewing 16 injured workers, for whom information was sought on current income and other costs borne by the individual. Most of the respondents reported a decline in current income following injury. Table 4.1 presents data on the pre-injury and post-injury income of the 16 respondents.

Table 4.1 Pre-injury and post-injury incomes of injured workers

Case No	Pre-injury income (\$ pw)	Post-injury income (\$ pw)	Change in weekly income (\$)	Current income as a percentage of pre-injury income (%)
1	483.6	361.8	-121.8	74.8
2	569.1	487.8	-81.3	85.7
3	1029.4	360.3	-669.1	35.0
4	444.8	304.4	-140.4	68.4
5	487.8	0	-487.8	0
6	316.1	316.1	0	100
7	316.1	316.1	0	100
8	602.9	268.8	-334.1	44.6
9	409.7	281.0	-128.7	68.6
10	978.0	355.2	-622.8	36.3
11	260.0	175.0	-85.0	67.3
12	398.0	351.2	-46.8	88.2
13	656.7	260.0	-396.7	39.6
14	450.0	0	-450.0	0
15	700.0	35.0	-350.0	50.0
16	650.4	463.2	-187.2	71.2

Stewart found that most respondents suffered significant income reductions 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.

Respondents also incurred significant out-of-pocket expenses. These included medical services, physiotherapy, medication, travel and special equipment required as a result of the injury, for example a therapeutic mattress.

In addition to monetary loss, many respondents provided information on various intangible costs. Respondents argued that as a result of their disability their ability to engage in leisure activity was reduced. Boredom and depression were reported and relationships with others affected. These problems drove one injured worker to consider suicide, while another sought counselling from a psychiatrist. Stewart concluded that many of the injured workers he interviewed had suffered uncompensated economic hardship, social isolation and emotional stress as consequences of their injuries. The study report is available on request.

Source: Stewart consultancy report

Reflecting, in part, the balancing of these effects, existing compensation schemes start by compensating injured or ill workers at less than pre-injury levels and subsequently taper down — depending on the nature of the injury or illness and the length of time the employee remains off work.

Cost-containment considerations of existing schemes can also lead to dollar or time limits applying to benefits (sometimes including medical and rehabilitation expenses). While limits can act as an incentive to encourage return to work, they also shift some compensation costs onto the individual or the community (see Chapter 6).

4.3 Who should pay the cost of work-related injury and illness?

The causes of work-related injury and illness are many and varied. Sometimes workplace conditions are responsible, sometimes worker behaviour and sometimes some combination of both. A participant from the Victorian Institute of Occupational Safety and Health argued that at least 85 per cent of accidents were due to 'system failure', for which employers may be considered responsible, while the remainder were due to worker error or random factors (Transcript p.2343).

Allocating 'blame' for work-related injury or illness would, in many cases, be an essentially arbitrary process — as well as being costly and ultimately unsatisfactory (since any assignment will often be contentious). This explains the appeal of 'no-fault' systems, which have become increasingly common and which the Commission endorses (see Chapter 3).

Adopting a 'no-fault' approach does not settle the question of who should pay. It does, however, rule out any approach which requires the parties to contribute to the extent of their negligence.

As a general principle, those best placed to influence/control the incidence of workplace injury and illness should be charged with the responsibility for doing so. Applying this principle to the present context means holding employers liable to compensate workers for work-related injury and illness.

The Commission's view is that employers — rather than employees — are best placed to ensure that their workplaces are safe and healthy. Generally, management is (or should be) more aware of potential workplace hazards and has more control over the workplace than does the individual worker, and thus is in a better position to initiate measures designed to prevent 'system failure'.

While employers may be the best position to ensure workplace safety, their capacity to do so may be affected by:

- the current state of knowledge of potential hazards (especially in relation to occupational diseases) and of medical knowledge regarding treatment and rehabilitation;
- how best to manage risks; and
- an inability to prevent some accidents.

In addition, employers may have limited control over the ensuing factors affecting the costs of injury or illness. Labour market conditions, for example, may affect the duration of a claim.

The Chief Executive of the Victorian WorkCover Authority (Transcript p.2468) summarised the limitations of employer control:

There are risks that aren't controllable, there are risks that can't be avoided, that can't be guarded against because ... they're just unknown. There are injuries that develop, there are diseases that develop years and years after, people don't know about them. There are gradual onset injuries. There are a whole mix of things. There are workers that present with pre-existing injuries.

There are a whole array of costs, if you like, that need to be properly separated and I think apportioned between the things that an individual employer ought to be held accountable for, has some control over and therefore ought to be paying for.

However, the case for reducing employer liability on the grounds of imperfect knowledge on the part of the employers can be overstated. For example, there is significant knowledge about the causes of injury and illness (the hazards of unguarded machinery are well known and the causes of soft-tissue injury are now better understood). In addition the 'cautionary principle' suggests taking

care in situations where possible health implications are unknown, for example, by preventing worker exposure to substances of uncertain toxicity.

4.4 Compensating for lost earnings

When deciding on the level and duration of compensation payable to those suffering work-related injury or illness for lost earnings, considerations include:

- the nature of the injury/illness and prospects for rehabilitation/return to work; and
- the incentive effects compensation is likely to have on behaviour (including employers, employees, insurers/underwriters, service providers and governments).

Those suffering a work-related injury or illness are often classified, on the basis of an initial medical prognosis or their capacity for work, as either:⁸

- partially incapacitated — with the expectation that while most workers would be able to resume their former duties, some would be restricted in the work that they could (eventually) undertake; or
- totally incapacitated — with the expectation that most workers would be permanently unable to work because of the nature of their incapacity.

The medical prognosis may change over time as the ultimate condition of the worker becomes clear. Similarly, expectations about the likely success of rehabilitation efforts can be revised over time. This uncertainty argues for similar benefit structures during initial periods of incapacity.

The different jurisdictions have developed categories for eligibility for benefits based on the above principles. For example, in NSW workers are classified as partially incapacitated if they suffer a reduced physical capacity to do their previous job, or a job they might reasonably be expected to perform. A totally incapacitated person is a person unable to work in their previous or other reasonable job.

Depending on the medical prognosis and/or prospects for return to work, compensation payments for lost earnings typically start at level related in some way to pre-injury earnings (or some other benchmark)⁹ and taper down over

⁸ This distinction is made in NSW. Some other jurisdictions make more detailed distinctions. Victoria, for example, distinguishes between serious injury, total incapacity and partial incapacity.

⁹ Other candidates are average ordinary time (award) earnings or average weekly earnings for the relevant jurisdiction as compiled by the Australian Bureau of Statistics.

time (perhaps in one or more steps), before falling to some 'minimum' support level (or ceasing altogether).

These broad features affect behaviour in various ways, and the details of individual arrangements are often predicated on the implications for the various parties. Thus:

- initial levels of compensation are usually pitched at less than pre-injury earnings (to reinforce natural incentives for workers to behave in safety-conscious ways at work);
- income-replacement levels step down over time (to encourage rehabilitation and return to work); while
- income support may fall dramatically after a period (often justified on grounds that there should be a limit to the liability placed on employers to support employees who have suffered a work-related injury or illness).

4.4.1 Benefits and the behaviour of employees and employers

Benefit levels, and changes to them, influence the behaviour of employees and employers. Evidence suggests that benefit increases can result in a greater incidence and duration of claims. For example, Worrall and Butler (1986, p. 231) reviewed US evidence on the impact of benefits on claim duration, and concluded:

People respond to incentives. If social insurance benefits increase, applications for beneficiary status will increase. The evidence from the [workers' compensation] program indicates that applications (claim filing) ... [is] quite sensitive to changes in the level of benefits.

The Queensland Law Society (Sub 203, p.11) referred to actuarial calculations showing that when compensation payments in SA in 1974 were increased from 74 per cent to 100 per cent of average weekly earnings (AWE) there was a 55 per cent increase in time off work following an accident. In WA, increasing payments from 53 per cent to 95 per cent of AWE in 1973 preceded a 22 per cent increase in compensated time off work.

However, Moore and Viscusi (1989), using US data, found that increases in workers' compensation benefits resulted in improved health and safety measures by firms, and a reduction in the number of fatal accidents. They estimated that if benefits were reduced to zero the average fatality rate would increase by 22 per cent.

To the extent that benefits are less generous, and premiums reflect this, employers will face reduced pressure to place safety first and promote rehabilitation.

Thus the impact on overall scheme costs of changes in benefit levels is difficult to determine, since a change in benefit levels can be expected to have effects on employee and employer behaviour, with mutually offsetting costs and benefits.

One way to address this is to decouple these opposing effects by breaking the nexus between the cost to the employer (in terms of liability for the cost of work-related injuries and illnesses) and the benefits actually paid to employees. Thus, employers could be held liable for the full (pre-injury) cost of compensating employees, while actual compensation paid to employees could be less than pre-injury levels. This would have the effect of creating an 'injury levy wedge' between the cost to employers of work-related injury or illness and the actual payouts to employees. Such an approach may be the only way to resolve the opposing effects on employers and employees highlighted above.

The Commission recommends that:

- **employers be liable to pay a significant part of the cost of compensating employees suffering work-related injury or illness for long periods; and**
- **compensation paid to injured or ill workers should start at near pre-injury levels (indexed), and step down depending on the nature of the injury or illness, prospects for rehabilitation and return to work and the worker's willingness to undertake suitable rehabilitation.**

4.4.2 The structure of weekly benefits

Under current arrangements, weekly benefit structures vary significantly among jurisdictions (see Chapter 2). This means that workers with the same condition are treated more generously in some jurisdictions than others.

Differing benefit structures mean the costs of injury and illness are shifted to varying extents onto individual workers and the community — rather than being borne by the scheme (see Chapter 6). In some jurisdictions, this appears to be a deliberate aim.

The Commission has decided not to recommend a specific benefits structure, because, ideally, this needs be negotiated between jurisdictions. It has, instead, identified general principles on which a specific benefits structure should be based. The general principles aim to ensure that costs are allocated so that employers and employees face appropriate incentives to prevent injury and illness and encourage rehabilitation and return to work.

The Commission recommends that a weekly benefits structure be developed by the proposed National WorkCover Authority in consultation with existing schemes, to apply in all jurisdictions.

An illustrative benefits structure

A possible scheme which could serve as a basis for the various jurisdictions agreeing on a common benefits structure to apply Australia-wide, and one which the Commission believes would ensure strong safety, accident-prevention and return-to-work incentives for both employers and employees is the following:

- employers be held liable to pay the cost of compensating employees suffering work-related injury or illness for up to 5 years (with their liability being discharged upon a 'reasonable' offer of employment being made to formerly injured/ill employees upon completion of any necessary rehabilitation program, or if employees 'unreasonably' refuse to undertake rehabilitation);
- employees receive periodic compensation for lost earnings while they are off work: initially at 95 per cent of pre-injury earnings for the first 26 weeks (indexed for inflation) and:
 - ◆ in the case of *partial incapacity*:
 - periodic compensation after 26 weeks would step down to 75 per cent for the next eighteen months, then down to 60 per cent for a further 3 years;
 - if after 5 years the employee still does not have a job, the employer would continue to be liable to meet the cost of associated social security payments until deemed retirement age or return to work, whichever occurs first;
 - ◆ in the case of *total incapacity*:
 - periodic compensation after 26 weeks would continue at 95 per cent for a further 54 months, then down to 85 per cent until deemed retirement age or return to work, whichever occurs first.

Importantly, such a benefit structure would address concerns over cost-shifting to the social security system and to individual injured workers.

The proposed benefits structure for partially and totally incapacitated workers under this illustration are shown in Figures 4.1 and 4.2 respectively.

Figure 4.1 Benefit levels for partially incapacitated workers

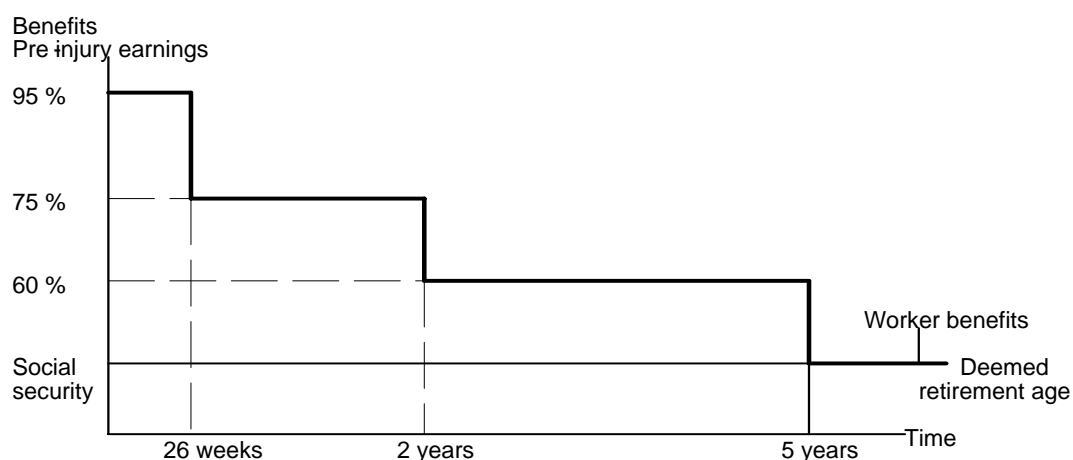


Figure 4.2 Benefit levels for totally incapacitated workers



The Commission accepts that under this illustrative benefits structure the benefits payable to some low-income earners may fall below social security benefit levels. The AMEU (Sub 158, p.14) gave an example of how this could occur. A Ford assembler on pay level 3B would receive gross pay of \$465 per week. If the worker steps down to 75 per cent of this, they receive \$349.75 per week, and if they step down to 60 per cent they receive \$279 per week. If the injured worker has a non-working partner and two children (aged 14 and 12), their social security entitlement would be \$338.15 per week, excluding assistance or concessions on rent, transport, gas, water, electricity and pharmaceutical bills.

The benefits structure could include 'top-up-pay' where, for example a worker who returns to permanent part-time work receives a workers' compensation payment in addition to part-time earning to bring total income to pre-injury levels.

4.4.3 Issues relating to the suggested benefits structure

Pre-injury earnings

Some participants indicated the earnings base for assessing compensation payments was an issue. The two main options suggested were award wages and some measure of the worker's pre-injury earnings.

Compensation could be based on ordinary time award wages; such a base excludes overtime and additional penalties or allowances. A disadvantage of assessing compensation on this basis is that, in many cases, a close link to the individual worker's earnings is not maintained. Every worker under a particular award would receive the same in compensation if injured, regardless of their pre-injury earnings. Such a system creates minimum income support for workers based on their particular award. It is not providing compensation related to the worker's lost earnings.

Compensation based on awards would disadvantage workers who receive regular overtime and other over-award payments. For example, workers in the building and mining industries often regularly earn significantly more than award rate of pay (Transcript p.1453). The Labor Council of NSW (Sub 36, p.6) argued that:

...many workers are reliant on their overtime and penalty rates and have their financial matters organised to include regular penalty rates etc.

Many workers are not covered by awards. Moreover, enterprise agreements and, particularly in Victoria, individual contracts are increasingly used as the basis for determining an individual's remuneration.

Workers' compensation payments could also be based on the worker's pre-injury (or illness) average weekly earnings (PIAWE) — including overtime, penalties and any other allowances the worker usually received. The Tasmanian Trades and Labour Council (Sub 35, p.7) argued that:

... no worker should be financially disadvantaged because they have suffered a work related injury or disease ... Pre-injury earnings should include overtime, penalty rates and other allowances.

Some participants expressed concern at the inclusion of overtime in the definition of PIAWE. A worker injured during a period of high overtime would

receive workers' compensation benefits based on a temporarily inflated income. Where overtime payments to workers subsequently ceased, the injured worker may end up receiving more in workers' compensation benefits than his/her former workmates.

The Australian Mines and Metals Association (Tasmanian Branch) (Sub 140) noted that this situation may act as a disincentive to return to work. It may create inequities between workers and create morale problems, particularly when an injured worker was being rehabilitated on part-time work, but earning more than those working normal hours. It proposed the following definition of PIAWE (Sub 140, p.5):

Weekly payments shall be an amount relevant to the remuneration which the employee would reasonably be expected to have received in respect of that period from that employment if the employee had continued to work within that period, but excluding payment for unrostered hours.

While arriving at a satisfactory measure of pre-injury earnings will be relatively straightforward in most cases (eg by averaging weekly gross income over, say, three months prior to the injury/illness), the circumstance of some workers pose problems. Examples are seasonal workers whose earnings fluctuate significantly over time. A satisfactory proxy for (weekly) pre-injury earnings could be obtained by averaging earnings over twelve months. This problem may need to be resolved on a case-by-case basis. Pre-injury earnings may also, in particular cases, be a poor proxy for expected earnings (as when an apprentice is injured before he or she can qualify as a tradesperson).

The Commission recommends that weekly workers' compensation payments be based on a worker's pre-injury average weekly earnings (including penalties and any other allowances 'normally' received).

Benefit step-downs

In accepting the tapering-down of benefits, the Commission accepts that this provides incentives for injured/ill employees to become rehabilitated and return to work.

Reforms to the Victorian WorkCare scheme provided some evidence on the impact of benefit reductions on worker behaviour. In 1989, benefits to long-term, partially incapacitated workers were reduced from 80 to 60 per cent of pre-injury earnings. A Coopers and Lybrand actuarial review of WorkCare (1992, p.5) concluded:

The decreases in weekly benefit payments have been accompanied by decreases in numbers of open long-term claims, which have fallen steadily since the reforms were introduced.

Another actuarial review, Trowbridge Consulting (1992, p.34), noted that:

... claim reviews for benefit reductions appear to lead to high rates of claim finalisation. There is still, however, difficulty in quantifying the long-term effect of ... reviews on termination rates.

It is difficult, though, to attribute claim finalisation and closures unequivocally to improved rehabilitation. Moreover it is impossible to attribute the reduction in long-term claims to benefit reductions alone, as the 1989 reforms constituted a package of changes.

A recent Australian study of the impact of weekly benefit structures on worker behaviour (Sloan and Kennedy 1993, p.16), however, provides support for step-downs. The study concluded that there is:

... evidence that the timing of changes in benefit levels are ... significant in determining duration. In both workers' compensation and social security schemes, high exit rates by beneficiaries are typical just prior to the time at which benefits are significantly reduced.

Capping benefits

In many jurisdictions there is an upper limit on weekly payments. In Victoria, for example, injured workers are initially entitled to 95 per cent of pre-injury average weekly earnings up to a maximum of \$603. Such limits can violate the link between compensation and lost earnings, so discriminating against more highly paid workers.

More highly paid workers, who generally would have greater information and bargaining power, should be free to negotiate additional benefits, insure for any perceived 'gap' and/or accept higher remuneration instead of higher workers' compensation benefits. Imposing caps on weekly benefit levels can protect workers with little information or bargaining power while maintaining the ability of the higher paid to negotiate benefits.

The caps are best expressed as a multiple of average weekly earnings in the particular jurisdiction (either state or national). An appropriate measure which is readily available is the Australian Bureau of Statistics (ABS) estimate of average weekly earnings for the particular jurisdiction.

Caps should not be regarded as immutable. Employers and employees should be free to negotiate a higher cap if they desire.

The Commission recommends that weekly compensation payments be capped, for example at twice average weekly earnings in the relevant jurisdiction.

The level of initial benefits

In suggesting a minimum initial level of 95 per cent, the Commission accepts the argument that, on balance, employees incur fewer expenses (eg transport to and from work and child minding) when they are off work. In addition, the Commission accepts that, historically, certainty of statutory benefits of 95 per cent PIAWE has been traded for the uncertainty associated with non-statutory compensation.

The Commission noted the arguments presented by some participants in favour of 100 per cent PIAWE for injured workers. It was argued that, as most injured workers return to work within a relatively short time, it would be unfair for these workers to suffer any financial loss as a result of injury. For example, the Trades and Labour Council of Queensland (Sub 82, p.1) argued that:

The union movements' view of a "fair" compensation scheme is that for such a scheme to be truly fair, it should restore injured workers, as far as possible, to his or her pre-accident position ...

It was also argued by some participants that high benefit levels will also provide employers with a strong incentive to ensure the injury does not occur in the first place.

However, the Commission views a minimum level of 95 per cent pre-injury earnings as both fair and generating sufficient incentives for employers to minimise injury and illness. The option remains open for employees to negotiate higher benefits if desired in the context of enterprise agreements.

'Notional' earnings

In Victoria and NSW, rehabilitated workers unable to return to their previous job are deemed able to earn income from alternative employment. Compensation payments are reduced to the difference between pre-injury earnings and deemed earnings. Notional earnings apply irrespective of whether the worker is able to find employment in the alternative occupation. The concept of 'notional' earnings is a method of limiting the cost to the scheme, of long-term workers' compensation recipients.

The Commission is concerned that the injured worker's incentive to undertake training may be affected. Once training has been completed, the worker may be deemed to earn an income from the new skills even if no job is available. As a result workers' compensation benefits may be reduced.

In addition, some participants — for example the Hunter Action Group Against WorkCover (Sub 34) — indicated that the application of 'notional' earnings caused compensation payments to cease altogether. The cost of the injury is

therefore shifted from the workers' compensation system onto the individual, their family and the community. MEND (Sub 15, p.5) argued that:

In NSW, the operation of the partial incapacity provisions ss 38, 40 [deeming provisions] can have the effect of shifting the burden from the state compensation system to the national social security system. In other words it is not a cost saving but rather a cost transference from the employer to the taxpayer.

Cost of the suggested benefit structure

The Commission contracted Trowbridge Consulting to undertake an actuarial costing of the suggested benefits structure presented in its Draft Report.¹⁰ Trowbridge estimated that the proposed benefits structure would mean premium would be between 2.5 and 3 per cent of payroll.

Some jurisdictions argued that these costings represented an unacceptable increase in their current premiums. The Victorian Department of Premier and Cabinet (Sub 208, p.4) argued that the suggested benefits structure would impose an additional \$2 billion on Victorian employers in the first five years. WorkCover NSW (Sub 205, p.2) argued that the Commission's proposals would add between \$350 million and \$650 million per annum to total workers' compensation costs.

It was suggested that premiums may go higher still. Buchanan (Sub 151, p.6) argued that while the Trowbridge estimates seemed "reasonable":

There is also a risk ... that the cost could turn out to be over 3.5 per cent. Without tight administration, it could go much higher.

The Commission accepts that the short-run impact of its proposals would be to increase premiums. However, as employers and employees respond to the changed incentives, 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. Employees would also face increased incentives to undertake rehabilitation and return-to-work.

¹⁰ The suggested benefits structure in the Draft Report contained the additional category of injured worker 'temporarily disabled' who received 95 per cent of PIawe for 26 weeks, then 75 per cent for 18 months, then 60 per cent for 3 years, whereupon employer liability was discharged.

4.4.4 An example of generating strong preventive incentives: an 'injury levy' wedge

An option which is attractive in terms of sharpening the *incentive effects* is to break the nexus between the cost to the employer (in terms of liability for the cost of work-related injuries and illnesses) and the compensation actually paid to employees, in particular compensation for lost income. This would have the effect of creating an 'injury levy wedge', the money from which could either be rebated to employers (eg on a per-employee basis) or used to fund 'second injury' schemes or 'gradual onset' programs (where the link to work has become tenuous because of the passage of time). In terms of the Commission's illustrative benefits structure, this would mean that employers would be held liable to pay the cost of compensating employees at 95 per cent of pre-injury earnings (indexed for inflation): for up to 5 years in the case of *partial incapacity* or until deemed retirement age or return to work (whichever occurs first) in the case of *total incapacity*.

Operation of the 'wedge'

The difference between the benefits actually paid to workers and the level paid by the employer represents the 'injury levy wedge' revenue. Figures 4.3 and 4.4 illustrates the case of partially incapacitated and totally incapacitated workers respectively.

Figure 4.3 The injury levy wedge: partially incapacitated workers

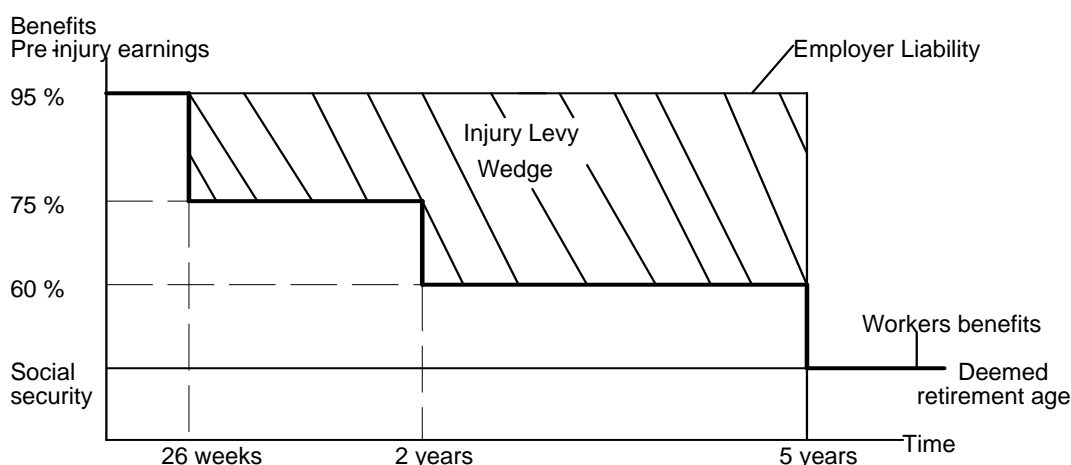
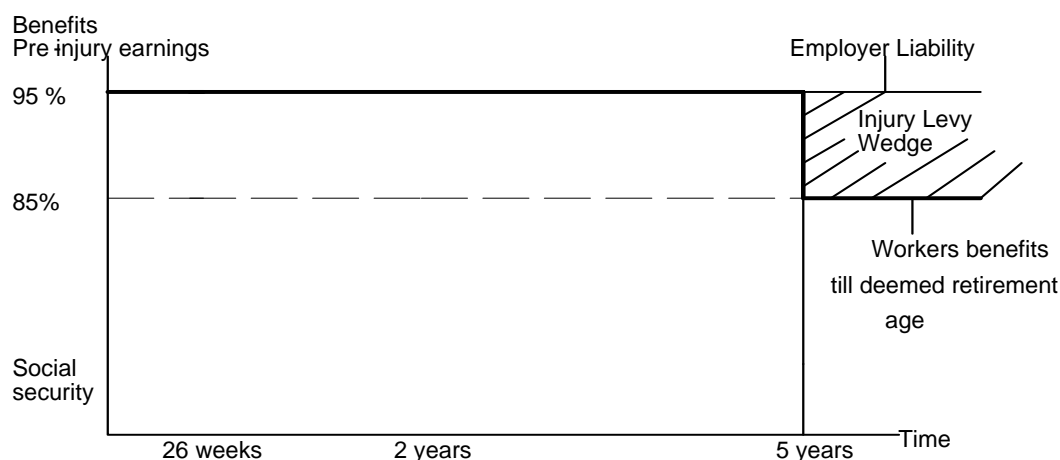


Figure 4.4 The injury levy wedge: totally incapacitated workers



Implementing the 'wedge'

The 'wedge' would be incorporated into the usual workers' compensation premium calculation. Premiums would be calculated on the basis that employers are liable for benefits equivalent to 95 per cent of pre-injury average weekly earnings. Self-insurers would avoid the wedge.

The difference between the premium paid and the actual premium required to fund the benefits received by injured workers would represent the 'revenue of the wedge'.

A number of options exist for using the wedge revenue. One could be to return revenue raised to all employers as a unit wage subsidy. Other options for using the wedge revenue include funding 'second injury' schemes and/or providing a fund to compensate for gradual-onset injuries or illnesses where liability cannot easily be attributed.

The Commission accepts that (unless returned to employers as a unit wage subsidy) in many jurisdictions the impact of this proposal would be to raise workers' compensation premiums, on average, in the short run. However, faced with higher workers' compensation premiums, employers will have stronger incentives to reduce the incidence of work-related injury and illness and encourage rehabilitation and return to work. Over the longer term, total costs — including the costs borne by individuals and those transferred to the social welfare system — will fall.

Disability management can be expected to emerge as an important component of effective employer response to their increased liability, with the emphasis on employer-based approaches to managing the occurrence and outcomes of work-

related injury and illness. Disability management factors within employer control include:

- encouraging health and safety initiatives aimed at prevention;
- taking (and maintaining) an active interest in workers' access to proper care and appropriate rehabilitation programs;
- early intervention to identify disabilities characterised by gradual onset (such as occupational disease) by, for example, noting patterns of absenteeism, benefit use, and grievance rates;
- expanding familiarity with the mental and physical requirements of jobs in their workplaces in order to appropriately rehabilitate workers and assist external health care and rehabilitation providers to determine appropriate duties for impaired workers; and
- designing work placements involving modified work assignments that entail minimal disruption to productivity.

4.4.5 Redemption of weekly benefits

In some jurisdictions it is possible to redeem weekly benefits as a lump sum, thereby absolving the scheme of ongoing liability to compensate workers for lost earnings. Existing redemption provisions vary among jurisdictions.

Redemptions would appear to be the most satisfactory solution for the insurers and employers, who are able to clear claims from their books — especially long-term claims. The Tasmanian Confederation of Industry (Sub 22, p.6), for example, argued:

... there remains a place for redemptions in the current system. On occasions, a lump-sum payment is the most satisfactory solution for all parties.

Some union groups, for example the Labour Council of New South Wales (Sub 36) also supported the retention of the option to redeem periodic payments, as it allows injured workers to put the incident behind them and make a new start.

There is some evidence that lump sum redemption of weekly benefits can lead to workers seeking social security support. For example, the NSW Law Reform Commission found that two-thirds of people who had received lump sums of \$20 000 or more in 1976 were in receipt of social security payments in 1983 (Sub 80, p.16).

The Commission's view is that as a general rule redemptions of large weekly benefits are undesirable for the individual and the community. The Commission is concerned that workers who redeem their entitlements ultimately come to rely on social security support.

However, the Commission accepts that a limited role remains for redemptions. Where continuing weekly benefits are low the most effective outcome for all concerned may be to redeem benefits. Adequate safeguards are, however, needed to ensure redemption is in the worker's best interest and to prevent the worker becoming reliant on social security benefits.

The Commission found that, in general, periodic benefit payments are to be preferred, but recognises that in some cases redemptions may be a more satisfactory conclusion to long-term claims.

The Commission recommends that redemptions for long-term claims be permitted where continuing weekly compensation payments are 'low' and when the redemption is in the best interests of the worker.

4.4.6 Superannuation contributions

During the inquiry, participants raised the issue of whether employer superannuation contributions should continue while a worker is on compensation. Given the expected increase in contributions, the Commission considered it appropriate to establish general principles for the treatment of superannuation contributions. How this issue is treated has implications for the worker's retirement income and for the incentives to reduce the cost of work-related injury or illness.

Current treatment of superannuation contributions

Participants made a distinction between contributions to the Superannuation Guarantee Charge (SGC) and those to contributory superannuation schemes.

They highlighted the fact that treatment of contributions to contributory superannuation schemes depended on the individual scheme. The ACM (Sub 29, p.19) argued that in some cases the employer is required to continue superannuation contributions while a worker is on workers' compensation or receiving make up-pay, while in other cases this is not required.

The South Australian Employers' Federation (Sub 30) argued that there was an anomaly under the WorkCover SA scheme. Superannuation payments are taken into account when assessing the workers' compensation insurance levy payable, but compensation payments made to workers did not incorporate an amount to cover superannuation contributions. The Federation pointed out that many firms continued to make contributions on behalf of workers.

The ACM (Sub 29) noted that the SGC provisions do regard compensation payments as “ordinary time earnings” for the purposes of attracting superannuation contributions.

The Tasmanian Trades and Labour Council (Sub 35, p.9) argued for the continued payment of award superannuation contributions while a worker is receiving benefits, on grounds that:

Occupational superannuation [SGC] was legislated for in lieu of a pay increase and what is happening in effect is that injured workers are being deprived of this entitlement which they would receive had they not been injured.

The Commission is concerned that when superannuation contributions are not made while a worker is on compensation:

- the worker will be disadvantaged on retirement relative to others; and
- the employer has less incentive to prevent work-related injury or illness.

The possibility of injured or ill workers being disadvantaged on retirement relative to others was noted by DSS (Sub 80, p.19):

... workers injured prior to retirement (and dependant on either workers' compensation or the invalid pension) will presumably not receive retirement incomes at the same level as their counterparts due to the smaller level of contributions made prior to retirement age. Unless their contributions are maintained by employers or government they will, albeit in a relative sense, incur additional financial hardship for their work-related incapacities.

Such an outcome may be considered to be unfair by many members of the community. One group of workers may have superannuation contributions continued while others do not.

If the employer is not required to continue payment of superannuation contributions the cost borne by the employer is reduced. The financial incentive faced by employers to prevent injury or illness will be thereby weakened. The cost will be shifted to the community (through social security) or to the worker.

The Commission recommends that payment of employer superannuation contributions continue while a worker is in receipt of weekly benefits.
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4.5 Compensating for permanent impairment and pain and suffering

When a work-related injury or illness occurs, particularly if the worker suffers a permanent disability, it is difficult to put a monetary value on the impairment or

the pain and suffering involved. Historically, workers have been able to seek recompense through suing their employer at common law (with a court-condoned-or-awarded dollar amount — or lump sum — being the anticipated outcome). More recently, statutory payments (according to schedules in so called Tables of Maims/Injuries/Disabilities) have been increasingly relied on as full or partial substitutes for common law remedies.

Participants' views

Some participants, especially lawyers through their Law Societies and Bar Councils, argued strongly for retaining access to common law (eg Subs 125,144,147 and 178). Some arguments in support included:

- it is a fundamental right;
- it is intended to provide 'just' compensation for those harmed because of the negligence of others;
- it provides an efficient process to monitor the adequacy and propriety of a 'no fault' scheme;
- it creates incentives for employers to prevent work-related injury and illness;
- it prevents employers shifting costs to others;
- there are some cases for which statutory 'Tables of Injuries' type payments are inadequate or too inflexible to cover particular cases (eg disfigurement);
- without common law some workers/dependants would suffer from under-compensation; and
- removal of access to common law for work-related injuries or illnesses would discriminate between those harmed in (as opposed to outside) the workplace as a result of the negligence of others.

Further, provision may be made for expected career earnings in a common law award, which is not presently the case with statutory benefits. The Queensland Department of Employment, Vocational Education, Training and Industrial Relations (Sub 63, p.28) argued that:

... the common law system, by design, should be the most effective means for determining the appropriate compensation to an injured worker. There is currently no alternative method offered which takes account of all factors.

Examples of the inadequacies of existing 'Tables of Injuries' were provided by participants. The Queensland Law Society (Sub 203, p.9) cited the example of a soft-tissue injury for which the injured worker received \$8377 in statutory

compensation. As a result of a common law claim, the injured worker received a sum of \$403 000 of which \$290 000 was for future economic loss.

However, the perceived advantage of case-by-case flexibility is diminished by lack of consistency in common law awards. AMCOR (Sub. 46, p.9) argued that awards for similar injuries may vary within jurisdictions:

Common law awards may be determined on a case-by-case basis but this of itself has no bearing on the accuracy or adequacy of such awards as very Substantial variances can occur even within the same State, for example common law awards in the Latrobe Valley of Victoria are generally Substantially higher than those for identical incidents heard in the Melbourne Courts.

The NT Government (Sub 43, p.7) outlined arguments against common law:

Common law is not available as the NT Government believes this is inappropriate for a 'no fault' scheme since it increases costs, results in significant delays, provides a disincentive to rehabilitation and return to work, and creates an adversarial environment which is detrimental to the workers long-term return-to-work prospects.

Most jurisdictions have restricted or prohibited access to common law. One important factor appears to have been the cost of such actions. In WA, the Workers' Compensation and Rehabilitation Commission (Sub 44, p.7) indicated that common law payments accounted for approximately 20 per cent of the cost of claims. The Metal Trades Industry Association (Sub 71, p. 12) noted that, in 1990–91, 1.6 per cent of claims involved common law actions in Queensland — yet these claims accounted for 28 per cent of the total cost of claims.

Participants also noted that workers may wish to delay their cases in hopes of larger settlements, on grounds that buying time (and not participating in rehabilitation) can assist in establishing the seriousness of their disability. Other participants noted that common law creates an adversarial environment which can damage the employer-injured worker relationship.

The role of common law in a 'no fault' workers' compensation scheme was also questioned by some participants when adequate statutory benefits were available. For example, the Chamber of Commerce and Industry South Australia noted (Sub 51, p.7) that:

The establishment of non-fault-based schemes was made on the premise that common law compensated fully only a few persons, but the majority, who could not show fault, were inadequately provided for. The WorkCover scheme restricted the worker's right to bring common law damages but increased substantially the amount that could be recovered under the 'no fault' scheme.

Reduced access to common law in some jurisdictions has been justified on grounds of more generous statutory benefits. Australia Post (Sub 100, p.2) argued that, over the past decade, as workers' compensation schemes have changed:

Certain trade-offs have been made. For example, in the Commonwealth jurisdiction, access to common law has been restricted in 'exchange' for improved benefits.

The Commission's view

Of particular concern to the Commission is whether common law creates the right incentives for employers to prevent injury or illness and for employees to undertake appropriate rehabilitation and return to work. The main argument in favour of common law is that each case is judged on its merits, so that compensation should therefore reflect individual circumstances.

The Commission considers that uncertainty surrounding likely outcomes does not provide appropriate incentives for employers and workers to reduce work-related injury or illness. The longer the delay between the injury or illness occurring and the cost being incurred, the weaker is the incentive on the employer to take preventive action. Statutory benefits ensure certainty of compensation, and so reinforce preventive incentives in a predictable way.

The Commission is not convinced by other arguments advanced in favour of common law. The argument has been advanced that common law prevents cost shifting by employers and prevents under-compensation of workers. However, statutory benefits can achieve the same outcome without the disadvantages of common law. If statutory benefits have been inadequate in the past this should be seen as an argument for improving them, not as a justification for seeking other remedies at common law.

The Commission accepts that in the light of reduced access to common law, the seriously injured need to be guaranteed adequate compensation for non-pecuniary loss. The Commission considers that a common 'Table of Injuries', to apply Australia-wide, is the most appropriate mechanism to achieve this. Supporting the Commission's view, AMCOR (Sub 46, p.9) stated:

We do not consider that common law is appropriate with 'no fault' workers compensation schemes provided that adequate 'Table of Maims' benefits are provided to the seriously injured.

The Commission's preference for compensating for permanent impairment and pain and suffering is to rely on uniform payments based on a common 'Table of Injuries', rather than allowing access to remedies at common law. Such an approach is direct, certain and more immediate. The details of the Table, including its structure and amounts payable, should be developed by the proposed National WorkCover Authority, in consultation with existing schemes.

Some participants argued that such a Table may not be appropriate in all cases. Exceptional cases may arise which are inadequately compensated by existing Tables. Some injuries, such as serious facial disfigurement, are under-

compensated by existing Tables, other injuries or illnesses may not be covered at all, for example, injuries to internal organs. Rather than allowing access to common law in these cases, the Commission sees merit in establishing a tribunal under the proposed National WorkCover Authority.

Exceptional cases could be referred to the tribunal for consideration. The tribunal would decide whether the existing 'Table of Injuries' payment (where available) is appropriate. Where the tribunal decides the payment is inadequate, it would have the power to determine an appropriate payment. Where there is no Table payment, the tribunal would decide what would be appropriate in the circumstances.

The Commission recommends that access to common law be removed, with compensation for non-pecuniary loss through a common 'Table of Injuries', to be developed by the proposed National WorkCover Authority in consultation with existing schemes. A tribunal should be established, within the proposed National WorkCover Authority, to consider exceptional cases and to periodically review the Table.

4.6 Paying for medical and related costs

Following an injury or illness, the worker will typically require medical and rehabilitation services in order to return to work. Usually these costs are covered under existing workers' compensation arrangements. A common proviso is that only 'reasonable' expenses will be met (or limits are placed on eligible costs).

The Commission's position is that people suffering a work-related injury or illness should not be financially disadvantaged when it comes to paying for directly attributable medical costs (including rehabilitation). The danger with such an approach is that any good or service which is free invites overuse. For example, an injured worker will generally not be in a position to know whether a particular visit to a doctor is justified in terms of prospective benefits compared with the costs involved. Neither the patient nor the doctor have much of an incentive to confine consultations to cost-effective ones (because the worker bears no costs and the doctor's fee is guaranteed).

Overservicing — whether by doctors or other providers — is best tackled directly via 'best practice' or by effective fraud control (see Chapters 5 and 7), rather than by (arbitrarily) cutting back on the extent to which such services are reimbursed under workers' compensation.

The Commission recommends that attributable medical, rehabilitation and related expenses be fully compensated.

4.7 The overall compensation package

In previous sections, the Commission noted wide variations in benefits and coverage in different jurisdictions. This is not only inequitable, but also opens the way for schemes to shift some of the costs of injury and illness onto the individual worker or the community.

The Commission has recommended nationally uniform weekly benefits, 'Table of Injuries' and a uniform approach to paying for health costs. The Commission has also recommended consistent definitions of a worker and of a compensable injury or illness.

These measures should be regarded as an integrated package of recommendations.

4.8 Special problems

4.8.1 Aggravation of a prior injury/related injuries

Those who have suffered a work-related injury or illness may find it hard to get another job because of employer reluctance to take on previously injured workers. Some reasons include:

- concern that investments in training will be wasted;
- fear of incurring liability for aggravation of a prior, or related, injury or illness; and
- 'risk aversion' generally (when people with no history of work related injury or illness are available for employment).

Discrimination in the job market against formerly injured or ill employees is a problem which needs to be tackled. Such discrimination can encourage workers to conceal a former work-related injury or illness. This is not without risk, as getting found out can lead to the worker being denied access to compensation and can absolve the employer of liability.¹¹

¹¹ See, for example, W/Comp Board of WA, No s813/89 and AAT, V92/377.

Under the Commission's recommendations, employers will have potent incentives to maintain the employment of injured or ill workers (or to arrange a job with another employer). But too rapid a re-entry to the workforce may risk aggravating the original injury or illness, or causing a consequential one.

In cases where re-employment is with the original employer, any such tendency can be countered by treating aggravation/related injuries or illnesses in exactly the same way as the original injury or illness (ie by restarting the five-year liability rule for employers).

Cases of re-employment by another employer pose a more difficult challenge. Here, the answer would appear to be to prevent the liability of the original employer from being so easily discharged. One way of roughly achieving this would be to require each employer in whose workplace an individual suffered a work-related injury or illness (including an aggravation of a pre-existing condition or a related injury or illness) to share in the resulting liability over the five year period from the date of the original injury or illness in proportion to the time the individual was 'on their books'.

However, for such a scheme to operate in practice the administratively complex problem of tracking the employment history of the worker would need to be overcome.

The question also arises of who should be held liable for compensation after the first five years in cases of total incapacity. The Commission's view here is that all employers should share that responsibility via a special pool of funds financed from premiums, unless causality can be established and liability attributed.

4.8.2 Occupational disease/gradual onset

Workers' compensation arrangements are better equipped to respond to injury than to illness, particularly occupational diseases characterised by long latency or gradual onset. Injuries are usually associated with a readily identifiable incident. This is frequently not the case with work-related disease, where cause and effect can be problematic — partly because of the passage of time but also because there may be multiple causation. For example, is the lung cancer of a cigarette-smoking coal miner due to smoking or is it work-related (and therefore compensable)? In addition Luntz (Sub 210, p.9) argued that:

We all suffer from a degenerative disease called ageing. ... [which leads to] degeneration of the spine or joints ... The extent to which in any particular instance the work "contributed", or contributed "significantly", to the incapacity for work is likely to be controversial.

There are no easy answers here and tackling the issue of causality can be time-consuming, costly and ultimately unsatisfactory. Two issues relating to causality need to be resolved:

- was the illness caused by employment, or other factors?; and
- if the illness was employment related, can causality be attributed to a particular employer?

Where work can be established as the cause of the injury or illness, liability should be assumed under workers' compensation. Where causation can be attributed to a particular employer, that is where the liability should lie. In addition, a designated diseases approach could be used to attribute liability to the employer for certain diseases.

Remaining cases would be covered by a separate pool of funds (the same pool as used for aggravation injuries), funded from premiums intended to cover such liabilities. This pool would cover cases where the employer responsible for the disease has been identified but the firm no longer exists and cases where the responsible employer cannot be identified.

Other options include a case-by-case examination of each claim by the courts where required. Although time consuming and costly, it may be the best available solution in some cases.

5 REHABILITATION AND RETURN TO WORK

Historically, workers' compensation concentrated on compensating those suffering work-related injury or illness — rather than on prevention or rehabilitation. Increasing recognition that long-term claims account for a major proportion of overall costs has underscored the importance of rehabilitating injured/ill workers and getting them back to work. Effective workers' compensation arrangements must encompass medical, occupational and even social aspects of rehabilitation and return to work. Key features of 'best practice' include prompt intervention, maintaining effective communication and co-operation between employer and employee, workplace-based programs — supported by strong financial incentives and obligations on both parties.

Workers' compensation arrangements encompass prevention, compensation and rehabilitation. Historically, worker's compensation schemes focused on compensating injured workers. Over time it was increasingly recognised that prevention also had an important role in reducing the costs of work-related injury and illness. Today there is increasing emphasis on the contribution effective rehabilitation programs can make to minimising overall costs. Rehabilitation, along with prevention and compensation, now form the cornerstones of an integrated approach to combating work-related injury and illness.

'Rehabilitation' is often taken to refer only to the medical treatment of an injury or illness; this aims to contain the extent of the physical aspects of the injury or illness, and any resulting disability. Such treatment normally occurs outside the workplace by an accredited practitioner (eg a doctor or physiotherapist).

However, successful rehabilitation also encompasses occupational and social aspects. Occupational rehabilitation involves integrating the worker back into the workplace and society. There is increasing recognition that the most effective rehabilitation programs are workplace-based and involve a great deal of support, communication, co-ordination and co-operation among the relevant parties (eg employees, employers, insurers, doctors and rehabilitation providers).

Rehabilitation aims to get formerly injured or ill employees back to work as soon as practicable — in so doing, successful rehabilitation programs reduce the costs of work-related injury and illness to both employers and employees.

Successful programs will also reduce indirect costs — such as retraining, disruption to production and labour turnover.

Workplace-based rehabilitation operates on the principle that early intervention is a vital ingredient to the success of both medical and occupational rehabilitation. This involves not only medical treatment but also continuing contact with the employer to counter any feeling of detachment from the workplace. These social considerations are important in facilitating recovery and reinforcing the desire to return to work.

The South Australian Employers' Federation (Sub 30, p.4) argued that:

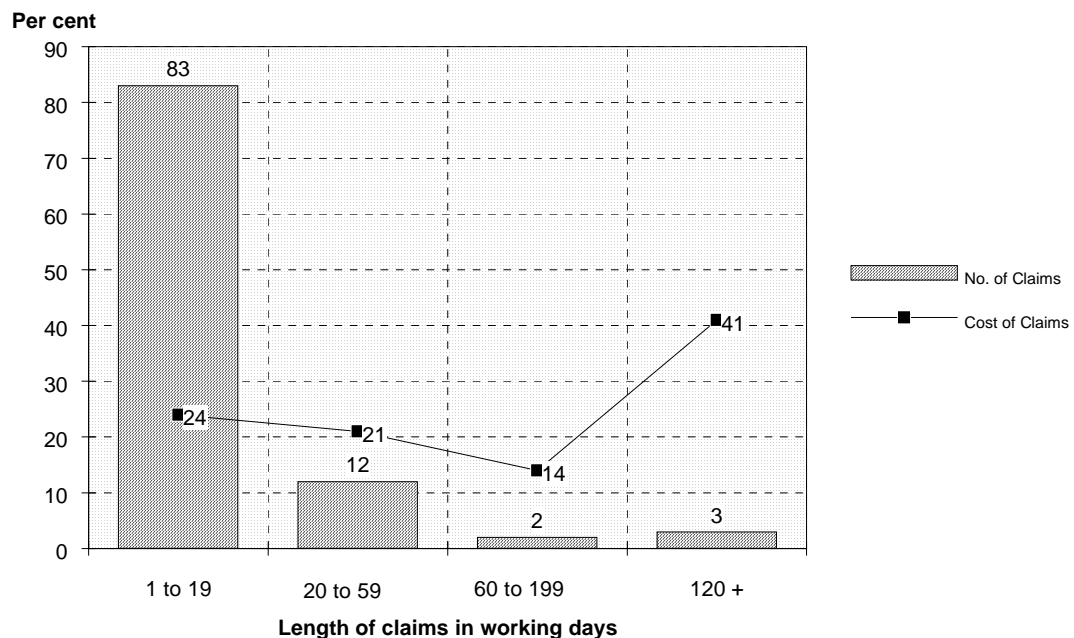
Rehabilitation systems, or indeed the concept of return-to-work processes generally, are vital and the emphasis upon an early and comprehensive return-to-work is a major factor in limiting costs and maximising the efficiency of the system. There is a need to ensure that we link return-to-work performance with the level of benefits and the on-going claims-management system.

Several inquiries into workers' compensation have suggested that successful and early return to work is dependent on early access to rehabilitation (Coneybeare 1970, Harris 1977, Cooney 1984). The importance of effective rehabilitation as a means of dramatically reducing compensation costs is reinforced by evidence from one scheme which suggests that, whereas only about one in five claims extend beyond 4 weeks, they nevertheless account for approximately 85 per cent of total costs (ACT Government 1990). Figure 5.1 illustrates the cost of the 'tail'.

Over the last ten years, most jurisdictions have incorporated provisions relating to rehabilitation into their legislation. However, the schemes vary in their approach and emphasis. The NSW, Victorian and Comcare schemes emphasise workplace-based programs and employer involvement in the process. By contrast, Queensland and SA place greater emphasis on services provided by external rehabilitation specialists, and a case-management approach. In addition, Queensland has adopted a program aimed at assisting employers to develop their own workplace-based programs. The NT requires that employers take reasonable steps to provide rehabilitation and suitable employment.

The WA system does not expressly require employers to provide rehabilitation, although the workers' compensation authority may require the employer to do so in certain cases. In Tasmania, employers are required to pay for the costs of rehabilitation services incurred by injured or ill workers. As a result, if a doctor or the worker initiates a rehabilitation program, the employer is required to meet the costs of such a program. There is, however, no legislative requirement for the employer to institute the rehabilitation. In the ACT, there are no rehabilitation requirements, although there are proposals for their introduction.

Figure 5.1 Cost and number of claims in Western Australia 1990–91
(Per cent of total costs)



Source: Monrowd 1993

In September 1991, Worksafe Australia established a Rehabilitation Task Group (RTG) to identify issues and develop recommendations relating to the national co-ordination of rehabilitation and what constitutes 'best practice' in the field. The major work of the group is the development of a 'guidance note' for occupational rehabilitation. The note will include:

- a national definition of occupational rehabilitation;
- uniform guidelines for accreditation of rehabilitation providers; and
- an information guide to systems for measuring the efficiency of disability management services.

To date the first two of these goals have been achieved. The RTG is also seeking to address the problem of long-duration rehabilitation claims.

5.1 Effective rehabilitation

5.1.1 Achieving return-to-work objectives

Case studies suggest that rehabilitation can often be successful in returning injured or ill employees to full-time work, thereby reducing costs (Allworth 1988).

Comparing claims-duration statistics and return-to-work rates across schemes is difficult because of differing reporting practices (see Section 3.4). Establishing the strength of the relationship between duration and differing rehabilitation strategies is also problematic because of other confounding factors. Other factors — such as the imposition of notional earnings rules — reduce average duration statistics, artificially boosting reported return-to-work rates.

The Victorian Accident Compensation Commission identified failure to expeditiously rehabilitate and return injured employees to work as the single most important factor influencing the longer duration figure for Victoria compared to NSW (which in 1990—91 averaged 28 weeks and 9.6 weeks respectively). The Chamber's Annual Report (1992, p.7) estimated that:

... 70 per cent of the cost differential between the two schemes [NSW and Victoria] is explained by the different duration experience ... nearly four times as many claimants as in NSW stay on benefits for more than 12 months.

Both the WorkCover Authority of NSW and Comcare have recently achieved reductions in the average duration of claims — attributed in part to their emphasis on workplace-based rehabilitation. As a result, they have been able to significantly reduce costs.

It is often argued that self-insurers are better at rehabilitation. The costs of failing to rehabilitate an worker are more apparent to the self-insurer (as they are directly responsible for paying compensation). These costs are less apparent to employers who insure their liability, because of the muting effects changing costs have on premiums. Because of this, self-insurers are likely to place more emphasis on rehabilitation. This is reflected in Table 5.1, which shows that, in NSW, self-insurers consistently out-performed the managed fund in terms of claims duration.

Table 5.1 Return-to-work rates for managed fund and self-insurers:
NSW, 1991–93*

	<i>Proportion on benefits for more than (weeks)</i>							
	4		13		26		52	
	Fund	Self-insurers	Fund	Self-insurers	Fund	Self-insurers	Fund	Self-insurers
3rd quarter 1991	10.8	7.7	3.7	2.2	2.2	1.1	0.9	0.6
4th quarter 1991	10.3	7.7	3.8	2.2	2.0	1.1	1.1	0.4
1st quarter 1992	10.3	7.4	3.7	2.0	2.0	1.0	1.1	0.5
2nd quarter 1992	11.1	6.7	3.8	2.5	2.2	1.6	1.0	1.1
3rd quarter 1992	10.8	6.5	3.9	1.6	2.1	1.4	1.1	0.8
4th quarter 1992	10.8	6.1	4.1	2.2	2.1	1.5	1.2	1.1
1st quarter 1993	10.5	5.5	3.9	1.6	2.3	0.7	1.1	0.4
2nd quarter 1993	10.5	5.2	4.0	1.4	2.5	0.8	1.1	0.3

* Return to work is expressed as a percentage. For any specified quarter, the number of workers who have more than 4, 13, 26, and 52 weeks on weekly benefits is expressed as a percentage of the total accidents which occur in that quarter.

Source: Statistical appendix (Self-Insurers Association of Australia)

Average claims-duration figures are poor indicators of return to work and the effectiveness of rehabilitation. It is necessary to supplement claims duration with information on why claim were closed. It is only by looking at how many claims were closed as a result of return to work that the effectiveness of any rehabilitation scheme can be measured. The Commission surveyed schemes asking them to provide a breakdown of why claims were closed during 1991–92. Only Queensland and NT were able to provide the information. For the NT, of the claims that were closed during the period, all resulted from return to work while in Queensland 96 per cent of the cases closed were as a result of return to work.

The survey also asked all jurisdictions for their return to work rate (expressed as the per cent of workers who returned to work after undertaking rehabilitation) during 1991–92. Only NSW, SA and Comcare responded to this question. Return-to-work rates were 64 per cent, 85.3 per cent and 86 per cent respectively. However, direct comparisons between the schemes are difficult because of different approaches to rehabilitation by each scheme. For example, in NSW, the employer is obliged to establish an approved program; in SA it is WorkCover's responsibility to establish or approve rehabilitation programs, while federally, Comcare may determine and arrange for an employee to undertake an approved program.

Thus, return-to-work rates on their own can also be a misleading indicator of effective rehabilitation. A number of factors should be considered when using

return-to-work rates in assessing the effectiveness of rehabilitation. First, the return to work must be durable. The Broadmeadows Community Occupational Rehabilitation Centre (Sub 168) argued that rapid, but inappropriate, return to work may be incorrectly represented as a 'successful' when in fact it leads to an aggravation or new injury — resulting in a new claim and possibly another return to work. Second, the form the return to work takes is important. The ultimate aim of rehabilitation should be to return the workers to full-time employment, if possible. Third, the severity of the injury or illness will influence both duration and return to work — that is the more severe an injury or illness, the lower the return-to-work rate and the higher the claims duration.

The Commission found that a range of performance indicators is required to measure the effectiveness of rehabilitation, and allow meaningful 'benchmarking'.

5.1.2 Cost-benefit considerations

Evaluating the effectiveness of rehabilitation requires assessing the expected benefits against the anticipated costs involved in returning an injured or ill employee to work.

The SA Government (Sub 56, p.16) stated that:

'Best practice' as identified by WorkCover [SA] are those which are aimed at increasing the return-to-work rate. Thus, while claims costs in the short term may not be the lowest, the additional expenditure on rehabilitation and case management reduces ongoing liabilities by achieving more and earlier returns to work.

There have been several cost-benefit analyses conducted of rehabilitation in Australia, although data deficiencies mean that in many cases the results must be treated with caution. For example:

- a review of Commonwealth Rehabilitation Service (CRS) programs (Anutech 1993) estimated that for every dollar spent on rehabilitation approximately nine dollars are saved;¹

¹ An earlier study conducted by the CRS (1985) found that:

- after rehabilitation, 50 per cent of clients worked regularly (compared with 20 per cent before rehabilitation);
- the average paid work per client increased by 9½ hours a week following rehabilitation; and
- the economic benefits of these increased earnings outweighed the costs by a factor of six, assuming that without rehabilitation earnings would not have changed.

- the Victorian Accident Rehabilitation Council (1990) analysed factors that affected the probability of returning to work after rehabilitation. Benefit-to-cost ratios for a number of workers ranged from less than 1 to over 33;
- Ganora and Wright (1987) provided case-study data for a firm of 300 employees which had developed its own injury management and rehabilitation program with a direct benefit to cost ratio of 12.6 to 1;

while on the other hand:

- an evaluation of rehabilitation programs in Telecom required under Commonwealth legislation concluded that, although rehabilitation was welcomed by injured workers, it had not been cost-effective — involving a net loss of \$4266 per case (Hocking *et al* 1993).

Although overseas compensation and rehabilitation systems can differ greatly from those of Australia, there is some evidence to suggest that rehabilitation is generally beneficial and cost-effective. For example, evidence from the USA suggests that there are considerable savings for every dollar spent on rehabilitation (Roberts, Wood and Thomas 1985). A review of USA studies suggested that benefit-to-cost ratios range from 1: 1 to 36: 1, averaging 10: 4 (Pati 1985).

The Commission found that rehabilitation has generally proven to be cost-effective, although returns compared to outlays can vary widely.

5.2 Rehabilitation and return-to-work incentives

Different aspects of workers' compensation arrangements affect the behaviour of the various parties and therefore the likely success of rehabilitation and return to work. In the case of employees, these include the extent of compensation paid, the nature of the injury/illness, whether medical and rehabilitation costs are fully covered, and the quality of any ongoing relationship with the employer. In the case of employers, they would include the nature of any liability, the nature of the injury or illness, the extent of any firm-specific human capital represented by the employee, and the cost of replacing injured/ill workers. In the case of insurers, the incentive to encourage rehabilitation and return to work would focus on the costs that will otherwise be borne. Doctors and rehabilitation providers may have weak incentives in this regard if their fees are met irrespective of their size (or the outcome) — although there will no doubt be professional reasons why they would like to see a successful outcome.

5.2.1 Employee incentives

Compensation payments

Any compensation arrangements need to ensure both employers and workers face adequate incentives to undertake rehabilitation (see Chapter 4). Participants generally agreed that both the structure and timing of compensation payments are important in influencing early return to work. There is a possibility that injured or ill workers may refuse to co-operate in the rehabilitation process or take steps to find work. WorkCover NSW (Sub 205) stated that Sections 38 and 40 of the NSW Workers Compensation Act already contain provisions for workers' benefits to cease if they do not co-operate with rehabilitation or take reasonable steps to find work. The difficulty lies in defining unreasonable behaviour and the administrative burden of monitoring job-seeking activities. Appropriate criteria for judging the behaviour of both employer and employees, along with suitable dispute-resolution processes need to be developed.

To encourage rehabilitation and return to work, the Commission recommends that, compensation payments be suspended where there is 'unreasonable' failure on the part of an employee to undertake rehabilitation. Payments would recommence when the employee agrees to undertake a suitable program.

Award conditions

Awards may contain provisions relating to rehabilitation and return-to-work processes in particular industries.

The Communication Workers' Union (Sub 60, p.5) argued that:

The use of industrial awards in ensuring ... employer compliance with the principles of rehabilitation, return to work, redeployment and re-employment are areas which require action on the part of the union movement.

However, the South Australian Employers' Federation (Sub 30) warned that some awards embody inflexible work practices which do not, for example, provide for part-time work and job redesign (and may therefore jeopardise rehabilitation). The Australian Chamber of Commerce and Industry (Sub 181) and the National Farmers Federation (NFF, Sub 154) argued that awards may impede rehabilitation. This is especially so where they contain restrictions upon part-time work or minimum hours, restrictions imposed by classification structures, minimum salary levels and penalty rates.

However, the ACTU (Sub 160) argued that rehabilitation provisions can be included in awards, allowing for flexible working arrangements and graduated return to work. Such clauses can be used to create exemptions from provisions which require a worker to perform the full range of duties of a classification, if they are unable to do so for medical reasons.

The Commission draws attention to the possibility that inflexible work practices may impede rehabilitation and return to work.

'Make-up' pay provisions in some awards provide that the employer will fund the difference between the worker's normal wage and statutory weekly benefits. 'Make-up' pay is normally justified on the basis that workers should not be disadvantaged by the fact that they have suffered a work-related injury or illness. It places strong incentives on employers to provide rehabilitation, retraining and work opportunities for workers. However, the Australian Chamber of Manufactures (ACM, Sub 29) argued that such provisions negate employee incentives to participate in rehabilitation and return-to-work programs. Similarly, the Victorian Automobile Chamber of Commerce (Sub 26, p.2) argued that:

The existence of 'make-up' pay provisions in awards is incompatible with the aims of Victorian accident compensation WorkCover Act as they negate any incentive for claimants to return to work given that their wage can be 100 per cent for anything up to 52 weeks (dependant on the award).

The ACTU (Transcript p.2530) argued that a major problem with removing 'make-up' pay from awards is that it creates an inequity between the industrially weak and the industrially strong. Those areas with industrially strong unions will be able to negotiate 'make-up' pay whereas those in industrially weak positions may not.

'Make-up' pay negotiated at the enterprise level can act to strengthen return-to-work incentives on employers and employees. Where 'make-up' pay provisions encourage workers to return to work and employers to provide the appropriate retraining and duties, both parties to the agreement will benefit.

The Commission found that existing 'make-up' pay provisions in awards are inconsistent with the return-to-work incentives embodied in the Commission's illustrative benefits structure. However, where such provisions are negotiated at the enterprise level — rather than imposed via awards — the outcomes are likely to be in the interest of both parties.

Access to common law

Assessing the total costs of work-related injury or illness under common law often requires workers to wait until their condition has stabilised, to establish the full extent of any incapacity. This may delay rehabilitation and jeopardise successful recovery, as well as increase costs for which the employer is held liable.

The Commission received many submissions which suggested that access to common law accentuated delays in the rehabilitation process.

The Commission recommends that all jurisdictions have arrangements which encourage employers and insurers to provide rehabilitation as soon as practicable, if necessary without any acceptance of liability. (The Commission notes that this is current practice among a number of self-insurers with good occupational health and safety records.)

The issue of common law access was discussed in Chapter 4 (see also Appendix D) where the Commission recommended that common law access be removed from workers' compensation arrangements.

5.2.2 Employer incentives

Employer responsibility

The Commission considers that its recommendations affecting compensation would create effective incentives for employers to support occupational rehabilitation and retraining programs for workers and to achieve a return to work as early as practicable.

Some existing systems attempt to protect workers and encourage rehabilitation programs by:

- prescribing that employers provide rehabilitation for their employees; and
- providing protection from employers terminating an injured/ill worker's employment.

Legislative requirements for rehabilitation in each of the jurisdictions differ markedly. WA legislation does not expressly require rehabilitation, although the Workers' Compensation and Rehabilitation Commission (WCRC) may require the employer to do so in certain circumstances. In the ACT, the relevant legislation contains no provisions relating to rehabilitation. Legislation in NSW, for Comcare, and recent changes in Victoria, require that employers assist in the rehabilitation process by establishing workplace rehabilitation co-

ordinators and developing written rehabilitation policies — as well as (written) rehabilitation plans for individual workers.

In SA, employers are required to provide suitable employment, either full or part-time, whether or not workers return to their original job. Failure to provide adequately for return to work can result in a supplementary levy on the employer equivalent to the amount being paid out by the scheme to the worker. The Boston Consulting Group (1992) indicated that, in NSW, such legislative requirements have resulted in employers taking a greater role in the rehabilitation process in NSW. It suggested that this resulted in earlier and more successful referrals to rehabilitation.

The Labour Council of NSW (Sub 36, p.14) argued that there is a need for a mandatory requirement to rehabilitate injured workers such that “even if the employer does not have suitable duties available on site to rehabilitate an injured worker, rehabilitation must continue via a referral to a rehabilitation provider”.

Problems often exist in small workplaces with regard to the provision of rehabilitation and suitable alternative duties (see Box 5.1).

Box 5.1 Rehabilitation and small business

In Australia, small businesses employ 48 per cent of the workforce (ABS 1993a).

Small firms are unlikely to have the resources to implement workplace-based rehabilitation programs or employ rehabilitation co-ordinators. In addition, the cost of case-management services may limit the overall benefits to small firms of using case-management.

Because of their size and the resources available to them, small employers encounter a number of difficulties during the rehabilitation process including:

- not being able to keep a job open while the worker is rehabilitated;
- not being able to provide graded return to work during the rehabilitation process; and
- not being able to provide a worker with alternative or modified duties upon return to work.

Co-operatives or employer networks may be an effective means of facilitating rehabilitation through the provision of alternative duties, including placement of workers with other employers.

An example of how this can work is the Electrical Employers Self-insurance Safety Plan (EESISP), a self-insurance group in New York. Most of the employers within the plan are small, and return-to-work opportunities with any one employer are limited. Under the scheme, injured or ill employees are targeted for return to work either with the prior employer or with another EESISP employer.

The difficulties faced by some small employers may result in:

- small employers feeling frustrated and excluded from the rehabilitation process;
- many small employers having little or no knowledge of the rehabilitation process;
- many workers in small businesses not being effectively rehabilitated; and
- small employers relying on insurance companies or medical practitioners to run the rehabilitation for their workers.

The attitudes of employers and workers are very important in the rehabilitation process. Ford (1992) found that:

A successful rehabilitation system above all needs co-operation between the various interested groups. These include primarily the injured worker and his or her employer; maintained through the injury management and retraining process (paragraph 11.20).

Small employers are more likely than large employers to be in a position to maintain a good relationship with the worker during the rehabilitation process. As Ford (1992) notes:

... our claimant survey suggests that employees of small business found their employers co-operative and prepared to help. The lack of success of this co-operation must be a function of the system in not being able to network in providing alternative duties or light duties, possibly on a temporary basis (paragraph 11.32).

The ACT Government (1990, p.93) stated that:

Unless an employer is of a certain size, it will not be possible to transfer a worker from one function to another without degrading efficiency. In the more extreme cases, there may simply be no useful alternative duties to which an injured worker may be transferred.

Ford (1992) recommended that rehabilitation should be facilitated for people employed in small business or self-employed by encouraging employer 'co-operatives' to provide for 'light duties' and graded return to work. Such

networks could be co-ordinated by industry or employer groups. For example, Telecom (Transcript, p.1435) stated that, in small towns, it had in some circumstances out-placed injured workers with private firms (such as service stations) as part of its rehabilitation and return-to-work programs.

The Commission draws attention to the role 'co-operatives' or employer networks can play in facilitating the rehabilitation and return to work of injured or ill workers, particularly in small workplaces — and notes that its suggested benefits structure would create strong incentives to bring this about.

Case estimates

A case estimate provides the employer with an estimate of how their premium is likely to be affected as a result of a claim. The employer therefore has an indication up front of how much a claim may cost. Employers can thus see from the outset that there are financial benefits to be gained from reducing initial case estimates by assisting in the rehabilitation process. The Boston Consulting Group (1992 p.14) stated that:

Claims agents favour the case estimate system because it provides an excellent mechanism for focusing an employer's attention and behaviour on returning injured workers to the workplace as quickly as possible. Employers also like the system because it provides immediate and measurable feedback on their rehabilitation performance.

Case estimates are used by the Victorian and NSW schemes and provide a strong incentive for employers to encourage the effective rehabilitation and return to work of workers. In NSW, for example, employers receive details showing the date and nature of the injury or illness, an initial estimate of the likely cost and revised estimates if warranted (including an explanation of differences).

The Commission found that, timely case estimates can be an effective device for providing important information to firms of likely consequential costs of work-related injury or illness.

The Commission recommends that all insurers provide employers with case estimates of the costs of significant claims, and their likely implications for premiums, as soon as practicable in the claims-management process.

Employee protection

Provisions exist in some jurisdictions protecting workers from being retrenched for a specified period after their injury/illness (see Table 5.2). Such surety will serve to encourage workers to undertake rehabilitation and return to work.

Table 5.2 Provisions for protection of injured/ill workers from dismissal*

	<i>New South Wales</i>	<i>Queensland</i>	<i>South Australia</i>
<i>Act</i>	Industrial Arbitration Act	Industrial Relations Act 1990	Workers' Compensation and Rehabilitation Act
<i>Provision</i>	26 weeks	3 months	28 days notice

* WA, Tasmania, Victoria, Comcare, NT and ACT do not have such provisions.

Source: Relevant workers' compensation authorities

However, the Labour Council of NSW (Sub 36) expressed concern that employers may be avoiding rehabilitation by terminating the employee immediately after the 26 week protection period.

The SA Chamber of Commerce and Industry argued that legislation preventing workers from being sacked because of compensation claims has acted as their best form of job security legislation, especially in periods of recession and restructuring. They argued (Sub 51, p.18) that:

There are instances where employees have not put in claims until after their employment has been terminated and employers have been forced to re-employ at a subsequent time notwithstanding that they have had to terminate other employees in order to do so.

The Commission recommends that all jurisdictions place legislative obligations on employers to take responsibility for the rehabilitation of their injured/ill workers. Employers should also be required to provide a job for an injured or ill worker to return to — to be kept open for a period of up to twelve months.

It is the Commission's expectation that this recommendation will operate in a similar way as maternity leave operates now. Most awards contain a provision for maternity leave which requires an employer to provide 52 weeks unpaid leave. In the case of maternity leave, employers usually hire replacements on a temporary basis with the understanding that once the employee returns from her maternity leave the position is to be vacated. It could be expected that an

employer could hire someone temporarily while the worker recovers, with the understanding that once the worker is fit to return the position will be vacated.

The Commission recognises that this recommendation may pose problems for small employers, however it is expected that employer 'co-operatives' could develop to allow small employers to fulfil this obligation.

The Commission found that having to retain a job for an injured or ill worker and advice, education and support from the occupational health and safety authority (and as a last resort, the threat of prosecution for breaching regulations) may also provide more of a preventive incentive to small employers than varying workers' compensation insurance premiums.

Re-employment and 'second-injury' schemes

Formerly injured or ill workers often encounter difficulties finding an employer willing to take them on after they have been on 'compo'. The Workers' Compensation and Rehabilitation Commission (WA) commented (Sub 44, p.15) that:

Based on calls received by the Department's information line, if an employer is given the choice of 2 workers, one with a 'compensation history' and the other without, the employer will invariably choose the latter. More and more employers therefore appear to be using 'compensation history' as a screening device.

Existing anti-discrimination legislation prohibits employers from discriminating against applicants on the basis of their compensation history or previous injuries.

The Commonwealth's Disability Discrimination Act was passed came into force on 1 March 1993. It makes discrimination on the basis of disability unlawful in a number of areas, including employment. The Act requires that a person's disability should only be taken into account where it is relevant to do so, this may mean making adjustments to accommodate special needs. The Act does not require that a person with a disability be given a job which they cannot do, or for which they are not the most suitable person.

Financial incentives such as employment subsidies and 'second-injury' schemes exist in NSW, Victoria, SA and under Comcare (see Table 5.3). These programs are intended to protect employers against the costs associated with employing injured workers and recurrence of injury. Employment incentive schemes commonly offer wage subsidies and training allowances to compensate for the potential liabilities which may arise from hiring injured workers.

Table 5.3 Employment incentives and 'second-injury' schemes*

	<i>New South Wales</i>	<i>Victoria</i>	<i>South Australia</i>	<i>Comcare</i>
Employment incentive scheme	JobCover Placement	WISE	RISE	New Horizons
Administration	WorkCover	WorkCover	WorkCover	Different providers in each state
Provisions	Training allowance	Up front bonus, partial wage subsidy, six month bonus	Training allowance, wage subsidy	Full wage subsidy for 3-6 months, training allowances
'Second-injury' provision ^a	12 month exemption on premiums, protection from recurring injury	Indemnifies employers against costs for 12 months	Exempt from first weeks compensation payment and levy rate penalties	Indemnifies employers against costs

* WA, Tasmania, NT and the ACT do not currently operate these schemes. In Queensland, the Board covers the costs of second injuries.

a In some states, 'second-injury' provisions are incorporated into employment incentive schemes, while others operate separate schemes.

Source: Relevant workers' compensation authorities

'Second-injury' schemes compensate employers for the aggravation of a prior (or related) injury or illness while working for a new employer. Such schemes commonly subsidise workers' compensation premiums or exempt employers from further liability relating to aggravated or related injury.

The RISE scheme (SA) was established in 1991 to support employers in hiring injured and rehabilitated workers who cannot be provided with suitable work by their pre-injury employer. Under the scheme employers receive a wage subsidy or a training allowance. Since its inception in September 1991, the scheme has found work for 486 claimants.

The New Horizons program under Comcare is a re-skilling program for long-term claimants. The retraining program is conducted over 6-8 weeks during which job placements (work trials) are negotiated. This is usually with new employers and the employee is supported throughout the work trial period. The cost-benefit analysis projection for the first New Horizons program (covering 8 people) was:

- if one of the eight participants returns to employment within 9 months, a savings-to-cost ratio of 7: 1 will be achieved; while

- if all eight participants return to employment within 9 months, a saving-to-cost ratio of 57: 1 will be achieved (Sub 180, p.27).

The 'second-injury' scheme conducted by Comcare is an individually negotiated placement with a new employer for the purposes of graduated return to work, skill development and re-skilling of employees who cannot return to their pre-injury position with their former employer. The scheme allows for 12 weeks placement with no cost to the new employer, and covers the costs of any subsequent injury occurring during that time. Under the scheme, the original employer is required to continue to be liable for the earnings of the worker for the duration of the work trial.

The scheme provides an incentive for the new employer because all the costs of employment are covered. The injured worker is provided with an opportunity for graduated return, skill enhancement and is in a good position to compete for the job they occupy. The liable employer carries the costs associated with their inability to place the injured worker within their own business, while still meeting their rehabilitation responsibilities.

The Department of Employment, Education and Training also offers a range of labour market programs designed to help people begin or return to work. 'Second-injury' and employment-incentive schemes assist the Commonwealth Employment Service (CES) in coping with demand for its services.

In states without employment-incentive or 'second-injury' schemes there is some concern that there is a transfer of cost and responsibility of servicing workers' compensation recipients or past recipients to the CES. There is also some concern that extra demand is placed on the CES in states where workers with compensable injuries or illnesses can be legally terminated, resulting in increased retraining costs and reduced job prospects.

The Department of Prime Minister and Cabinet (Sub 180, p.26) concluded:

The experience of Comcare Australia in operating its New Horizons project and the experience of the Department of Employment, Education and Training in delivering programs designed to help people return to work (including some workers' compensation recipients) suggests that re-employment and 'second-injury' schemes play a crucial role.

<p>The Commission found that 'second-injury' schemes can be an important means of reintegrating workers into the workforce.</p>

5.2.3 Incentives for rehabilitation providers

Incentives for overservicing by rehabilitation and treatment providers are affected by the degree of control over the provision of services to workers and

payment systems. Rising trends in medical costs have increased concerns over allegations of overservicing.

Examples of controls over the quality and cost of services by rehabilitation and treatment providers are:

- accreditation of rehabilitation providers;
- restriction on choice of practitioner; and
- payment systems for services incorporating mechanisms for detecting fraud/overservicing.

Accreditation

Accreditation of rehabilitation providers is a means for ensuring that services are of an adequate standard. It also assists workers and employers to identify treatment providers who have adequate qualifications and experience in the treatment of workers.

Accreditation standards differ greatly among jurisdictions. For instance, the Comcare system requires providers to achieve return-to-work rates of 85 per cent, whereas in Queensland there are no such requirements.

The Tasmanian Association of Vocational Rehabilitation Providers (Sub 196) argued that linking accreditation to return-to-work rates is inappropriate and creates the wrong incentives. They argued that if accreditation is tied to the proportion of workers returned to work, rehabilitation providers would accept only 'easy cases', thus denying severely injured or ill workers quality occupational rehabilitation. However, accreditation and funding can be tied to particular types of workers or seriousness of injury or illness. Ideally service providers should be reimbursed on the basis of outcomes or output. The South Australian Employers' Federation (Sub 30) argued that rehabilitation providers in that State are required to comply with poorly defined performance standards.

The Employers' Federation of NSW stated (Sub 98, p.6) that:

With regard to rehabilitation experts, there is a need for careful consideration to be given to an accreditation system as well as monitoring of results to enable positive changes to be made in the absence of successful rehabilitation.

As mentioned earlier, Worksafe Australia has established the RTG to review, among other things, accreditation standards for occupational rehabilitation providers with a view to national consistency. It is currently in the process of producing a national guidance note on occupational rehabilitation.

Choice of provider

The ACTU (Sub 45) supported the right of workers to choose their treating practitioner. The Labor Council of NSW (Sub 36) argued that, where fund managers have a role as a rehabilitation provider, this may introduce a degree of bias in the service provided. Furthermore, Mrs MacIntosh an injured worker, argued (Sub 108, p.4) that:

The corporate interests of the insurance companies are not consistent with comprehensive rehabilitation programs... Doctors are able to be coerced into writing medico-legal reports which suit whoever is paying.

The Labour Council of NSW (Sub 36, p.15) suggested that:

... the system has failed to ensure that providers are independent and unbiased in their service to injured workers. The union movement are extremely concerned with regard to the concept of insurers who are Fund Managers under the Workers Compensation Act also having a Rehabilitation Provider role. There is inevitably a bias in the service provided, as would a provider service run by an employer.

On the other hand, there is concern that insurers do not have an appropriate level of control over the cost and quantity of services. Insurers argue that they should be able to exert some control by nominating which practitioners are able to provide services.

<p>The Commission found that rehabilitation is most successful when employers and employees agree on programs and treatment providers.</p>
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Payment systems

A distinction has to be made between payment for a rehabilitation program and payments to medical practitioners. A rehabilitation program can encompass more than just medical treatment, a medical practitioner may be treating an injured worker but may not be a part of the rehabilitation process. There are therefore two issues that need to be dealt with. The first is payment for medical services and the second is payment for occupational rehabilitation services.

In most jurisdictions, medical practitioners are able to charge a loading on services provided under workers' compensation arrangements. Generally fees for all services are higher than the Commonwealth Medical Benefit Schedule (CMBS) and are mostly linked to (or based on) the Australian Medical Association (AMA) schedule. Fee levels vary greatly from jurisdiction to jurisdiction. Fee levels for the same treatment also vary depending on whether the treatment is under the Medicare or the workers' compensation systems. There appears to be little justification for these variations (refer to Appendix D, Section D4.3).

In its submission addressing the Commission's Draft Report, the AMA (Sub 202) disagreed that there is no justification for current loadings on medical fees for workers' compensation patients. It argued that AMA-determined fees were the most appropriate because they reflected the costs involved in providing quality and focused services. The AMA further stated that the Commission's suggestion, in the Draft Report, that fees be based on the CMBS was inappropriate because the CMBS reflected the level of rebates that the Government was prepared to pay and not the costs of providing quality services.

However, it was not the Commission's intention to argue that fees charged for medical services provided to workers' compensation cases be based on CMBS levels. Instead the Commission concluded that if workers' compensation schemes were to meet the desired objectives of economic efficiency, provider equity and worker equity there could be a case for the development of a uniform national medical fee schedule for treating workers' compensation patients. One approach could be to negotiate a uniform national schedule based on current market rates, which would normally lie somewhere between CMBS and AMA rates for most services.

Within a rehabilitation program it will be necessary to use the services of a number of providers. As per medical services, the payment rates and method of payment for other providers involved in the rehabilitation process vary between jurisdictions, with a tendency to adopt 'fee for service'. Payments systems for treatment providers which are based on 'fee for service' create obvious incentives for overservicing and continuation of treatment. The Chamber of Commerce and Industry of SA claimed that it has received many complaints regarding charges by rehabilitation providers, and suggested (Sub 51, p.6) that:

... these complaints would be even more numerous if employers were aware of the costs of rehabilitation.

Furthermore, the Chamber argued that remuneration of certified registered practitioners based on hourly rates does not encourage providers to return workers to work quickly.

<p>The Commission draws attention to the significantly different payment rates under Medicare and the various workers' compensation schemes for the same medical treatment.</p>

Alternative payment structures, based on the expected total costs of rehabilitation treatment per case within an agreed rehabilitation program, may be preferable as a means of increasing incentives for the efficient delivery of services. This is consistent with the approach adopted in a recent Victorian 'case-payment' trial relating to the provision of public hospital services to workers' compensation payments (see Appendix D).

The AMA (Sub 202) argued that a global fee to cover the whole of a worker's medical costs could act as an incentive to underservice as the practitioner receives the same remuneration regardless of the work performed. This, however, will not be the case if an assessment of a worker is made and an appropriate rehabilitation program developed with detailed costings. The program might provide, for example, for 10 visits to a physiotherapist, 7 visits to an occupational therapist, 3 to a general practitioner and so on. The total cost of the program would be based on the average cost of the services included. Any variation to the program should be subject to the agreement of the insurer.

5.2.4 Incentives for insurers

Insurers are motivated by the costs they would otherwise bear if injured/ill workers are not rehabilitated and do not return to work. The insurer has an important role to play in the rehabilitation process. As discussed in Section 5.3.2, early referral is crucial to the success of rehabilitation and in helping to reduce the costs of work-related injury and illness. As stated by WorkCover NSW (Sub 205, p.17):

WorkCover is currently working with its fund managers to ensure that they have established effective systems aimed at minimising the delay between injury and commencement of rehabilitation, unless inappropriate. In general, reducing delay is crucial because lateness results in physical and psychological implications for the injured person which are difficult to overcome.

5.3 Components of effective rehabilitation

Submissions and other evidence identified factors necessary for effective rehabilitation. The Commission considers the most important factors to be:

- maintenance of constructive employee/employer relations;
- early referral;
- workplace-based rehabilitation programs;
- provision of alternative duties and periodic review; and
- retraining.

Other factors influencing the effectiveness of rehabilitation include:

- the effectiveness and quality of administration;
- injured workers' support groups;
- provisions for rehabilitation co-ordinators;
- education and research on rehabilitation; and

- a link back to prevention.

5.3.1 Employer/employee relations

Submissions generally indicated widespread support for the direct involvement of employers in the rehabilitation process and for enhancing the effectiveness of ongoing association with the workplace to achieve rehabilitation and return-to-work objectives. Employees should also equally willing to participate in the rehabilitation process and make reasonable attempts to return to work.

In a Department of Social Security commissioned consultancy, Ford (1992) found that successful rehabilitation:

... requires first of all a commitment by the injured worker and his or her employer and, if this commitment does not exist, no amount of formal rehabilitation will successfully cement the bond... Where the possibility of co-operation does exist, the quality of the surrounding system will make or break the success of the rehabilitation program (paragraphs 11.20-22).

Employers should remain in close contact with injured or ill workers. Just as an effective safety culture within firms is important to workplace safety and accident prevention, so a 'culture of care' is important to rehabilitation. Blackett (1991, p.226) has argued that:

... success in reducing claims payments only comes about through the development of a culture of care - when all managers, but especially those with direct responsibility for operations, take an active interest in the welfare of workers and pursue timely interventions that break the otherwise ineluctable escalation of health care costs. Managers are the ones who need to visit seriously injured workers in hospital, to see that effective rehabilitation is commenced, to create an environment for an early return to work. In a large organisation this cannot be done effectively by a central claims manager. Unless people at all levels of the organisation are committed to proactive risk and claims management, claims costs may well blow out.

Some firms have in place 'support networks' which seek to aid injured/ill workers and keep them in touch with the workplace during their absence. For example, fellow employees of Alcoa supported injured workers by helping them with part of their household and other duties (Self-Insurers of WA, Transcript, p.590).

The Commission found that rehabilitation is most effective, and costs are significantly reduced, where employers take responsibility for maintaining both contact with and support for employees suffering work-related injury or illness.

5.3.2 Early referral

Delays in starting rehabilitation often reduce effectiveness of treatment and speedy return to work. Strautins and Hall (1989) found that the shorter the time between injury and referral, the greater the likelihood of the injured worker returning to work, and the less time taken to return.

Evidence from NSW, for example (Chinnery and Kable 1993), suggested that 89 per cent of those workers who are referred to rehabilitation within one month their injury return to work, whereas only 46 per cent of workers referred after 12 months return to work.

The ACM stated (Sub 29, p.10) that:

Rapid return to work is the hallmark of success of any rehabilitation program. Research indicates that if a worker is not accommodated in the workforce within six weeks of injury then the success of rehabilitation declines markedly.

Figure 5.2 and Table 5.4 show data for two insurers operating in NSW. They illustrate the importance of early referral in ensuring a successful return to work. Table 5.4 further suggests that the type of injury is also important. For example insurer 1 had a 100 per cent return-to-work rate for cases referred to rehabilitation within two months of the injury. Of those cases, 50 per cent were sprains, 25 per cent were disc lesions and 25 per cent were crushings.

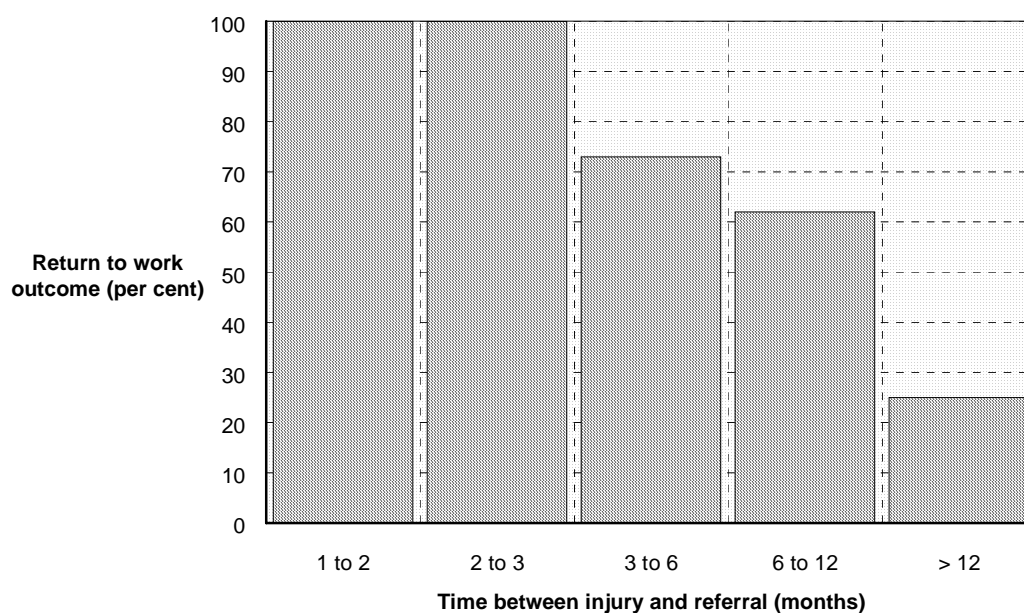
Generally, medical rehabilitation should commence once the injury or illness has stabilised. There is a need to weigh waiting too long to refer a patient against the possibility that rehabilitation will not be effective because treatment commences before the injury has stabilised.

Occupational rehabilitation should commence as soon as is practicable, for example by the employer and employee agreeing on a suitable rehabilitation program, and if necessary on a graduated return to work.

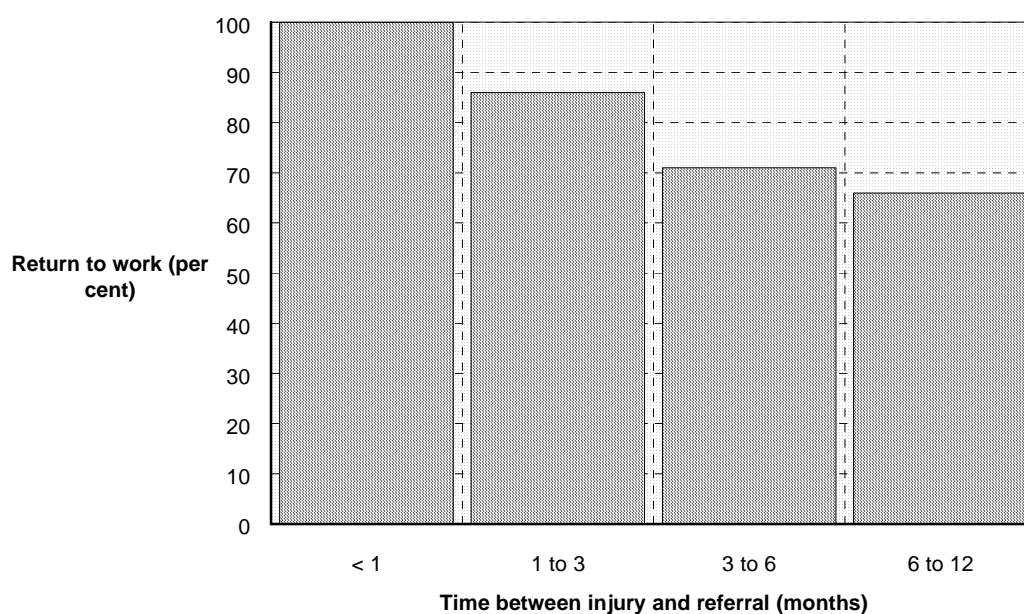
<p>The Commission found that early referral is important for the effective treatment and speedy return to work of injured/ill workers.</p>
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Figure 5.2 Relationship between delay in rehabilitation referral and return to work

Insurer 1



Insurer 2



Source: IRS Total Injury Management

Table 5.4 Percentage of injuries by lapsed time between injury and referral against return to work outcomes

<i>Lapsed time between injury and referral</i>	<i>Return to work rate (per cent)</i>	<i>Of those who returned to work</i>	<i>Of those who did not return to work</i>
<i>Insurer 1</i>			
1-2 months	100	50% were sprains 25% were disc lesions 25% were crushings	na
2-3 months	100	50% were sprains and strains 50% were disc lesions	na
3-6 months	73	10% were multiple injuries 90% were sprains and strains	33% were strains and sprains 33% were fractures 33% disc lesions
6-12 months	62	66% were sprains and strains 33% were stress/anxiety	100% were sprains and strains
> 1 year	25	50% were sprains and strains 20% were tenosynovitis 15% were stress/anxiety 15% were disc lesions	75% were sprains and strains 15% were fractures 10% were tenosynovitis
<i>Insurer 2</i>			
<1 month	100	100% were sprains and strains	na
1-3 months	86	30% were lacerations/crushings 50% were sprains and strains 20% were arthritic	100% were disc lesions
3-6 months	71	66% were fractures 33% were sprain and strain	60 % were sprains and strains 20% were fractures 20% were stress/anxiety
6-12 months	66	33% were disc lesions 66% were sprains and strains	33% were crushings/lacerations 66% were sprains and strains
>1 year	25	50% were amputations 50% were sprains and strains	70% were sprains and strains 20% were stress/anxiety 10% were lacerations/crushings

n.a. Not applicable.

Source: IRS Total Injury Management

5.3.3 Workplace-based rehabilitation

Rehabilitation is often most effective when it takes place within the workplace, and incorporates some of the workers' normal duties.

Workers' Compensation Development submitted (Sub 31, p.44) that:

Research consistently shows modified jobs and alternative work with the same employer returns injured employees to gainful employment quicker, better and at less cost. Conversely, formal schooling plans are the longest, least successful and more expensive programs. The message from these findings is clear; a substantially similar job in a substantially similar work environment, frequently with substantially similar co-workers, offers the greatest opportunity of improved results and contain costs in rehabilitation.

The Australian College of Occupational Medicine (ACOM 1987) suggested that employers should seek to do everything possible within the workplace to rehabilitate the injured worker, drawing on external medical support and rehabilitation services as needed.

Resthaven (Sub 24) also argued for the provision of in-house rehabilitation as a means of strengthening employer/employee links and reducing delays in starting the process.

There is a role for supplementary rehabilitation services for seriously injured/ill workers where workplaces may not be in a position to provide appropriate treatment facilities. For example, it may be difficult to provide 'light duties' for a construction worker who has injured an arm, because of the nature of his/her work. The South Brisbane Rehabilitation Centre provides comprehensive work assessments and work-conditioning programs aimed at restoring workers to their maximum functional capacity. These programs are short-term and with centre and workplace-based components. Victoria and NSW are also moving to establish rehabilitation centres for seriously injured/ill workers.

Hopkins (Sub 4) raised concerns that centres may detract from the rehabilitation effort, for example by not permitting the injured worker to return to work until fully fit. It is important for these centres to be integrated with workplace-based rehabilitation programs to ensure that the worker does not become detached from the workplace.

Preferred Care Networks (Sub 52) emphasised the role of clinical case-management services in facilitating rehabilitation. Case managers co-ordinate medical treatment, rehabilitation and, ultimately the return-to-work process on behalf of the employer. It suggested that clinical case-management may achieve better results due to its cost-effectiveness and use of specialised knowledge of occupational injuries and rehabilitation requirements.

However, the cost of case-management services may limit the overall benefits to small firms. Larger firms are likely to be in a better position to benefit from such services or, alternatively, may be better off employing their own in-house case manager. On the other hand, smaller firms may be better able to manage their own rehabilitation within the workplace.

The Commission found that workplace-based rehabilitation appears to be cost-effective, but there is a need to ensure the availability of 'quality' support services.

5.3.4 Alternative duties and periodic review

Submissions emphasised the need to provide workers with alternative tasks or modified 'light duties' at the workplace as part of the rehabilitation process. The Communication Workers Union (Sub 60, p.10) claimed that:

The most common rehabilitation plans have often come to exist [consist] only of reduced hours of work involving exactly the same duties as those performed by the claimant when the injury was incurred. While graduated return to usual duties may be appropriate rehabilitation in some cases, it is almost certainly not appropriate for the overwhelming number of cases for which it is used at present.

It has been suggested (ACOM 1987, and Roberts, Wood and Thomas 1985) that alternative tasks need to be graded in terms of a number of factors, including:

- the nature of the injured/ill worker's condition;
- physical demands on the worker's abilities, vigilance and skill;
- improvements needed in the working environment and the organisation of work; and
- regular review of progress in the rehabilitation program and modification of appropriate tasks.

The Commission found that the provision of appropriate duties for injured/ill workers is important for their effective rehabilitation and reintegration into the workplace. Furthermore, it is important for such duties to be periodically reviewed to facilitate progress towards complete rehabilitation of the injured/ill worker.

Particular problems exist with the provision of rehabilitation and alternative duties in small firms. 'Co-operatives' or employer networks may be an effective means of facilitating rehabilitation through the provision of alternative duties, and the direct placement of workers with other employers (see Section 5.2.2).

5.3.5 Retraining

Participants identified retraining as being an important part of the rehabilitation process, particularly where a worker is unable to return to his/her previous job — either because the job no longer exists or the worker is no longer able to perform the tasks involved.

'Second-injury' schemes encourage on-the-job training as employers are entitled to wage subsidies. There will be circumstances, however, where on-the-job training is inappropriate and more extensive retraining is necessary.

Where retraining is available it usually takes the form of Technical and Further Education (TAFE) courses. For example, the Tasmanian Government Insurance Office currently funds a number of such courses. Workers remain on benefits until they find a job or reach the statutory limit. In NSW, partially incapacitated workers who are unemployed are entitled to a number of allowances, including a Job Search Allowance (paid for up to 52 weeks), an Approved Rehabilitation Training Benefit (paid for up to 44 weeks) and a Post-Training Job Search Benefit (paid for up to 4 weeks while seeking suitable employment after completion of 'approved rehabilitation' retraining).

The Labour Council NSW (Sub 36) criticised these provisions, claiming that they are too confusing and that interpretations of them by insurance companies vary widely. It argued that the definition of 'approved rehabilitation' has been substantially narrowed and excludes on-the-job training as well as basic skills training such as numeracy and literacy). This means that, unless workers are undergoing a retraining course (under TAFE or other relevant institution), they are eligible only for statutory compensation while looking for a job.

A number of participants argued that not enough resources are committed to the retraining of workers. The Trades and Labour Council SA (Transcript p.1667) argued that few of the schemes look at retraining, possibly because they do not see it as being part of their traditional role. The Communication Workers Union (Sub 60) noted that rehabilitation programs invariably ignore options such as reskilling or retraining which could broaden the claimant's job options.

5.3.5 Other factors

Effective claims administration

The effective administration of claims is an essential element of timely and effective rehabilitation.

The Labour Council of NSW (Sub 36) stated that delays in rehabilitation exist for two reasons:

- delays in accepting claims; and
- delays in dispute resolution.

ACOM (1987) emphasised the need for a rapid acceptance of compensation claims. The Communication Workers Union (Sub 60, p.9) submitted that:

Rehabilitation is not being addressed until the claim is accepted further delaying the rehabilitation process.

Various schemes have deadlines for the acceptance of claims. For example, WorkCover NSW is required to accept claims within 21 days, while in WA claims that are unresolved after 14 days are deemed to be in dispute.

Comcare does not have explicit time limits on decisions to accept or reject claims. The Commonwealth Bank Officers Association (Sub 8) suggested that the lack of time limits on Comcare decision-making accentuates delays in rehabilitation and return to work. However, Comcare has claimed that, in 1991–92 it processed 86 per cent of simple claims within 2 working days and 89 per cent of all new claims within 10 working days.

Delays in dispute resolution may also have a detrimental impact on the timeliness of referral. A non-adversarial and simple system of dispute resolution is important to facilitate the earliest possible referral (see Section 7.2.7).

Injured workers' support groups

It is clear to the Commission from a wide range of discussions with injured workers that many feel isolated, alienated, frustrated and powerless. Injured workers' groups clearly play an important role in acting as a point of contact and support for many workers — particularly (but not exclusively) those who felt they had been abandoned. Clearly, avoiding these outcomes will enhance worker morale, and in doing so doing improve return-to-work rates.

The Northern Region Injured Workers' Support Group argued that limited financial grants and funding acts as a severe resource constraint. They suggested (Sub 104, p.10) that:

Given the lack of resources support groups are not able to achieve the goal of assisting all injured workers that are in dire straits. A significant number of long-term injured workers in need of moral and clinical support on a regular basis tend to miss out. Their chances of being rehabilitated are diminished and the burden falls on the community and families.

The Commission draws attention to the important role that injured workers' groups can play, both in supporting workers and in generating and disseminating information. This suggests a case for some funding for these groups, through premiums, to enable them to make a greater contribution to workplace safety awareness and rehabilitation.

Rehabilitation co-ordinators

Some jurisdictions — for example NSW, Comcare and Queensland — require use of rehabilitation co-ordinators. Rehabilitation co-ordinators are employees, nominated by the employer, who have a facilitating role in the rehabilitation process. They are required to liaise with the worker, the employer, and treating doctors and other service providers. They also provide a focal point for contact and play a role in the appraisal of suitable 'light duties' and employment in the workplace.

The Labor Council of NSW (Sub 36) suggested that insufficient training of rehabilitation co-ordinators diminished their effectiveness (and that of the rehabilitation program).

The Shop Distributive and Allied Employees' Association emphasised the importance of co-ordinators in allocating suitable duties to workers, based on medical advice and any disabilities. They suggested (Sub 68, p.12) that:

Training of all workplace based co-ordinators must be compulsory and provided by the relevant authorities as opposed to the employers should they wish to do so.

The Hunter Action Group Against WorkCover (Sub 34) recommended mandatory training and accreditation of workplace rehabilitation co-ordinators, reviewable every twelve months.

In addition, occupational health and safety (OHS) committees may be a suitable forum for the review of occupational rehabilitation progress and assessment of suitable duties. Rehabilitation co-ordinators could be represented on these committees. Linking rehabilitation with OHS would also facilitate the identification and reduction of workplace hazards.

Education and research

Submissions argued that there is an insufficient emphasis on employer education. The Queensland Workers' Compensation Board has developed workplace rehabilitation programs in conjunction with TAFE colleges, which are available at no cost to employers. WorkCover NSW has also made a commitment to introduce similar programs. The Commonwealth Bank Officers

Association (Sub 8) advocated that there should be compulsory education programs on rehabilitation for both supervisors and workers.

Another issue relates to whether doctors are receiving the appropriate level of training, or have adequate knowledge of appropriate treatment of occupational injuries or illnesses. The Australasian Faculty of Occupational Medicine (AFOM, formerly ACOM) (Transcript, p.856) expressed concern that it was sometimes difficult for a doctor to judge a worker's ability to perform certain tasks in the workplace. AFOM stated that doctors are unlikely to make functional assessments, because it may be considered an inappropriate use of a doctor's time. Instead, such assessment may be better performed by other specialists in a team approach to the treatment of injury. There is a strong emphasis on education and training in Scandinavian countries. Occupational health physicians and safety officers in Finland receive comprehensive and continuing training through The Institute of Occupational Health.

AFOM (Transcript, p.857) also argued that compensation authorities should encourage research and development of protocols for the treatment of common injuries such as crook backs and shoulders. Protocol development has already been undertaken in the USA and could be used as a starting point for the development of protocols for the treatment of similar injuries in Australia.

Link to prevention

A number of participants, for example the Automotive Metals and Engineering Union (Sub 158) and IRS Total Injury Management (Sub 166) stressed the importance of the link between rehabilitation and prevention. For example, the IRS approach has as a key feature a 'feedback loop' from rehabilitation to prevention to ensure continuous improvement of the injury management process. For a 'feedback loop' to be effective it must:

- result in a modification of jobs to be completed prior to the worker returning on a graduated program to avoid either a 'second-injury' or an aggravation of the existing injury;
- have any modifications done in consultation with employers, employees (and their health and safety representatives) and the rehabilitation provider; and
- have the process that caused the injury inspected, and rectification/modification of the task that caused the injury undertaken where necessary.

The occurrence of any injury or illness and the need for rehabilitation is an opportunity to review and improve OHS practices. Rehabilitation providers, in conjunction with risk-management experts, can advise employers on how work

practices and processes can be changed to reduce the likelihood that an accident or an illness would be repeated.

6 INTERACTION WITH OTHER GOVERNMENT PROGRAMS AND SUPERANNUATION

Often, those suffering work-related injury or illness turn to forms of support (such as the social security system and Medicare) other than — and occasionally as well as — workers' compensation. In the process, costs are shifted to and from government programs and superannuation schemes and some people are doubly compensated. Where costs are shifted, overall costs remain the same — but those whose responsibility it is to pay fail to do so. In the process, incentives to prevent work-related injuries and illnesses and encourage rehabilitation and return to work are blunted. Where 'double dipping' occurs, more is paid than is justified. While the extent of the problem is unknown, and there are no easy solutions, the Commission's recommendations aim to significantly improve the situation.

There are significant interactions between workers' compensation arrangements and:

- the health system;
- the social security system;
- the taxation system;
- transport-accident schemes; and
- superannuation arrangements.

Interactions also occur with other government programs, such as labour-market schemes run by the Commonwealth.

These interactions lead to costs being transferred between programs (and levels of government) which are sometimes unintended but are nevertheless unacceptable. When programs are designed in isolation from one another — usually with different objectives and eligibility rules — integration will never be perfect. This means that, for example, workers may be compensated more than once for the same injury or illness. In the process, incentives for prevention, rehabilitation and return to work are compromised. The end result is that resources are misallocated because government programs are not well targeted.

In spite of the considerable resources devoted to the various programs, there is little documented evidence on the nature and extent of interactions and the cost-shifting involved. This is surprising, given the level of concern surrounding this issue. Improved information is a priority.

Often the result of interaction is to shift the costs of work-related injury and illness away from those who should bear them. Cost-shifting takes a variety of forms — for example, between employers and injured/ill workers and between employers and taxpayers. Shifting can occur in both directions, as when weekend sporting injuries manifest themselves at work on Monday and are claimed as workers' compensation (Smith 1989). As another example, costs are shifted from workers' compensation to the community when workers have benefits terminated (due to a dollar or time limit) and are left without a job.

To aid the discussion, the Commission has attempted on the basis of sketchy information to quantify the dollar amounts that could be involved with various forms of cost-shifting. These rough estimates are intended to provide a tentative guide to the possible order of magnitudes involved.

As a general principle, where cost-shifting is identified action should be taken to prevent it. This principle holds regardless of whether costs are being shifted from employers to individuals or the community, or the other way.

6.1 The health system

Workers' compensation claimants are usually consumers of health services, since health-care providers have an obvious role in treatment and rehabilitation of injured and ill workers.¹ Health-care workers are also involved in research into the causes and treatment of work-related injury and illness.

6.1.1 Interaction with Medicare

To ensure appropriate incentives, workers' compensation schemes should bear the full cost of using medical services needed by injured or ill workers. Only

¹ Brennan and Deeble (1993 p.25) found that – excluding Commonwealth employees and amounts contained in lump-sum settlements – State workers' compensation scheme payments for medical services totalled \$458 million in 1989–90.

At the state level, the Workers' Compensation and Rehabilitation Commission of WA (Sub 44, p.1) indicated that in 1991–92 payments for medical services for compensation claims amounted to \$51.74 million of total claim payments of \$253.6 million (approximately 20 per cent).

then can premiums accurately reflect the true cost of work-related injury and illness.

The WorkCover Authority of NSW reflected the Commission's concerns when it stated (WorkCover NSW Sub 92, p.35) that:

It is appropriate that workers' compensation systems meet the full hospital and medical costs of injured workers. This does not appear to occur in some state systems. On the other hand, schemes such as WorkCover should only be responsible for the real cost of treatment and should not provide a subsidy for other users of the health care system.

Similarly, the State Electricity Commission of Victoria (SECV Sub 16, p.9) argued that:

Medical expenses that are related to a work-related injury should be claimed under compensation, thus affecting the employer, rather than Medicare which spreads the burden across the broader community.

Where costs are shifted onto Medicare, they are borne by the community rather than the workers' compensation scheme. Employers benefit to the extent that premiums are lower than if the scheme had borne the full cost of medical care. Employers therefore face a reduced incentive to lower the incidence and severity of work-related injury and illness. Rehabilitation and return-to-work incentives will also be reduced.

Cost-shifting to Medicare

Health costs associated with a work-related injury or illness may be passed onto Medicare in a number of ways. Examples include where schemes limit coverage for medical costs, medical excesses apply, lump-sums are paid for future health care, there are long latency periods or compensation is uncertain. Where such requirements are in place, additional expenditures will be borne either by the community (via Medicare) or by the individual.

Limited coverage

Some medical conditions may be limited or excluded entirely from workers' compensation coverage. In addition, in some jurisdictions time or dollar limits may apply to the payment of medical expenses.² Others limit coverage of specific conditions. SA, for example, has now limited access to compensation for stress claims. Medical costs associated with part of these claims will therefore tend to be shared between Medicare or the individual. Such a

² For example, in WA the prescribed maximum dollar limit is \$26 097.60 — although workers can apply for additional support if they can prove social and financial need (\$50 000 maximum). In Victoria, payment of medical expenses generally ceases one year after an injured or ill worker returns to work.

restriction on coverage can result in a significant transfer of costs. In 1991–92, stress claims accounted for about 5 per cent of total workers' compensation payments in SA (WorkCover SA 1992, p.26). Assuming stress claims also generate about 5 per cent of SA workers' compensation medical costs (some \$58 million in 1991–92) — and without trying to differentiate the costs of treatment for different injuries or illnesses — limiting access could transfer responsibility for up to \$3 million onto Medicare.

In addition, workers not covered by statutory workers' compensation (eg the self employed) may have their work-related medical costs borne by Medicare (or private insurance). In these circumstances, medical costs for work-related injury or illness are shared between the individual, their insurance company (if they are privately insured) and the community.

Employer excesses

In some states, scheme provisions which require the employer to meet initial medical costs can also lead to cost-shifting. In Victoria, employers are required to meet the first \$378 of medical costs associated with a compensation claim. In such cases, the employer has an incentive to encourage the injured or ill worker not to claim compensation, and have the medical cost borne by Medicare. Injured workers support groups provided anecdotal evidence of this practice.

These excesses are, by their nature, not recorded by the Victorian WorkCover Authority (WorkCover Victoria); nor does the Department of Human Services and Health (DHS) record them. It is thus not possible to assess their extent, nor measure them with accuracy. In 1991–92 in Victoria, , there were some 30 600 workers' compensation claims involving at least 5 days off work. Assuming all these claims were sufficiently serious to incur the \$378 excess, the potential existed for up to \$12 million in medical expenses to be shifted to Medicare in that year alone.³

Lump-sum payments

Brennan and Deeble (1993) argued that lump-sum payments for medical care could also lead to cost-shifting. Where a lump-sum is inadequate to cover the cost of future care or is spent on other things, work-related health costs will tend to fall to Medicare. Medicare is unable to identify accurately such cost-shifting. Hence, the extent of these transfers cannot be quantified with any certainty. Brennan and Deeble (pp. 28–9), after considering the results of a study of 216 people who were awarded lump-sums, argued that:

³ Calculated as 30 600 times \$378. *Source:* Industry Commission Workers' Compensation Survey A.

... the major area of concern is in the interaction of systems that deliver lump-sum benefits and Medicare. ... it was found that eight years after receiving compensation about half of those still alive required medical treatment for their injuries in the preceding year, and nearly 21 per cent had ten or more accident related visits to a doctor or physiotherapist.

Long latency/gradual onset problems

The costs of work-related illness characterised by long latency can also fall on Medicare. In this regard, WorkCover NSW (Sub 92, p.4) highlighted the example of work-related cancer:

Worksafe estimates that between 550 and 2200 Australians die each year from cancers caused by exposure to carcinogenic substances used at work. However, because of the long term latency of cancer, and the lack of documentation regarding the relationship between cancer and workplace exposure to hazardous substances, the costs of cancer are usually borne by the public health system rather than through workers' compensation premiums.

Quinlan and Bohle (1992 p.145) refer to estimates that at least 20 000 unrecognised cases of occupational disease caused by exposure to hazardous substances in the workplace arise in Australia each year. These cases, not currently included in workers' compensation, represent an additional 14 per cent on top of the 140 000 claims for 5 days or more received by workers' compensation authorities in 1991–92.⁴ In that year, workers' compensation claims generated approximately \$500 million in medical and related expenses for all jurisdictions (except the Commonwealth and ACT).⁵ Assuming these extra cases generated commensurate medical costs – which arguably should have been more properly borne by workers' compensation – this means that some \$70 million in medical costs (equal to 14 per cent of \$500 million) was transferred to the community.

Uncertain compensation

Some workers may seek payment of medical expenses by Medicare if they are either uncertain whether to claim compensation or if any claim will succeed. If compensation is forthcoming, the patient is required to reimburse Medicare. This may not always happen, however, but does not seem to result in significant cost-shifting. Brennan and Deeble (1993, p.33) found that for all state workers' compensation and transport accident schemes:

The sums involved are relatively small however. In the short term, while backlogs in recovery are overcome, gross recoveries might reach \$4–5 million annually, but in the

⁴ Source: Industry Commission Workers' Compensation Survey A.

⁵ Source: Industry Commission Workers' Compensation Survey A.

longer period \$2–3 million per year would be a reasonable expectation if no other changes followed.

Medicare administrators have difficulties in countering such practices. Medicare claim forms require self-identification of workers' compensation cases, but policing is difficult.

Cost-shifting from Medicare

Cost-shifting can go the other way. Measuring the extent of shifting from Medicare onto workers' compensation is also difficult.⁶ Queensland Employer Organisations argued (Sub 182, p.7) that:

Anecdotal evidence suggests that a wide variety of social injuries are collected in the workers' compensation net, and it is obvious that many congenital or lifestyle related injuries/illnesses are in full or in part compensated through the workers' compensation system.

WorkCover Victoria, in its first seven months of operation, met costs for medical and like services of approximately \$80 million (WorkCover 1993 p.28). Assuming, based on Smith's (1989) estimates, 2 per cent of these payments were for non-work-related injuries, claimed as workers' compensation cases, then approximately \$1.6 million of medical costs were shifted from the community onto employers over this period. Based on total payments of approximately \$500 million in 1991–92, of the order of \$10 million in medical costs were shifted onto employers in aggregate.

Injuries and illnesses attributable to multiple causes provide the opportunity to shift costs onto workers' compensation schemes. In addition, anecdotal evidence was received of sporting injuries being claimed as work-related and workers' compensation being received for them. The SA Government argued (Sub 120, p.9) that:

A number of injuries and diseases covered by workers' compensation relate to degeneration, environmental or social causation factors which would otherwise be supported via the Commonwealth social security or medical health budgets. ... It is not right, however, that employers should bear this liability in total.

⁶ Smith (1989) examined the types and timing of injuries reported at work in the USA. He found a greater proportion of injuries which could easily be concealed, such as strains and sprains, were reported on Monday and days following holidays. Smith (p.126) concluded that in 1978–79, workers' compensation claims for 4 per cent of sprains and strains and 1 per cent of fractures represented off-the-job injuries. These cases accounted for 2 per cent of the total compensation paid for work related cuts, lacerations, fractures, sprains and strains.

Net cost-shifting

The Department of the Prime Minister and Cabinet (PM&C Sub 180, pp. 31–2) noted the two-way nature of health-care cost-shifting, and the difficulties in quantifying the size of the transfers:

States and the Commonwealth have each alleged that the other has benefited from cost-shifting in this area. ... This conflict is aggravated by the inconsistent arrangements between States, such as the ‘cap on benefits’ and front-end deductibles in various States. This means that in different States, different health care costs are being borne by employers and Medicare. This inconsistency is undesirable and makes who pays such costs less transparent.

The potential exists for health-costs to be shifted between workers’ compensation schemes and Medicare. From the limited quantitative information available it would appear that the more significant problem is likely to be cost-shifting onto Medicare. However, existing arrangements of the Department of Human Services and Health are inadequate to identify the net extent of cost-shifting to Medicare.

The main problems identified by the Commission are:

- time or dollar limits on the payment of medical expenses;
- requirements that the employer meet an initial medical excess;
- the availability of lump-sum payments for medical expenses; and
- limited coverage of medical conditions under workers’ compensation.

The Commission recommends that:

- **there be no dollar or time limits on legitimate medical expenses in respect of successful workers’ compensation claims;**
- **employer excesses for medical costs be removed because of the ease with which these costs could be passed onto the health-care system; and**
- **lump-sum payments for future medical expenses be discontinued (payment of expenses as incurred is preferable).**

If the Commission’s recommendations are not implemented, the Commonwealth should estimate the net extent of cost-shifting to Medicare and explore mechanisms to pass the costs back to the States/Territories.

6.1.2 Overservicing

Interaction between Medicare and workers' compensation coverage of health outlays creates opportunities for overservicing. Where this occurs, the effect is to raise the income of medical and health-care providers — while generating extra costs for employers. In addition, the Automotive, Metals and Engineering Union (AMEU, Sub 158, p.24) argued that claims of overservicing may be used to shift costs off the workers' compensation scheme and onto the individual or the community:

Complaints regarding overservicing are generally from the employer resenting paying for medical bills. Their response is to pursue the avenue of termination of workers from medical and like expenses.

Extent of overservicing

Some participants, for example, Toyota (Sub 23) and Workers Compensation Development (Sub 31), claimed that medical practitioners and hospitals overservice workers' compensation patients. The medical practitioner can order services for these patients with the knowledge of assured payment. Similarly, in most states, hospitals have no incentive to limit the average length of stay, and may prescribe 'excessive' tests or drugs — as they are fully reimbursed for all costs. Toyota argued (Sub 23, p.5) that:

Costs of individual claims should be monitored better to avoid the unfortunately common practice of overservicing on the part of some doctors and other health professionals.

Not all participants thought that overservicing was a problem. The Tasmanian Confederation of Industry argued (Sub 22) that, while fraud and overservicing occurred, employer organisations and insurers monitored the situation to prevent excessive abuse.

The Commission received no evidence, other than anecdotes, on the extent of overservicing and has no recommendations on the subject.

The role of medical fees

Some participants, for example the SECV (Sub 16), argued that higher fees charged for services provided to workers' compensation patients may encourage overservicing. Brennan and Deeble (1993) found that payments for services were higher than the Medical Benefits Schedule (MBS) and most were linked to a schedule published by the Australian Medical Association (AMA). Many participants maintained that higher fees for workers' compensation patients were not justified. The SECV (Sub 16, p.9) argued that:

It is unreasonable that workers compensation medical expenses are charged at a higher rate than normal treatment. This encourages greater attribution of injuries to work-related incidents and may encourage over-servicing of the patient.

However, the AMA (Sub 202, p.1) argued that the MBS was not a legitimate basis of comparison, referring to a report in which the Commonwealth Auditor-General argued that:

... the schedule fee simply represents the amount the Government, having regard to budgetary and economic considerations, is willing to pay for the provision of particular medical services.

The AMA (Sub 202, p.2) concluded that:

The Workers' Compensation bodies in most jurisdictions base payments for medical services on the AMA list as it is seen to more accurately reflect the costs involved in providing quality and focused medical services.

Typical fees for workers' compensation patients in various jurisdictions are presented in Appendix D, showing that significant variations exist.

The Commission gave considerable thought to the issue of medical fees. Avenues to deal this issue include:

- use of contractual arrangements between medical providers and insurers;⁷
- concerted action by existing schemes to move towards a more uniform fee structure; and
- the proposed National WorkCover Authority negotiating, on others' behalf, with medical providers.

However, the issue is part of a wider problem regarding regulation of the health-care industry.

Combating overservicing

In its Draft Report, the Commission sought comment on the following proposals to deal with overservicing:

- Medicare assume responsibility for processing workers' compensation claims on a full cost-recovery basis; and
- case payments for hospital services at appropriate levels be considered.

Little comment was received. PM&C (Sub 180) argued there were advantages in the proposal that Medicare assume responsibility for processing claims, especially to combat overservicing and fraud. However, PM&C (Sub 180, p.31)

⁷ This approach could be consistent with that suggested in the report of the Private Insurance Taskforce (1993), which suggested that the price of medical services be negotiated between doctors, hospitals and insurers.

argued that, if such a scheme were implemented, the following difficulties would need to be addressed:

- cases which do not 'self-identify';
- whether the treatment related to a compensable injury;
- cases where liability is disputed; and
- an appropriate appeal mechanisms when recovery of money paid is sought, or payment restrictions are imposed.

In addition, such an arrangement implies that the workers' compensation schemes would have to give details of claimants to Medicare. Many in the community would regard this an unwarranted invasion of privacy, and therefore consider the proposal unacceptable.

Not all participants favoured Medicare processing claims. The AMEU (Sub 158), for example, argued that such an approach was complicated, distanced the employer from the medical costs and would result in delays.

The Commission's view is that this issue warrants further consideration. Limited information was received from DSHS and better information — for example, on the cost-effectiveness of such an arrangement — is warranted to justify such a major change.

The proposal for case payments was supported by PM&C. The Department (Sub 180, pp. 33-4) argued that this is consistent with the Commonwealth's policy of promoting case-mix funding for hospital services as a means of increasing efficiency in the use of health-care resources.

No other comment was received from participants. The Commission notes that a pilot study of case-mix funding for workers' compensation patients in public hospitals was undertaken in Victoria between 1991 and 1993. A Commonwealth review of that study has been undertaken (see Appendix D), and further research into case-mix funding is being conducted by the Commonwealth.⁸

6.1.3 Interaction with private health insurance

Just as costs for medical care can be shifted between workers' compensation schemes and Medicare, similar shifting can occur between workers' compensation and private health insurance.

Brennan and Deeble (1993 p.29) argued this was possible:

⁸ For example, by the Private Insurance Taskforce.

The States are responsible for administration of public hospitals and the interaction of compensation schemes. However the States' administration of that interaction can affect ... the outlays of private health insurance funds when compensable patients are paid for as non-compensable private patients.

This outcome is more likely where work injuries are not reported, perhaps from fear of dismissal. However, Brennan and Deeble (1993 p.23) argued the extent of this cost-shifting was unlikely to be significant:

The range of services [for workers' compensation cases] is generally wider than is available under any other public program and more comprehensive than can be covered under private health insurance.

No estimate of the extent of this form of cost-shifting was presented to the Commission.

6.2 The social security system

6.2.1 Cost-shifting

Interaction between workers' compensation and the social security system may also result in cost-shifting to and from the community. Such cost-shifting will, for example, occur where an individual who is eligible for workers' compensation receives social security benefits instead (or visa versa).

Cost-shifting from employers to the community

The Department of Social Security (DSS Sub 80) indicated that an injured or ill worker may resort to assistance from the social security system because:

- delays arise before workers' compensation payments commence;
- the worker is assessed fit for work (and workers' compensation benefits cease) even though the worker has no suitable employment;
- workers' compensation benefits are inadequate;
- the worker may be assessed as earning 'notional' income in an alternative occupation (and workers' compensation benefits cease) even though the worker is unable to find employment in that occupation;
- the worker mismanages a lump-sum; and
- time or dollar limits are reached (and benefits cease).

DSS (Sub 80, p.24) estimated that, for each additional 1000 workers transferred onto social security, the community incurs an additional \$10 million.⁹ A DSS consultancy estimated that, each year, 20 000 workers' compensation claimants seek social security payments of some type (Ford 1992 p.49). While not all would remain on social security for long periods, many become long-term beneficiaries. The possibility therefore exists for up to \$200 million of costs to be shifted onto the Commonwealth each year on a continuing basis. Under these circumstances, by the year 2000 over \$1 billion in costs will have been transferred to the community from state workers' compensation schemes.

The Commission is concerned that DSS is unable to track the claim's history of workers' compensation recipients.¹⁰ This information is essential to determine the magnitude of the problem of cost-shifting and to ensure employers are more informed of the cost of work-related injury and illness. DSS will track the compensation history of a client only to the extent required to determine any impact on current entitlements. The planned introduction of a new computer system in 1994 may improve DSS's ability to track recipients.

Limitations in the coverage of workers' compensation schemes also result in cost-shifting onto social security. In Section 6.1.1, it was noted that an estimated 20 000 non-compensated cases of occupational disease occur every year. Assuming that these workers are eligible for social security benefits — and accepting the DSS estimate that each 1000 workers transferred to social security incurs an additional \$10 million — every year \$200 million is inappropriately borne by the community.

The United Trades and Labour Council of South Australia (Sub 206) estimated employer liability transfers in 1990–91 of some \$1066 million of weekly income payments, with individuals bearing 75 per cent of the transfer and the Commonwealth bearing the remainder.¹¹

⁹ It noted that if these workers transferred to the Disability Support Pension, these costs would be ongoing. Luntz (Sub 210, p.8) argued that, if the injured worker is replaced by someone previously in receipt of social security benefits, then there is no increased cost to the taxpayer.

¹⁰ The Commission understands that data collected by DSS depends on current or past workers' compensation recipients identifying themselves, and that computer files are purged one year after a claim is finalised.

¹¹ When estimating the average weekly payment per worker, total payments were divided by the total number of workers rather than the number of actual claimants. This biases downward the estimate of average weekly payments and, correspondingly, biases upwards the uncompensated element. The Commission understands that it was not possible to get data on the actual number of claimants. The study is also limited to weekly compensation payments. No adjustment is made for lump sum compensation through 'Table of Maims' or common law.

It has been reported that recent changes to Victoria's workers compensation arrangements will subject some 16 000 claimants to review, with the potential to lose their benefits. On 1 December 1993, the *Age* reported that benefits to 3000 partially incapacitated workers were terminated, while another 1500 accepted lump-sum settlements of their claim. Many of these may turn to social security for support.

WorkCover Victoria (1993 p.2) indicated that, in the first seven months of its operation, there had been a 20 per cent reduction in the number of long-term claims (representing 3300 workers). This reduction was attributed, in part, to legislative changes which redefined eligibility for benefits. No information is available on how many of these former long-term claimants remain unemployed and in receipt of social security benefits.

Cost-shifting from the community to employers

The Victorian Employers' Chamber of Commerce and Industry (VECCI, Sub 167) argued that it is often difficult to determine where the employer's responsibility for supporting an injured or ill worker ends and the community's begins. Chapter 4 discusses questions of coverage and causality in more detail. VECCI argued (Sub 167, p.20) that the then Victorian WorkCare scheme resulted in costs being shifted from the community onto Victorian employers:

... by December 1992 there were 16 600 long-term claimants in Victoria. The overwhelming majority were for soft tissue injuries, ... where claimants still had the capacity to work. By comparison NSW had approximately 5000 long-term claimants. WorkCare, with its user-friendly approach for claimants, served to mask an unemployment problem, and Victorian employers have borne the cost.

VECCI (Sub 167, p.19) referred to a 1992 study by the Accident Compensation Commission, which argued that the WorkCare scheme (which was replaced with the WorkCover scheme on 1 December 1992) was saving social security \$163 million per year. VECCI argued that some of this cost should have been borne by the community.

The Victorian Department of the Premier and Cabinet (Sub 208, p.11) updated these figures to 1993–94 and estimated the Commonwealth budget benefited annually by \$107 million (comprising \$29 million in taxes, a \$51 million reduction in social security outlays, and \$27 million for medical and related expenses).

However, the Commission is concerned that these estimates may not account for measures introduced over the life of WorkCare which in effect shifted costs onto the community (eg changes to the benefits structure). These estimates may, therefore, simply reflect a reduction in the extent of cost-shifting to the community.

Injuries occurring outside the workplace but claimed as being work-related also shift costs from the community and onto the workers' compensation schemes. As noted in an earlier section, Smith (1989) estimated that in the USA approximately 2 per cent of non-disease claims payments were for injuries which occurred during weekends and holidays. Assuming 2 per cent of total workers' compensation benefit payments are thus inappropriately borne by workers' compensation, approximately \$20 million would have been shifted onto employers in 1991–92.¹²

The Commission found that, under existing arrangements, the incentive and opportunity exists to shift costs between workers' compensation schemes and the social security system. Although the extent of cost-shifting either way is difficult to determine with accuracy, there is likely to be a large net shifting of costs onto the community. Existing arrangements in relevant government agencies are inadequate to identify the net extent of cost-shifting to Commonwealth programs.

Responses to cost-shifting

The Commission's view is that the best way of preventing cost-shifting to the social security system is to provide workers with a comprehensive and adequate compensation package.

The compensation package would have consistent definitions of a worker and a compensable injury or illness. This would limit the extent to which jurisdictions could shift costs onto the community. In addition, the benefits structure suggested by the Commission would ensure that injured or ill workers remain on workers' compensation benefits for much longer periods than is currently the case in many jurisdictions. Benefits would also emphasise periodic payments rather than lump-sums. The development of an agreed compensation package to apply in all jurisdictions (see Chapter 4) will greatly limit cost-shifting to the community.¹³

¹² In 1991–92, total weekly benefit payments in all jurisdictions, excluding the Commonwealth and ACT, were approximately \$990 million. *Source:* Industry Commission Workers' Compensation Survey A.

¹³ If these recommendations are not adopted, the potential would continue to exist for states to reduce weekly benefits and access, and so shift more costs onto individuals and the community. This would increase pressure from unions and workers to seek renewed access to common law. WorkCover NSW (Sub 92, p.12) noted that during discussions on reforms in 1989, the NSW Labour Council indicated:
... that if statutory benefits were not improved, it wanted the right for workers to pursue common law.

In addition, the Commonwealth could estimate the extent of any ongoing cost-shifting to the social security system and recover the amounts involved. This response would assume greater importance if an adequate compensation package, to apply in each jurisdiction, is not developed.

DSS (Sub 80) suggested including workers' compensation in reviews of Commonwealth/State financial arrangements (eg by including workers' compensation arrangements in Commonwealth Grants Commission (CGC) fiscal equalisation calculations, or by the Commonwealth imposing 'negative' financial grants on the States).¹⁴ However, PM&C (Sub 180) argued that, while inclusion of workers' compensation arrangements may affect per capita relativities calculated by the CGC, so many factors are included in the calculations that workers' compensation arrangements would have a small impact on the distribution of financial assistance grants.

The Commission accepts the view that the CGC process is inappropriate to deal with cost-shifting, as the process is too indirect and administratively complex.

In the event that the Commission's recommendations are not implemented, the Commonwealth should estimate the net extent of cost-shifting to the social security system and explore mechanisms to pass the costs back to the States/Territories.

6.2.2 'Double dipping'

Some workers' compensation claimants may 'double dip', that is, receive workers' compensation benefits and social security payments. For example, an injured worker may obtain a lump-sum workers' compensation benefit by redeeming future weekly benefits, then exhaust the lump-sum and thereafter be paid social security benefits. Data on the extent of the problem is inadequate.

DSS has attempted to address the problem through a range of measures:

- a person entitled to compensation may be required to pursue that course;
- social security payments are reduced on a dollar-for-dollar basis to the extent that a person receives weekly compensation; and
- a statutory formula (the 50 per cent rule) is applied to recipients of lump-sum compensation.¹⁵

¹⁴ These arrangements were used when the Commonwealth assumed from the States their liability for university superannuation payments.

¹⁵ Recipients of lump-sums are not immediately eligible for social security benefits. Lump sums received on or after 9 February 1988 are subject to an exclusion period, calculated by

The Tasmanian Trades and Labour Council claimed that some recipients of lump-sums have dissipated the lump-sum benefit, unaware they would not be eligible for social security benefits. The Council (Sub 35, p.9) also stated that:

... the Department of Social Security certainly need to play a more educative role as it is our experience that many people have been caught out and are faced with a situation whereby they have no income at all for some time.

The Commission agrees that there needs to be mechanisms to ensure that workers are aware of social security rules. However, the DSS may not be best placed to provide this information. DSS may not become aware of the situation until injured/ill workers apply for benefits. By then it may be too late to inform the worker of the regulations.

The insurer, however, will have contact with the injured worker from the outset of the claim. The insurer could give all workers likely to consider taking a lump-sum, whether from a redemption or 'Table of Injury' pecuniary payment, information regarding current DSS regulations.¹⁶

The ACTU recognised a danger in the Commonwealth limiting the extent of 'double dipping' without the co-operation of the States, arguing (Sub 45, p.3) that:

... the attempts of the Federal Government to avoid liability have only served to punish victims rather than bring about a change in attitude on the part of the States.

When 'double dipping' occurs the cost of work-related injury and illness is multiplied. The individual involved gains, but the community as a whole is worse off. 'Double dipping' is inequitable. Some workers receive workers' compensation payments and social security, while others with the same injury or illness receive only workers' compensation payments. 'Double dipping' may, however, be unintended on the part of the recipient and mechanisms are needed to ensure workers are adequately informed of their rights.

taking half the lump sum and dividing it by Average Weekly All Male Earnings. This gives the number of weeks before the recipient becomes eligible for social security benefits. Changes announced in the 1993 Budget will extend the preclusion period. All lump sums, whether they contain an economic loss component or not, will be subject to the 50 per cent rule. The lump sum will then be divided by the all persons Average Weekly Earnings rather than male earnings. Any social security payments already made must be repaid. The government retains the discretion to disregard part or all of the lump sum in special circumstances.

¹⁶ The Commission is of the view that receipt of social security benefits in addition to a 'Table of Injuries' payment for pain and suffering does not represent double dipping as the lump sum is not intended as an income replacement payment.

The Commission recommends that insurers, in conjunction with DSS, ensure that recipients of lump-sums under existing 'Table of Injuries' (or redemption) are aware of eligibility rules for social security.

6.3 The taxation system

Interaction between workers' compensation arrangements and the taxation system occurs as a result of the compensation recipients' changed income status, for example, the worker may be awarded a lump-sum or redeem weekly benefits.

Interaction between workers' compensation arrangements and the taxation system will have implications in two major areas:

- the incentives faced by workers and employers may be affected; and
- Commonwealth taxation revenue may be affected.

This section draws on information from participants, supplemented with a consultancy report prepared by Mr Daryl Dixon. This report is available from the Commission on request.

Weekly benefit payments

Weekly workers' compensation payments to recipients are held to be income for tax purposes and taxed accordingly. Thus, workers' compensation authorities are required to deduct taxation instalments from benefits and issue group certificates. The Queensland Confederation of Industry (Sub 77, p.33) noted that in Queensland, for example, the Workers' Compensation Board deducts over \$20 million per year for the taxation office.

These arrangements ensure weekly compensation benefits are treated no differently from the worker's usual work-related income. Workers or employers thus face no undesirable incentives.

Lump-sum redemptions

In some jurisdictions, workers may redeem weekly benefits in the form of a lump-sum settlement. This lump-sum may be treated as a payment for loss of future earnings capacity and may not be assessed as income. Recipients may therefore have a tax incentive to redeem weekly benefits.

Any income derived from the lump-sum (eg bank interest or dividends) will be assessed as income and taxed accordingly. This may create an incentive to

invest the lump-sum in non-income producing assets. PM&C argued (Sub 180, p.7) these arrangements can have the effect of creating:

... a tax-induced disincentive to obtaining the cash flow required by the typical claimant in serious cases and this may increase the likelihood that compensation recipients will come to rely upon Commonwealth income support ...

However, some participants, for example the Communications Workers Union (CWU, Sub 169) argued for retention of the taxation bias in favour of redemptions when small weekly payments would otherwise have been payable. The CWU argued that in cases where weekly payments are small, redemptions may be a cost-effective outcome and should be encouraged. It argued (Sub 169 p.26) that it:

... cannot accept that the tax bias is a substantial factor or incentive in the decision to take a lump-sum settlement. Other factors such as convenience, ability to manage own affairs and the future are much more important.

The Commonwealth may suffer a decline in taxation revenue from redemptions. Total redemptions in all jurisdictions in 1991–92 were approximately \$73 million.¹⁷ If it is assumed that possible income derived from the use of the lump-sum redemptions is likely to be small, and assuming an average tax rate of 25 per cent, the Commonwealth has forgone about \$18 million in that year.

The Commission accepts that redemptions of small weekly payments may, in certain circumstances, be desirable (see Chapter 4). However, the Commission's view is that such a decision should be made by each individual on the basis of their personal circumstances, with full knowledge of the consequences for social security entitlements and, ideally, without there being any tax bias.

The Commission recommends that the Commonwealth consider removing the taxation bias favouring lump-sum redemptions of weekly workers' compensation benefits.

Lump-sums through 'Table of Injuries' or common law

Payments for non-pecuniary loss

In some cases workers may be eligible for a statutory 'Table of Injuries' payment for non-pecuniary loss. In addition, in some jurisdictions workers may receive a lump-sum common law damages award which includes a component for non-pecuniary loss.

¹⁷ Source: Industry Commission Workers' Compensation Survey A.

These payments are considered to be capital payments, not income, and are hence not assessable for income tax purposes. However, any income derived from the use of these lump-sums will be assessed as income and taxed accordingly.

The taxation treatment of awards for non-pecuniary loss, made in addition to weekly benefit payments, are unlikely to influence a worker's incentive to undertake rehabilitation and return to work.

Payments for pecuniary loss

The 'Table of Injuries' or common law lump-sum received by workers may include a component for pecuniary loss. As these payments are considered a payment for loss of future earnings capacity they are also not assessed as income.

However, to the extent that they substitute for ongoing weekly benefits, they are equivalent to a lump-sum redemption of weekly benefits.

Some participants argued that in the case of common law the award to the worker is made on a post-tax basis. The Law Society of Tasmania (Sub 125), for example, argued that courts base the award on the worker's net earnings. If such awards were subject to tax, courts would base awards on the worker's gross rate of pay. The value of awards could be expected to rise significantly.

Taxation revenue

Current treatment of payments for pecuniary loss results in some loss of taxation revenue to the Commonwealth.

In 1991–92, total 'Table of Maims/Injuries' payments in all jurisdictions, excluding the Commonwealth and ACT, were approximately \$260 million.¹⁸ Assuming that half the payments were for pecuniary loss and that these could have been taxed at an average rate of 25 per cent, the Commonwealth has forgone \$32.5 million in taxation revenue. In the same year, total common law settlements in all jurisdictions were approximately \$251 million.¹⁹ Again, assuming half were for pecuniary loss and taxed at 25 per cent, and the balance of the payment was not eventually taxed as income, the Commonwealth has forgone approximately \$31.5 million.

¹⁸ Source: Industry Commission Workers' Compensation Survey A.

¹⁹ Source: Industry Commission Workers' Compensation Survey A.

6.4 Transport-accident schemes

Interaction between workers' compensation arrangements and state transport-accident schemes occurs because, in some jurisdictions, journey accidents may be compensated under workers' compensation. In some cases, the scheme then recovers the cost from the transport-accident scheme.

The Commission is concerned that, in some cases, workers' compensation is being used as a *de facto* transport-accident scheme. The Motor Accidents Authority of NSW (MAA, Sub 198) argued that this is especially the case in jurisdictions where the transport-accident scheme is fault-based, while workers' compensation benefits are available on a 'no fault' basis. The MAA also pointed out that, in some jurisdictions, there were significant differences in the level and availability of benefits under the two schemes.

In Chapter 4, the Commission recommended removal of journey claims from compulsory workers' compensation coverage.

Some jurisdictions have sought to exclude journey claims from workers' compensation coverage. Under the WorkCover scheme in Victoria, for example, journey claims are excluded from workers' compensation and are now covered under the transport-accident scheme.

The MAA (Sub 198, p.3) argued that adopting the Commission's recommendation to remove access to journey claims from compulsory workers' compensation would:

... disentitle some injured workers who would previously have been compensated under a 'no-fault' workers' compensation scheme. Other workers would receive a level of benefits ... which might differ significantly from that which they would have been entitled to under the workers' compensation scheme.

The Commission accepts that the removal of journey claims from compulsory workers' compensation may disadvantage some workers. However, workers may negotiate with employers on an enterprise basis for journey claim coverage. In addition, workers have the option to take out private insurance for journey accidents if they wish.

'Normal' journey claims are more appropriately covered by relevant transport-accident schemes or private insurance arrangements.

6.5 Superannuation arrangements

Workers' compensation and superannuation arrangements interact where both provide benefits in the case of work-related death or permanent disablement.

6.5.1 Death and disability benefits

Some superannuation schemes provide benefits in the event of work-related death or disability. While death and disability provisions vary between superannuation schemes, the schemes are not concerned with the cause of death or disability. Some funds, particularly those of smaller employers or those complying mainly with minimum Superannuation Guarantee Charge (SGC) requirements, provide relatively limited death or disablement protection (other than pay-out of accumulated benefits). Some schemes may also cover temporary incapacity.

The Commission is concerned that current arrangements may allow workers to receive more than their pre-injury average weekly earnings should they receive both workers' compensation and superannuation benefits. This would severely weaken the rehabilitation and return-to-work incentives faced by workers.

Extent of interaction

Few submissions commented on this aspect of interaction. The Commission was unable to obtain information on the extent of interaction. The SECV (Sub 16) outlined the following financial support available to its injured workers or their families through their superannuation fund:

- a total and temporary disability benefit (TTD);
- a permanent and total disability benefit (PTD);
- an ill-health benefit; and
- a death benefit.

The TTD benefit is available to injured workers who have exhausted all sick leave and are not on workers' compensation. In the PTD category, the employee will receive a benefit equal to that they would have received if they had continued to work until retirement age. The SECV scheme also allows the payment of an ill-health benefit. This benefit differs from a total and permanent disability benefit in that "in theory, the worker can still and should not need any additional support. In reality, it depends greatly on their attitudes and socio-economic factors" (Sub 16, p.10).

The SECV (Sub 16, p.11) indicated that it currently has:

... more than 140 "retired" employees who continue to receive compensation weekly benefits. The vast majority of these have received an ill-health or permanent and total disability superannuation payment.

In public sector schemes, the typical scheme is an employer defined benefit fund which does provide benefits in the event of death or disability.²⁰

It is fairly straightforward to integrate the provision of superannuation benefits with those available under workers' compensation. This is a practice followed by Comcare, as shown in Table 6.1. Such integration ensures that workers do not receive in excess of their pre-injury earnings when receiving both workers' compensation and superannuation disability benefits.

However, integration is not generally applied. Victoria's legislation, for example, permits account to be taken of superannuation benefits not deposited in rollover funds. However, administrative arrangements do not ensure comprehensive integration, such as under Comcare legislation and procedures (which effectively reduces payments on a dollar-for-dollar basis).

The lack of consistent treatment between schemes of workers' compensation and superannuation benefits is highlighted with some examples in Table 6.1.

Many participants argued that injured or ill workers should receive any superannuation entitlements in addition to workers' compensation payments. For example, some argued that the purpose of superannuation differs from workers' compensation, while others argued that, to the extent that workers themselves contribute to superannuation death and disability cover they should be entitled to the benefit.

The Superannuated Commonwealth Officers' Association (SCOA) argued strongly against integrating superannuation and workers' compensation benefits (Sub 11, p.3):

The donative intent of a superannuation pension, including an invalidity rate of such a pension, has been clearly established in the Courts and should never be taken into account or assessed in determining a compensation entitlement arising as a result of work related injury or illness.

SCOA noted that in the case of Commonwealth employees, any combined payments from workers' compensation and superannuation pensions is limited to 70 per cent of former salary. The Association argued that, in their case, the principle that the amount of compensation not be affected by superannuation payments is violated.

²⁰ That is, a fund where benefits are usually, but not always, expressed as some 'multiple' of final salary — with the proportion varying according to actual or prospective years of service.

Table 6.1 Integration of workers' compensation and superannuation benefits

<i>Jurisdiction</i>	<i>Integration of workers' compensation and superannuation benefits</i>
Commonwealth employees	Workers' compensation benefits are reduced by the amount of any superannuation benefit. Combined benefit limited to 70 per cent of pre-injury salary.
New South Wales	WorkCover NSW takes no account of superannuation benefits when determining eligibility for workers' compensation. Self-insurers may integrate the two benefits.
Victoria	Superannuation benefits not rolled over into a rollover fund which may be taken into account when determining eligibility for workers' compensation. However, there is no evidence that this provision has been acted upon.
Australian Capital Territory	No account is taken of superannuation benefits when determining eligibility for workers' compensation.
South Australia	WorkCover SA takes no account of superannuation benefits when determining eligibility for workers' compensation. Self-insurers may integrate the two benefits. For example, the State Public Service and Police Superannuation Schemes both reduce superannuation benefits when workers' compensation benefits are paid.
SSAU (UniSuper)	Superannuation benefits are reduced when the individual is eligible for workers' compensation. Combined benefits are limited to 75 per cent of pre-disablement income

Source: Dixon consultancy report

The Finance Sector Union of Australia (Sub 162, p.7) argued the difference between workers' compensation benefits and superannuation was that:

Superannuation benefits are not paid from a statutory or common law scheme to which the injured worker has not contributed. They are insured benefits provided by either an underwriting insurer ... or self-insured by the fund in question. They are funded by members, either by deduction from employee contributions or from employer contributions for which in reality the member has sacrificed wage increases.

The Commission accepts that death and disability coverage under superannuation schemes may represent benefits which have been paid for by the worker. However, this coverage should not weaken the incentives faced by workers to undertake rehabilitation and return to work. In this regard, the Commission supports Comcare initiatives which reflect an effective integration between workers' compensation schemes and superannuation arrangements.

While not currently regarded as a problem, the Commission is concerned that as the coverage of superannuation is widened, an increasing number of workers will have the opportunity to receive both workers compensation and superannuation benefits.

6.5.2 The implications of wider superannuation coverage

Clarifying the role of workers' compensation and superannuation is essential, given the Commonwealth's intention to provide all employees with benefits under the SGC.

Some participants also noted how it is an opportune time to consider the issues raised in Section 6.5.1. The ACT Government, for example, argued (Sub 61, p.16) that:

The trend towards national and more universal superannuation arrangements argue in favour of a review of this area of workers compensation in conjunction with the philosophies underpinning the provision of income maintenance generally.

All employers are required by SGC legislation to provide superannuation benefits for employees. The Commonwealth is, therefore, in a position to ensure appropriate integration between workers' compensation and superannuation arrangements so that workers are unable to receive combined benefits in excess of pre-injury earnings.

Current arrangements for the integration of superannuation and workers' compensation (see Table 6.1) appear ad hoc and inconsistent. The Commission is concerned that with increasing superannuation coverage there may be some attempt to use superannuation to replace workers' compensation arrangements. Such a substitution would have the potential to undermine incentives for prevention, rehabilitation and return to work. The Commission supports the view of VECCI (Transcript p.2595) which argued that the SGC should only be used to provide retirement income for workers.

The Commission recommends that relevant agencies ensure that future superannuation arrangements are consistent with the preventive and return-to-work objectives of workers' compensation arrangements. To this end, some integration is required under which:

- **workers would not be compelled to take out death and disability cover under superannuation for work-related injury and illness; and**
- **where workers elect to take out such coverage, arrangements should be in place to ensure that they do not receive ongoing combined payments in excess of pre-injury earnings.**

7 INSURANCE REGULATION

Governments strictly regulate workers' compensation, for example by defining eligibility, specifying liability and compensation to be paid for work-related injury and illness, and ensuring that funds will be available to meet scheme costs (eg by insisting that employers insure their liability). Other activities include combating fraud, licensing insurers (including whether or not they can also act as underwriters), setting the basis for the premiums insurers are allowed to charge, collecting and disseminating data, and monitoring the 'quality' of service delivery. The Commission proposes establishment of a nationally available workers' compensation scheme (to be administered by a National WorkCover Authority) alongside which existing schemes could continue to operate.

7.1 Nature of insurance

In all jurisdictions, employers are required to insure against their liability to meet many of the costs of work-related injury and illness or satisfy the prudential standards required for self-insurance. This is to ensure that, even in the event of employer insolvency, funds will be available to meet claims.

The basic principle behind workers' compensation insurance has been spelt out by the Victorian WorkCover Authority (WorkCover Victoria 1992, p.6):

... the charge for insurance ought to reflect the expected risk of the insured in a system where the risk is largely controllable. In each policy year the insured should expect to pay for the risk potential it brings to the scheme.

In the long term, the insured should expect to pay for its true experience, as opposed to its risk potential, and no employer should subsidise another.

In the short term, because true experience is unknown and chance events can unduly influence experience, the insurance scheme redistributes some of the gain from those who have favourable experience to pay for the losses of those who have an unfavourable experience. This is called risk pooling, and is the basis of all insurance.

For insurance to operate efficiently, each risk pool should be reasonably homogenous; that is, members of each pool should have similar underlying risk profiles. Where risk pools are not reasonably homogenous — such as can occur

where pools are few in number or costs are distributed other than on assessed risk — cross-subsidies will occur either within or between pools. For example, more dangerous firms might be shielded from the full cost of insurance coverage if pooled with safer firms. As discussed in Chapter 3, deliberate cross-subsidies generally result in an inefficient form of workers' compensation insurance, as low-risk purchasers of insurance are subsidising high risk purchasers.

7.1.1 Extent of insurance

Employers are generally required to fully insure for their liabilities under the various Acts and, where applicable, for their liabilities under common law. While all schemes specify the nature of these liabilities, rules vary.

In some jurisdictions, employers face a limited uninsurable excess. Two types of excess currently occur: excesses on income benefits and excesses on medical expenses. For example, in NSW, employers must meet the first \$500 of weekly income benefits, while in Victoria, employers may choose to pay income benefits for the first 10 days of incapacity and/or the first \$378 of medical expenses (in return for lower premiums).

There are two main advantages of excesses. First, an excess removes the need to administer small claims, leading to greater administrative efficiency. Second, an excess also acts as an incentive to employers to prevent injuries or illnesses.

On the other hand there are also some disadvantages of excesses. First, cost-shifting may result if an employer tries to avoid paying an excess. As discussed in Chapter 6, excesses on medical expenses are particularly open to cost-shifting, because of the ease of access to Medicare. For this reason, excesses on medical expenses are undesirable. Second, the potential for employer insolvency may then jeopardise benefits, or may lead to additional calls on the 'nominal' insurer. Third, employers with little experience in administering claims may not provide quality service to workers. Fourth, there may be some incentive on employers not to report small claims within their excess, as this would convey information about their safety to their insurer, with possible adverse ramifications for their premiums.

Hence, where excesses apply, steps should be taken to ensure the quality of service to claimants, and that data collection remains comprehensive. Few claims for income benefits would not have associated medical expenses. If medical excesses are not allowed, this would ensure that information on most claims, including those within an income benefit excess, is available to the regulatory authority.

The Commission recommends that workers' compensation schemes allow excesses on income benefit payments (but not on medical benefits).

Flexible excess arrangements

An extension of the concept of an excess would be to allow employers to choose their own level of income benefit excess. Employers then could, in effect, self-insure for income benefits up to a chosen level. Examples of such flexibility are found in various fields of insurance, but are limited in existing workers' compensation schemes.

A form of variable excess is available under the Victorian WorkCover system. Section 125A (6) of the *Accident Compensation (WorkCover Insurance) Act 1993* provides that an employer may elect to increase, reduce or eliminate the excess by paying an adjusted premium. The Victorian scheme had for some time allowed employers to reduce the level of their excess by paying a higher premium, and many employers chose to do so. However, the option to increase the excess was only enacted in mid-1993, and provision for such an election has not yet been included in the premiums formula.

Problems associated with excesses include ensuring quality of service to employees, and the potential that workers' benefits may be threatened, or excessive calls made on the nominal insurer. These two problems could both be addressed by way of a variable employer-excess system, combined with 'reinsurance' of the employer's liability. This would involve the employer negotiating a variable excess with their insurer. The insurer would then be primarily responsible for paying all benefits and administering all claims, but the employer contracts to reimburse the insurer for the amount of the agreed excess. Under such arrangements, the size of the excess would be negotiable between the insurer and employer. Insurance premiums would be similarly negotiable — the larger the excess carried by an employer, the smaller the premium likely on the balance of risk borne by the insurer.

The Commission draws attention to its comments on 'reinsurance' as a mechanism for reconciling variable excess arrangements with surety of payment of benefits.

The Commission recommends that schemes allow flexible employer excesses, supported by arrangements such as 'reinsurance'.

7.2 The regulatory framework

The regulatory framework for workers' compensation insurance typically covers many elements. Key elements only are addressed in this section.

7.2.1 Fraud and non-compliance

Workers' compensation fraud may be separated into three main categories:

- claimant/worker fraud;
- employer fraud and non-compliance; and
- service-provider fraud and over-servicing (discussed in Chapter 6).

Claimant/worker fraud

Areas of claimant/worker fraud include inventing illnesses, claiming that injuries occurring outside the workplace are work-related, exaggerating the seriousness of an injury, and working while on weekly compensation.

There are also some types of behaviour — such as malingering — which constitute abuse, but which are not easily categorised as fraudulent. Such conduct may fall outside formal fraud-control activities, but can be directly influenced by individual employers applying similar management techniques to those used to tackle poor motivation and absenteeism.

Both employers and workers agreed that most claimants are genuine, but that precautionary systems must be put in place to ensure that fraud does not become a problem. Jurisdictions have introduced varying mechanisms to deal with claimant fraud. For example, in 1991, the Queensland Department of Employment, Vocational Education, Training and Industrial Relations (QDEVTIR, Sub 63, p.16) introduced staff training in investigation techniques and fraud awareness, and a computerised system to review new claims. By contrast, in WA the Workers' Compensation and Rehabilitation Commission relies on the criminal code to provide mechanisms for detecting and prosecuting fraud cases.

Many injured workers and injured worker support groups stressed the importance of trust and the potential gains which can flow from it. However, they felt that scheme administration often made it difficult for a 'climate of trust' to develop. Similar sentiments were reflected by the Australian Council of Manufacturers (Sub 29, p.4):

The [Victorian] WorkCover legislation places the emphasis on resolution of compensation problems at the workplace. The scheme will be most effective in those enterprises which recognise the inevitable occasional conflict and incompatibility of

job demands and life demands. In a culture of consultative work groups, enterprise bargaining and individual contracts, with flexible work arrangements that recognise modern demands on individuals, viable options may be created which will remove the pressure on workers to seek support from the compensation system, when life factors intrude.

Employer fraud and non-compliance

Examples of employer fraud include the collaboration of employers in fraudulent claims, or the shifting of the costs of employer excesses onto the worker or Medicare. The same strategies adopted to control claimant fraud may be applied to employer fraud.

Non-compliance may include failure to take out compulsory insurance, and the under-declaration of wages to reduce premiums.

Achieving a 100 per cent compliance rate is not practical. Therefore, all jurisdictions have a fund to meet uninsured liabilities (the 'nominal' insurer), so that workers whose employer is not insured are not disadvantaged.

Inquiry participants did not regard non-compliance as a major issue. The Australian Earthmovers and Road Contractors Federation and the Council of Small Business Organisations of Australia (Sub 47, p.6) stated that, currently, there is a high degree of compliance with compulsory insurance. The Insurance Council of Australia (ICA, Sub 65, p.19) stated that, although the degree of non-compliance in existing systems cannot be accurately assessed, non-compliance has not in the past been found to be of significance, provided there are uninsured liability provisions.

The WorkCover Authority of NSW (WorkCover NSW, Sub 205, p.23) has two major methods of estimating non-compliance: through audits of industry and through examination of cases which come before the Uninsured Liability and Indemnity Scheme (under which WorkCover provides benefits to injured workers whose employers have no insurance cover). The Authority (Sub 92, p.36) estimated non-compliance at about 4 per cent of enterprises, heavily concentrated in small and new business.

Fraud-control strategies

Effectively implemented fraud control helps maintain the integrity of a workers' compensation system. King (1988, p.7) stated that fraud is not being fully prosecuted in the workers' compensation arena — although benefit payments to suspected fraudulent claimants may be stopped, criminal charges are not generally laid.

There is a significant difference in the standard of proof necessary to sustain a criminal charge of fraud, and that necessary to deny benefits. However, justice and the deterrence of other potential fraudulent claimants require that clear cases of claimant fraud are prosecuted, and strong penalties applied.

The Commission recommends that clear cases of fraud be subject to criminal prosecution.

An important tool in the detection of fraud is the availability of information. The ICA (Sub 65, p.20) stated that:

Fraud or dishonest conduct in the presentation and pursuit of claims can best be handled through centralised data bases to which all insurers have access for the purpose of comparing doubtful claims information against duplication.

For example, QDEVTIR (Sub 63, p.17) stated that the most effective method of ensuring employer compliance with insurance requirements is the reciprocal legislative powers to disclose information with the Office of the State Revenue (Payroll Tax). Comparison of wages declared to each body can reveal inconsistencies which may need to be investigated.

Queensland's success in identifying fraudulent employers by this method suggests that enhanced links with the Australian Taxation Office would also be useful. QDEVTIR recommended a memorandum of understanding be put in place with the Australian Taxation Office to allow direct exchange of information in relation to employers' wages. Employers have an incentive to report their true wages figure to the Tax Office, as it is a allowable deduction.

However, the Queensland Government (Sub 159, p.18) stated that, although currently State schemes provide information to Commonwealth Government agencies when requested, privacy conditions and administrative arrangements mean that no information can be provided in the other direction.

The Commission draws attention to the possibility that the Australian Tax Office and workers' compensation schemes could share information to counter non-compliance, if this could be done without compromising privacy — for example, by exchanging payroll data for individual firms in aggregated form.

Where strict privacy provisions restrict access to information, so constraining fraud investigations, this is at a cost to the efficiency of workers' compensation schemes. This can mean that more invasive surveillance techniques to combat fraud have to be adopted. Few inquiry participants complained of fraud-control measures which they regarded as invasive, although this does not imply that it does not occur.

The 1991–92 Annual Report of the WorkCare Complaints Investigator noted (p.82) that:

The use of surveillance to ascertain the validity of some WorkCare claims has given rise to some complaints. It must be acknowledged that while surveillance is intrusive and distressing to most people, such surveillance is also accepted as reasonable in the context of claim management in the insurance/compensation sector. Complaints about surveillance are assessed to determine if the actions have been reasonable or excessively intrusive or incompetently undertaken.

Mechanisms to control excessive surveillance may take the form of licensing requirements, including fines or penalties for insurers who are found to be acting unreasonably. For example, Comcare (Sub 119, p.7) requires self-insurers and self-administrators to have a policy on surveillance activities in accordance with guidelines set by the Privacy Commission. A workers' compensation ombudsman could also play a role in determining whether harassment has taken place, and levying penalties where appropriate.

7.2.2 Premium regulation

Schemes regulate premiums to varying degrees: Queensland and SA explicitly set premiums; Victoria and NSW specify premium-setting formulas; WA publishes gazetted rates which insurers may vary within set guidelines; Tasmania and NT monitor premiums set by private insurers; while in the ACT private insurers set premiums. Importantly, regulations may also govern the allocation of employers to risk pools and the application of various bonus/penalty schemes.

One of the aims of premium regulation is to ensure schemes are fully funded (including ensuring the viability of private underwriters). Equally importantly, such regulation can ensure appropriate incentives for prevention (including minimising cross-subsidies).

It is not clear that detailed regulation of premiums is necessary to achieve full funding if adequate prudential supervision exists. However, regulation of premium structures is justified in order to create appropriate incentives to reduce the incidence and severity of work-related injury and illness.¹

7.2.3 Licensing

Governments generally set the rules for granting licences to workers' compensation insurers. The need to license workers' compensation

¹ Chapter 3 discusses the impact of premiums on prevention, and contains the Commissions findings in this regard. Appendix G also discusses various methods for setting premiums.

insurers/underwriters is usually justified on prudential grounds and to ensure quality of service and adequate data collection. Each jurisdiction generally has its own standards for licensing, which are not consistent.

Private insurers are also subject to Insurance and Superannuation Commission (ISC) prudential supervision. The ICA argued (Sub 177, p.2) that it is not efficient for insurers to be subjected to separate licensing requirements by the ISC and State authorities. It called for uniform licensing criteria, including an ability to take out a single national licence. This would enhance administrative efficiency, and remove barriers to entry into the workers' compensation insurance markets in some jurisdictions.

Yet if the various schemes are to continue to operate independently, they should be free to set their own licensing requirements. Uniform licensing criteria would lessen the scope for innovation (including allowing different approaches to areas such as risk-management and rehabilitation to be adopted).

Each scheme should be free to set its own licensing requirements relating such things as the number of insurers it will license, rehabilitation and preventive strategies, risk-management and premium monitoring. However, the ability of each scheme to set its own licensing criteria should be subject to certain minimum conditions relating to prudential regulation, data collection and quality of service which should be uniform across schemes.

The justification for uniform minimum standards relating to prudential regulation, data collection and quality of service are discussed below. These standards would be developed and monitored by the proposed National WorkCover Authority.

The Commission recommends that schemes adopt uniform minimum licensing criteria for prudential requirements, data collection, and 'quality of service' for insurers, to be developed by the proposed National WorkCover Authority.

Prudential regulation

Prudential regulation aims to ensure that insurers are able to meet claims made on them. It can encompass reserve requirements, minimum capital backing requirements, investment guidelines, 'nominal' insurance arrangements and premium supervision.

Prudential rules should limit the practice of insurers offering premiums which do not cover liabilities. This practice can lead to losses in the short-term and insolvency over the longer run.

The spillover from insurance company failures can create costly instability and uncertainty. If losses were confined to the insurer or fully covered by a private underwriter, the effect of the failure, while significant for the firm, is generally unlikely to undermine broader workers' compensation insurance arrangements. However, where unfunded liabilities are borne by a 'nominal' insurer or public authority, inter-temporal and inter-firm subsidies are likely to result. This occurs when a surcharge or higher premiums are imposed to pay for unfunded liabilities, as has occurred in Victoria and SA. In these circumstances, firms today pay for the shortfalls of the past. Moreover, it can also mean that premiums, by not reflecting risk, do not deliver the correct incentives for prevention, rehabilitation and return to work. The entire community is then worse off.

Prudential requirements

Private general insurers are subject to Commonwealth Government prudential requirements under the *Insurance Act 1973*, supervised by the ISC. The ISC considers that the Insurance Act provides for sufficient prudential regulation of workers' compensation insurance markets.²

In 1992, the Act was amended to increase minimum capital and solvency requirements and to introduce an additional solvency requirement based on the level of a company's outstanding claims provisions. The Insurance and Superannuation Commissioner also has the power to require a review by an independent actuary of an insurance company's outstanding claims provisions.³

However, extra prudential regulation of workers' compensation insurers may be warranted because of the higher proportion of long-term liabilities involved. The consequences of default by a workers' compensation insurer are also of more concern than defaults in other branches of insurance. They could include, for example, workers losing long-term income or medical support if an insurer fails.

A representative of the ICA (Transcript p.2862) stated that, in his opinion, the Insurance Act solvency tests could be stronger — even though they are much improved, and their application has increased in the last few years.

Prudential supervision

A related issue is the question of who should undertake the supervisory role. Some participants argued that ISC supervision of workers' compensation

² Discussions with Mr Richard Smith, Commissioner for General Insurance, Insurance and Superannuation Commission.

³ The Treasurer, the Hon. P.J. Keating, *Press Release No. 108*, Canberra, 6 November 1990.

insurers may be inadequate. For example, the ICA (Transcript p.2862) expressed concern that, in the past, budgetary restrictions had prevented vigorous ISC enforcement of prudential standards. It would like to see “a very strong regulatory office strongly applying the highest prudential standards.”

WorkCover NSW (Sub 205, p.24) expressed concern over the adequacy of Commonwealth Government prudential regulation for workers' compensation underwriters, and considered that State supervision of workers' compensation arrangements should continue.

The ICA disputed the claim that extra prudential supervision beyond that of the ISC is required for workers' compensation insurance. Other forms of general insurance supervised by the ISC, such as product liability insurance, also involve a significant proportion of 'long-tail' claims, and severe consequences of insurer failure.

The ISC stated that (Correspondence, 26 October 1993):

Over the past thirteen years, three workers' compensation insurers have failed. There are countries which have achieved a lower rate of insurance company failure than Australia. However, this has been at the cost of ultimate government responsibility for the state of the market, the stifling of product development, high premiums for insureds and much more intensive regulation.

Mr Richard Cumpston (Sub 126, p.38) argued that Commonwealth Government prudential supervision of workers' compensation insurers, assisted by disclosure of their solvency and class-of-business data, is appropriate:

... some States have additional prudential requirements for workers' compensation insurers. This seems a cumbersome and unnecessary duplication of the Commonwealth's supervisory role. Insurer failures are rare, and the payments of benefits to workers can be ensured by guarantee funds.

WA and Tasmania already rely largely on ISC prudential supervision of workers' compensation underwriters.

The Commission was not convinced that additional prudential regulation or supervision of workers' compensation insurers by states is justified. The ISC is the appropriate body to supervise the prudential standards of workers' compensation insurers/underwriters. However, further examination may be necessary to determine whether the Insurance Act should be further amended or strengthened, and whether the ISC is sufficiently resourced to prudentially supervise an increasing number of private underwriters under the Commission's preferred workers' compensation arrangements.

ISC supervisory coverage

The ISC's current supervision is confined by its Act and excludes both Commonwealth and State insurance bodies.

It may be argued that ISC supervision of government insurers is not necessary, as government effectively guarantee their insurer's liabilities. However, it may still be their interest to ensure that their insurer is financially sound by subjecting it to ISC prudential supervision. ISC supervision of government workers' compensation insurers could be arranged with the necessary co-operation between governments. However, the ISC has stressed that for such a scheme to work effectively, it would have to be granted unrestricted supervisory powers.

The ISC's expertise is limited to prudential supervision, ensuring compliance with minimum financial standards — largely capital, solvency and reinsurance requirements — it does not extend to other aspects such as ensuring that premiums embody appropriate preventive and rehabilitation incentives

There would thus have to be a dual or shared responsibility of supervision of insurance providers. The ISC should act as prudential supervisor, and some other body should oversee areas such as quality of service, accident prevention, rehabilitation, health-care services, and risk management.

Such arrangements already exists in relation to compulsory third party insurance in NSW where the ISC prudentially supervises thirteen insurers — leaving the Motor Accidents Authority to focus on accident prevention, training and effective rehabilitation.

The Commission recommends that the ISC's powers be extended, with the agreement of jurisdictions, to allow it to prudentially supervise government insurers.

Quality of service

There are grounds for requiring special consideration of service responsibilities in workers' compensation insurance. Unlike other insurance markets, those covered by insurance (employees) are not those who pay for it (employers). As the insurer's client, the employer, is not the one receiving the benefit. The result is that the usual pressures for delivering a 'quality' service are muted. Satisfying employer clients might not always mean delivering benefits expeditiously and fairly to injured workers. The incentive created by this type of insurance is for the insurer to deny liability so as to save money for both the insurance company and the employer. The employee then suffers.

For claimants, the quality of service is of major importance in claim processing, payment of benefits, dispute resolution, and other aspects of the process. The Commission heard many accounts of injured or ill workers dissatisfied with various aspects of the process. For example, the Victorian Trades Hall Council (Victorian Trades Hall Council 1990) provided a report on the Victorian WorkCare system from an injured worker's perspective which highlighted deficiencies in service quality. (The Victorian scheme has since taken steps to improve performance and has implemented an ongoing system of evaluation to provide for better management of service.)

Efforts to improve quality of service are being made. For example, WorkCover NSW includes a client service component in all internal training courses, to encourage a focus on client needs. Comcare has established a customer service plan to ensure the services it develops and delivers meet customer needs. Customers were canvassed for their service preferences, and partnership agreements made with selected customers on service levels and products.

Quality standards can be built into the licensing requirements for insurers and self-insurers, coupled with external monitoring. The power of workers' compensation regulators to withdraw an insurer's authority to operate was also suggested as way of ensuring quality.

Insurers' performance may be monitored by various indicators, and fines or penalties levied against insurers who fail to meet specified standards.

Insurers may also be subjected to regular, external, published 'quality' audits. This would provide employers and employees with an objective source of information on quality of service to balance against price when choosing a workers' compensation insurer.

The Commission surveyed workers' compensation schemes on their views on quality of service, and asked how they measured employer and employee satisfaction. Table 7.1 summarises the responses.

The Commission recommends that schemes develop quality standards and performance indicators, to form part of insurers' licensing requirements, and that schemes conduct regular, published 'quality' audits of insurers.

An independent body capable of monitoring the performance of schemes as a whole, or the performance of the workers' compensation authorities, may be justified. A workers' compensation ombudsman, similar to those operating in banking and telecommunications, could perform a valuable watch-dog function, providing a formal forum for complaints which are beyond the scope of dispute-resolution mechanisms.

Table 7.1 Scheme measures of quality of service

<i>Scheme</i>	<i>Measures of employer satisfaction</i>	<i>Measures of employee satisfaction</i>
NSW	Field reviews of licensed insurers, self insurers and specialised insurers. Emphasis on claims management. Monitoring of the number and outcome of premium appeals received. Market research in 1991-92. Establishing a Client Feedback System to handle service delivery issues.	Monitoring of the number and outcome of cases referred to WorkCover's Conciliation and Review Service. Monitors performance of rehabilitation providers. Monitors own performance through indicators relating to benefits as a proportion of average weekly earnings, return to work rates, Ethnic Affairs initiatives. Market research in 1991-92. Establishing a Client Feedback System to handle service delivery issues.
Qld	Annual satisfaction surveys. A recent client consultation survey. responses to Claims Experience Listings. Ministerial enquiries. Association with employer representatives. Feedback from members of the Board representing employers.	Annual client satisfaction surveys. A recent client consultation survey. Annual rehabilitation surveys. Return to work rates . Initial payment surveys. feedback from members of the Board that represent employees. Association with unions. Ministerial enquiries.
SA	Implementing a planned approach to quality service. Currently commissioning customer service research in relation to employers and injured workers.	Corporate plan reflects quality service indicators. Quality service is part of an enterprise agreement; managers are required to have in place standards and feedback processes in relation to the services they provide.
WA	Complaints substantiated by the Commission. Feedback from employer representative on the Workers' Compensation and Rehabilitation Commission.	Complaints substantiated by the Commission. Feedback from the Trades and Labor Council member of the Workers' Compensation and Rehabilitation Commission.
TAS	Feedback from employer representative on the Workers' Compensation Board, Premiums Monitoring Committee, Rehabilitation Advisory Committee and Nominal Insurer, Ministerial and other correspondence, Parliamentary Questions and media coverage.	Feedback from employee representative on the Workers' Compensation Board and Rehabilitation Advisory Committee, Ministerial and other correspondence, Parliamentary Questions and media coverage.

NT	Free market - employers may shift. Annual client survey. Employer representatives on the Work Health Advisory Council and the Premiums Monitoring Committee.	Complaints from claimants, applications to the Work Health Court. Annual client survey. Union representatives on the Work Health Advisory Council and the Premiums Monitoring Committee. Injured workers also have a representative on the Work Health Advisory Council.
ACT	Level of complaints - minimal. Compensation inspectors call on employers and act as information conductors. Workers' Compensation Monitoring Committee has employer representatives.	Level of complaints — no real concern. Workers' Compensation Monitoring Committee has employer representatives.
Comcare	Use of national and State Account Managers Internal and independent surveys Customer response to premium setting Feedback from Rehabilitation and Safety Commission	Performance indicators include turnaround times in claims processing, OHS inspections, rehabilitation success,. Quality Assurance Program monitoring all aspects of operations. Total Claims Management aims to ensure consistency and personal service.

Existing ombudsmen have wide powers to investigate complaints within the public sector. However, a specialised workers' compensation ombudsman may be justified. Unless there is specific jurisdiction for a state ombudsman to deal directly with the private sector — for example with doctors, lawyers and self-insurers — coverage is severely limitation. Although it is possible to deal with such complaints through the regulatory authority, this process is cumbersome and can involve conflicts of interest which an independent body can avoid.

Ms S Forbes, former Complaints Investigator with the Victorian WorkCare scheme, supported a separate ombudsman, arguing for a “formalised, functionally specific ombudsman for workers' compensation” (Sub 156, p.2).

The ombudsman should be funded internally by the workers' compensation scheme, for example by charging insurers for each complaint made against them, as occurs with the banking ombudsman.

The Commission recommends that each scheme come within the jurisdiction of an ombudsman who can deal with complaints by clients of the scheme. Funding should be internal to the scheme.

Data collection

Timely and accurate workers' compensation data are necessary for targeting prevention strategies (as discussed in Chapter 3), for setting experience rated premiums (as discussed in Chapter 3 and Appendix G), and for informed policy making more generally. A national approach to 'benchmarking' also requires development of a framework for performance monitoring and identification of 'best practice'. For example, the ICA argued that (Sub 177, p.5):

Comprehensive claims statistics are integral to the success of a workers' compensation system. Statistics should be collected through a central authority and insurers will cooperate in determining and collecting data which is meaningful for the management and prevention of claims for assuring correct rates of provisions for use in risk management and rehabilitation and for monitoring fraud.

Worksafe Australia's National Data Set (NDS) program, and plans to supplement compensation-based statistics with OHS-based data, should provide a useful start. However, the limited and poor quality of workers' compensation statistics, arising from the fragmented nature of the reporting system for insurers, has significantly limited the usefulness of current data.

Currently, Worksafe compiles data supplied to it by various OHS and workers' compensation authorities conforming to the NDS. However, there are significant gaps.

For various reasons, including legislative constraints and the cost to some jurisdictions of extending coverage, a 'lowest common denominator' approach was taken in establishing the NDS. Differing definitions adopted by various jurisdictions (eg of a worker and what qualifies as a compensable claim) also contribute to the non-comparability of data.

The Commission found major deficiencies in workers' compensation data. The fragmented nature of reporting systems and the resulting limited and poor-quality statistics greatly constrain the scope for analysis.

More centralised data collection could overcome some of these problems. Data-collection responsibilities could form part of the minimum licensing requirements for insurers and self-insured employers. Workers' compensation data could be collected at source, and then forwarded to the proposed National WorkCover Authority for collation and publication. This would remove one administrative layer from the system, as the data would not have to be filtered through the various schemes.

Centralised collection of insurance data already exists in the health insurance area. The Private Health Insurance Administration Council has a broad range of financial and administrative powers which include:

- the collection and dissemination of financial and statistical data, including tabling of an annual report to Parliament on the operations of health funds; and
- the establishment of uniform reporting standards for funds.

The Commission recommends that data-collection requirements form part of insurers' and self-insured employers' licensing criteria and that they be required to supply relevant data to the proposed National WorkCover Authority. In concert with Worksafe Australia, the authority would be responsible for establishing uniform reporting standards and the collation and publication of national workers' compensation statistics.

7.2.4 Brokers

Insurance brokers act as intermediaries between employers and insurers, and can play a significant role in the delivery of OHS and workers' compensation services.

The Tasmanian Government Insurance Office (Sub 109, p.8) accused brokers of destabilising the market by encouraging cost-cutting by insurers and "shopping around" by employers. They also argued that brokerage should not be paid on a compulsory form of insurance, as it erodes the premium pool.

However, brokers can minimise transaction costs by acting as information sources for employers, and putting pressure on insurers to become more efficient. If insurers respond to competitive pressures by charging 'inappropriate' premiums, this is better addressed directly through prudential standards or premium-setting regulations.

Overall, the Commission considers that brokers can perform a valuable function as information sources for employers, so long as there is sufficient price transparency for employers to make informed decisions on the purchase of insurance and brokers' services.

This transparency may be achieved either where employers pay for brokers' services directly, and insurers are restricted from paying commissions (as in NSW) or where employers are provided with a breakdown that includes brokerage.

7.2.5 Self-insurance

Under self-insurance, an employer substantially meets the cost of its workers' compensation claims on a pay-as-you-go basis. In practice, self-insurers often take out some form of 'catastrophe' insurance to limit their total liabilities. They may also be required to contribute to a 'nominal' insurance fund and meet specified prudential and claims-handling requirements.

There are various forms of self-insurance. In NSW, Government Departments can self-insure, and are able to contract out their claims management to GIO, in a similar arrangement to the Class B licences under Comcare. Such arrangements allow smaller employers to enjoy the benefits of self-insurance without the need for in-house claims management expertise.

Some jurisdictions allow licences for combined self-insurance by more than one employer. In NSW for example, Guild Insurance self-insures the employees of pharmacies in NSW. In Victoria, BHP holds a group licence to cover all its employees, including those employed by subsidiary companies.

Self-insurance may present a problem for the remainder of the scheme. If too many employers choose to self-insure, the pooling effect of insurance is lost. The ICA (Sub 65, p.13) argued this point:

It would be necessary to ensure that self insurance was not extended so that the viability of the balance of the scheme was in jeopardy. This could occur if the only risks left in the insurance scheme were a limited number of high-risk employers, so that the "pooling" effect of insurance ceased to be available.

On the other hand, this implies widespread systematic cross-subsidies, a fact acknowledged by the ICA (Sub 65, p.13). To the extent that the employers who choose to self-insure were systematically subsidising the high-risk employers now left in the pool, the option of self-insurance acts to drive out cross-subsidies — which is desirable. Allowing self-insurance promotes competition and in so doing helps drive cross-subsidies from the insurance system by allowing better risks to opt out if their premiums are being used to subsidise worse risks.

In any case, under the Commission's proposals relating to premium structures, the scope for widespread cross-subsidies would be significantly reduced. As long as insurers can successfully match premiums with risks through experience rating, premiums should not be greatly affected by allowing self-insurance.

Other concerns have been expressed about self-insurance. The United Trades and Labor Council of South Australia (Transcript p.1536-37) was critical of self-insurers, claiming they use their position to suppress claims reporting.

Blackett (1991, p.221) has expressed concern at the ignorance about financing workers' compensation as a self-insurer. Although he saw unassailable long-term advantages to self-insurance, he pointed out that it was not a financial panacea:

In reality self-insurance is not easy. The glowing reports that existing self-insurers and others give of self-insurance tend to be self-serving. The figures for savings often touted by New South Wales self-insurers usually depend on premium calculations based on tariff rates alone. If they based their comparisons on premiums calculated on using the whole formula, which for large insurers includes a significant adjustment for claims experience, a major proportion if not all of these so-called savings would evaporate.

The arguments in favour of self-insurance are, however, persuasive. Self-insurers face strong incentives to provide safe places of work, since a greater proportion of costs are borne internally. Self-insurance also means 'ownership' of the process of rehabilitation and return to work, and facilitates the development of an internal culture geared to minimising costs of work-related injury and illness.

The Commission recommends that schemes offer self-insurance to suitably qualified employers under appropriate regulation.

While all schemes regulate self-insurance, there is little consistency among jurisdictions. The Queensland, Joint Coal Board and Seafarers Schemes do not allow self-insurance. In the other jurisdictions, permission to self-insure must be obtained from the relevant authority.

Licensing criteria for self-insurance vary among jurisdictions. These are summarised in Table 2.2. Common themes include an ability to provide service promptly and effectively, to provide statistical information, as well a demonstrated capacity to meet their financial commitments under the scheme. Numbers of employees may also be a requirement. In SA, a firm with at least 200 employees may qualify, while in Victoria the minimum is 1000. However, it is unclear why number of employees is a necessary criteria for self-insurance.

So long as self-insurers satisfy objective prudential and quality-of-service standards, there seems little reason for imposing additional criteria.

Similar arguments to those applying to the licensing requirements of insurers apply to self-insurers. These are discussed in Section 7.2.3.

The Commission recommends that schemes adopt uniform minimum licensing criteria for prudential requirements, data collection, and 'quality of service' for self-insured employers, to be developed by the proposed National WorkCover Authority.

Mr Richard Cumpston (Sub 126, p.39) argued that the same prudential and claims-handling standards, and the same guarantee fund contributions should apply to self-insurers as to insurers.

Three levels of guarantee could be required of a self-insurer. First, there is 'catastrophe' insurance, which protects the self-insurer against an unexpectedly large claim. Second, there is reinsurance/reunderwriting, which ensures that the self-insurer's liabilities are met if it cannot do so itself. Third, there is a bank guarantee or similar financial instrument, which again provides an assurance that the self-insurer's liabilities will be met.

If a self-insurer takes out reinsurance, or provides a bank guarantee, and so long as the regulator is satisfied with the prudential supervision of the reinsurer, or bank, there appears no need for additional prudential regulation of the self-insurer beyond that imposed on other insurers.

The Commission recommends that prudential requirements imposed on self-insured employers be, as far as practicable, neutral compared to other insurers.

Self-insurers operating across jurisdictions must obtain a separate licence for each scheme. The varied rules between schemes is an additional administrative burden on self-insurers, which adds to cost and hinders efficiency. The Self Insurers Association of Australia (Sub 37, p.3) argued for national employers to be able to take out one licence to cover all their employees.

Box 7.1 illustrates the complexities faced by national employers who wish to self-insure. BHP would prefer to rationalise its self-insurance nationwide, as it has been able to do statewide in Victoria. However, as the box illustrates, its self-insurance arrangements have had to be much more elaborate.

Box 7.1 BHP workers' compensation insurance coverage

Queensland

- All BHP operations covered by the state scheme. Self-insurance is not allowed in Queensland.

New South Wales

- Four separate self-insurance licences under the NSW WorkCover scheme cover the majority of BHP operations.
- A small number of BHP-owned entities are separately insured, because they cannot be self-insured under NSW law, although the possibility of group licences is currently under consideration.

- BHP's coal mining operations are covered by Coal Mines Insurance (with Joint Coal Board)

Victoria

- All BHP operations are covered by one self-insurance licence.

South Australia

- Two self-insurance exemptions are held: — one for BHP, and one for a subsidiary
- Some small operations are covered under WorkCover.
- BHP is currently investigating the possible coverage of all operations under one licence.

Western Australia

- The majority of BHP operations are self-insured under one licence.
- Some small subsidiaries are externally insured.

Tasmania, Northern Territory and the Australian Capital Territory

- BHP has comparatively small operations in these States/Territories, and all are externally insured.
- One subsidiary holds self-insurance licences.

Seafarers' Scheme

- BHP's maritime employees are covered by the Seafarers' Scheme, which does not allow self-insurance.

Source: The Broken Hill Proprietary Co. Ltd

7.2.6 Industry-based schemes

Certain industries are covered by specific workers' compensation arrangements. The most well known are coal mining (covered under NSW Joint Coal Board (JCB) arrangements), and shipping (covered under the Seafarers' Scheme).

Joint Coal Board

The JCB was established in 1947, under joint Commonwealth/NSW legislation. Since 1948, it has provided workers' compensation insurance cover for the NSW coal industry, setting its own premium rates, with premiums collected

vested in the Board and managed solely for the benefit of the NSW coal industry.

BHP criticised the scheme, arguing that the scheme's higher benefits made it far more costly than would have been the case under NSW WorkCover arrangements.

Under the Commission's recommendations, the scheme would adopt a common benefits structure, with scope for negotiated additional benefits in the context of enterprise agreements.

BHP also criticised the compulsory nature of the JCB scheme. BHP Steel operates coal mines in NSW, with 1600 employees who are compulsorily covered by the JCB scheme. BHP (Sub 185, p.5) is otherwise a self-insurer, and would prefer to have the opportunity to self-insure its coal mining operations "for the reasons of improving efficiency and delivery of benefits to any injured employees."

As discussed in Section 7.2.5, the Commission supports the concept of self-insurance and considers that employers should be entitled to self-insure all their employees where appropriate self-insurance criteria are met.

Under the Commission's recommendations, the JCB Scheme would allow self-insurance to suitably qualified employers.

Seafarers' Scheme

Historically, seafarers have been covered by their own industry-specific arrangements, although there has been a close nexus between the seafarers' and Commonwealth employees' schemes.

A review of Seamen's compensation was tabled in Parliament in June 1988 (the Luntz Review). As a result, a new scheme commenced in June 1993.

Luntz (1988 p.67) canvassed the possible inclusion of seafarers under Comcare. He concluded that:

While the [Commonwealth scheme] covers a wide range of workers, and has been able to accommodate workers formerly dealt with under different workers' compensation regimes [such as South Australian and Tasmanian railway workers under the authority of the Australian National Railways Commission] all those covered under the Commonwealth legislation are in some shape or form public employees. By contrast, apart from the employees of the Australian National Line, seafarers are employed by private companies or corporations. It would thus seem totally inappropriate for seafarers to be brought within the [Comcare scheme].

Another alternative canvassed was for seafarers to be covered by state workers' compensation legislation. Luntz concluded that this too was unsatisfactory:

Two of the motivating factors for the introduction of a separate compensation scheme for seafarers in 1909 were, first, the unsatisfactory nature of State workers' compensation systems and, secondly, the desirability of a system of uniform entitlements and benefits across the entire Australian maritime industry...

He concluded with a recommendation:

...that a separate and distinct Federal workers' compensation statute be retained for the seagoing maritime industry and that integration with another compensation regime be left to any future national accident compensation system.

A further issue is the unusual 'pooling' arrangement for the employment of seafarers. The current scheme enables the Government to raise a levy on ship owners to operate a Fund which covers seafarers who are 'industry employees' at the time of injury. This covers workers attending the Seafarers Engagement Centre or an approved training course. Seafarers are also covered for 'recess periods' — off-duty periods during the voyage or during off-duty shore leave. Home leave between voyages and time spent at home during a ship's call to the seafarer's home port are not covered.

If the Commission's recommendations were implemented, the need for a separate Seafarers' Scheme would be substantially reduced.

7.2.7 Dispute-resolution processes

The dispute-resolution process is an integral part of a workers' compensation scheme, as many of the tensions inherent in a workers' compensation surface in disputes.

Disputes can arise at many stages, for example over:

- acceptance or rejection of a claim (eg whether an injury was work-related);
- compensation payments (eg the 'reasonableness' of medical or related costs);
- degree of disability (eg in relation 'Table of Injuries' entitlements);
- benefit reductions (eg as a result of the application of 'notional earnings' tests); and
- termination of benefits (eg as a result of refusal of a job offer).

Expeditious dispute resolution is crucial to the quality of service of any scheme. Inefficient processes result in delays which are not only unfair but are also an important driver of costs — and lead to poor employer-employee relations.

The absence of a fair and efficient method of resolving disputes may also contribute to cost-shifting between workers' compensation schemes and individuals or other government programs.

The dispute-resolution process should not be a vehicle for the erosion of benefits or denial of access to entitlements.

Imposing uniform dispute-resolution processes as initially proposed in the Draft Report would reduce the scope for non-uniform application of benefits. However, the Commission has accepted that there are several compelling arguments in favour of jurisdictions retaining control of their own dispute-resolution processes, particularly if the Commission's recommendations regarding a uniform benefits structure and a nationally available scheme are implemented.

A jurisdiction in control of its own dispute-resolution processes has an incentive to develop the most appropriate mechanisms for its particular circumstances. Such a system is also likely to be more responsive to change than a single national structure. Different approaches to dispute resolution provide an area where schemes can pursue competitive advantage, creating a breeding ground for innovation and the development of 'best practice'. It also avoids the possibility of the dispute-resolution system being captured at a national level by particular interest groups.

In addition, the mere existence of uniform dispute-resolution measures would not necessarily mean that they would be applied uniformly. Some form of monitoring or oversight would be necessary to regulate the application of uniform procedures. If monitoring or oversight is to be adopted in any case, it is preferable that schemes compete to provide the most efficient dispute-resolution system, with oversight to ensure that whatever system is adopted is fair and fairly applied.

Monitoring dispute resolution performance is a preferable method of overseeing access to compensation. To identify unusual trends in dispute-resolution processes, performance indicators such as the proportion of claims disputed by an insurer, the proportion of disputes upheld, and the average duration of disputes may be used.

A scheme which uses its dispute-resolution mechanisms to erode access to benefits may then be identified, and made subject to some form of financial adjustment to address any cost-shifting.

The workers' compensation ombudsman would also play a key role in ensuring that the dispute-resolution process is fair, by responding to complaints from dissatisfied claimants, employers and insurers.

The Commission recommends that the proposed National WorkCover Authority monitor all schemes' dispute-resolution processes, and publish
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performance standards to assist in identifying 'best practice' and in countering possible erosion of benefits.

Elements of 'best practice'

Although approaches to dispute resolution need not be uniform across schemes, there are certain elements which are essential if processes are to be regarded as efficient and fair.

The Commission endorses the following principles as representing 'best practice' in dispute resolution.

Payment of benefits

There is an incentive for employees to dispute claims if benefits are paid during the period of a dispute. The payment of benefits should follow the latest decision of a review body. For example, if the latest review body ordered that benefits be stopped, benefits should not be paid during an appeal against that decision.

Incentives should be in place for insurers and employers to make speedy and justifiable decisions relating to claims. This would ensure that genuine claimants do not face a dramatic drop in income while awaiting acceptance of their claim, or hearing of a dispute.

One method by which this may be achieved is by placing an automatic penalty on an insurer where the dispute-resolution process reverses the insurer's decision to deny or withdraw benefits. If the insurer wishes to dispute a claim, it may avoid this penalty by agreeing to pay benefits during the period of a dispute, on the understanding that it is not thereby accepting liability.

Another approach which would reinforce the incentive to make prompt decision is to impose strict time limits on decision making at each stage of the claims process, with automatic acceptance of the claim if those limits are exceeded. For example, in WA, once an injured worker has served a claim on an employer, the employer then has three days in which to make a claim on the insurer. The insurer then has 14 days in which to accept or dispute the claim, or to notify that a decision cannot be made in the time allowed, and the reasons why. Where an insurer fails to act within the 14 days, the worker is deemed entitled to weekly payments, but either the employer or insurer may apply for a determination as to the worker's entitlement. Such time limits could form part of the licensing requirements of an insurer. For example, in *Re Switzerland General Insurance*

Co Ltd,⁴ the disputation of claims by an insurance company for financial advantage was regarded as unethical and its licence was cancelled.

The Commission draws attention to the problems posed by delays in dispute resolution, and the need for mechanisms to address the potential imbalance of power between workers and employers/insurers.

Granting dispute-resolution bodies discretion to award costs would also discourage capricious disputes, while not preventing the hearing of genuine grievances. For example, a dispute-resolution body could be empowered to order the losing party to pay costs. The possibility of being liable to pay not only their own costs, but also those of the other party to a dispute would dissuade frivolous disputes. Unfortunately, such provisions have been rarely used in those jurisdictions where they exist.

The possibility of having to pay costs could, however, discourage genuine claimants from pursuing disputes. To avoid this, and the dispute-resolution body could be directed not to award costs against the claimant unless satisfied that “the claim was frivolous, or vexatious, fraudulent or made without proper justification”.⁵

The Commission recommends that dispute-resolution bodies be given discretion to award costs against a worker and/or the employer/insurer, particularly in cases regarded as frivolous, vexatious, fraudulent or without proper justification.

Alternative Dispute Resolution

In alternative dispute resolution (ADR) a neutral third party seeks to bring the parties to agreement, using a variety of techniques and strategies. A single dispute-resolution body may apply the whole range of techniques at various stages of a dispute, keeping 'ownership' of the dispute within the one body.

The various ADR stages include: mediation (where the parties determine the outcome of a dispute, aided by a neutral third party); conciliation (where the third party proposes a range of solutions to the dispute and the parties agree an outcome); and arbitration (where the parties agree to accept the decision of a third party without knowing the content beforehand). If agreement still cannot be reached, the parties may proceed to formal court adjudication.

⁴ [1970] WCR 132 (NSW).

⁵ *The Compensation Court Act 1984 (NSW)*, Section 18(4).

The earlier a dispute is addressed in the course of its history, the less likely it is to need complex application of the various ADR techniques, or recourse to a court-imposed decision.

The Commission supports adoption of ADR mechanisms in workers' compensation. Under ADR, the adversarial element is minimised, exchange of information is encouraged, and the likelihood of a satisfactory outcome is maximised. ADR is also conducive to maintaining constructive ongoing employer/employee relationships.

Role of medical panels

Many disputes turn on medical opinion, and often there are differences in opinion expressed by medical practitioners. If agreement cannot be reached, an independent medical panel should advise on medical issues. This would bypass resort to expensive and time-consuming adversarial experts.

The dispute-resolution body should be able to direct question to a medical panel for expert evidence on purely medical matters (eg on the nature of the injury and the degree of impairment). It is also important to distinguish questions of fact relating to medical issues, from opinions which may turn on matters outside panel's expertise (eg an injured worker's capacity to do a particular job).

Legal representation

Most jurisdictions currently permit a party to be legally represented at all stages of decision making. Many submissions argued for restricting or abolishing legal representation, at least in the early stages of a dispute. For example, it was suggested that neither party be able to employ legal representation, except by consent and for special reason — at which time both parties would be able to be represented.

However, if legal representation were barred, this would be likely to adversely affect the least powerful, generally the claimant. Employers and insurers are likely to have people who specialise in such work. Some workers' compensation cases raise difficult legal concepts unfamiliar to most workers, who generally rely on union or legal counsel. It is also argued that without legal representation disputes are likely to become more protracted.

Claimants should be entitled to representation, but this should not be restricted to lawyers. Participants should be allowed the advocates of their choice.

The need for representation can be reduced if responsibility for explaining workers' and employers' rights and entitlements is vigorously adopted by another party, possibly the scheme regulator or trade unions/employer groups. If the quality of service provided to participants is sufficiently high, there should

little need for legal involvement. The early exchange of information, and the avoidance of confrontational processes would also decrease workers' need for legal advice.

7.3 Market structures

Governments also regulate market structures (eg specifying the number of insurers, responsibility for underwriting, and funds management). Table 7.2 summarises the current situation.

Table 7.2: Current market structures

<i>Jurisdiction</i>	<i>Insurance providers</i>	<i>Underwriting</i>	<i>Fund Management</i>
New South Wales	Multiple	Public	Private
Victoria	Multiple	Public	Private
Queensland	Single	Public	Public
South Australia	Single	Public	Public
Western Australia	Multiple	Private	Private
Tasmania	Multiple	Private	Private
Northern Territory	Multiple	Private	Private
ACT	Multiple	Private	Private
Comcare	Single	Public	Public
Seafarers	Multiple	Private	Private

Source: Institute of Actuaries of Australia (Sub 6, p.3), and annual reports of various schemes

7.3.1 Number of insurers

Available information is inconclusive on the subject of whether a single insurer is preferable to multiple insurers in the area of workers' compensation (see Appendix E).

Participants favouring a single provider argued that this yields economies of scale, scope and organisation. The evidence for scale economies, however, indicates they may be largely confined to administration which generally accounts for less than 10 per cent of premiums (Cho 1988). Of themselves, they would not justify sole provision.

Participants also claimed advantages from the greater control possible over all aspects of workers' compensation insurance, including prevention, compensation, rehabilitation and return to work. This included better collection of data, and enhanced control over fraud and over-servicing.

They also claimed that multiple providers are less likely to invest in programs to reduce accident rates, because other providers may appropriate some of the benefits. A single provider overcomes this problem.

Those who argued for a single provider generally saw this as synonymous with a sole government provider. Additional advantages claimed for this approach were that it allowed workers' compensation to be used as a policy tool for assisting industry and allowed the profit element to be removed from premium costs. Neither of these are convincing arguments.

The shortcomings of assisting industry by manipulating premiums have been addressed in Chapter 3 and to an extent in Chapters 4 and 6. The removal of a profit margin from premiums ignores the opportunity costs involved. Not providing an economic return on capital employed forgoes the potential return on funds which could have been earned by investing elsewhere. It is an expense borne by the community.

Other participants identified problems associated with government monopoly provision of insurance. The Commonwealth Bank (Sub 42, p.4), for example, argued government monopolies do not cater to the needs of individual organisations, nor allow for competitive premiums.

Those favouring multiple providers argued that the resulting competition generates ongoing pressures to improve efficiency. It ensures firms bid resources away from less productive to more productive uses. It forces providers to compete through prices and quality of service to attract or maintain market share.

McEwin (1987) argued that competition, by constraining premiums, forces insurers to better control moral hazard (the possibility that an insured employer may allow greater risk in the workplace because of the existence of insurance). Without competition an insurer can simply charge more to cover moral hazard losses.

Critics of multiple private providers noted it has been associated with instability and insolvencies in the past. The SA government claimed that, prior to the introduction of their central scheme, competition between private providers led to excessive premium cutting. There is some evidence a similar situation exists in Tasmania, where many insurers are making losses. Many of these problems arose from premium rate restrictions imposed by governments and inadequate prudential supervision.

Any particular market structure may not of itself be critical to 'good' performance. Other factors, including the quality of scheme administration, are also important.

Information presented by the Victorian WorkCover Authority on the performance of some 80 jurisdictions (in Australia, Canada and the USA and its dependencies) provides support for this (Sub 89, p.14):

The record of some nine decades of this range of structures is that there is no obvious difference in performance according to the particular structure involved.

and:

... critical empirical and analytical studies of the operation of schemes in North America conducted by specialist research bodies such as the Workers Compensation Research Institute show that the crucial elements associated with effective system performance are not those connected with formal structure but rather a complex mosaic of features which affect system dynamics. The most successful systems have developed an overall culture which is oriented to practical and applied approaches towards returning disabled workers back to employment while, in the interim, providing benefits (both in terms of income support and the payment of medical and legal expenses) expeditiously and with a minimum of friction and litigation.

7.3.2 Underwriting

The underwriter of a scheme bears ultimate financial responsibility for workers' compensation liabilities. The underwriter is the risk bearer. This can be the government or the private sector.

Public underwriting

Under this option, the insurance fund is underwritten by government. This is currently the case in NSW, Victoria, Queensland, SA and for Comcare. Victoria is moving from public underwriting toward private underwriting.

A major argument in favour of public underwriting is that the liability for workers' compensation is too important to jeopardise by leaving it in the hands of the private sector. The failure of a private insurer/underwriter may put at risk workers' entitlements to compensation. The long-tail inherent in workers' compensation insurance gives this greater importance.

Yet, while public underwriting can ensure protection from the costs of insurer insolvency, adequate prudential supervision, backed up by a 'nominal' insurance fund serves the same purpose.

A second argument in favour of public underwriting is that governments can also ensure stability.

Finally, WorkCover NSW argued (Sub 92, p.7) that a major benefit of retaining public underwriting is that it ensures that licensed insurers must compete for market share on the basis of service delivery rather than premium cost cutting.

Private underwriting

Under this option, it is imperative for government to specify prudential requirements to safeguard workers' entitlements.

The Insurance Council of Australia (Sub 65, p.3) claimed that private underwriting was better able to manage and spread the risk of a workers' compensation system and, in doing so, avoid deficits in the funding of liabilities.

The Tasman Institute (1992, p.10) suggested that government should define rules promoting fairness and efficiency, rather than underwriting schemes. They argued that underwriting should be transferred from government to a competitive insurance industry for a number of reasons:

- There is a need for a system in which competitive insurance contracts can be written and administered at the enterprise level, with rates reflecting the actual and likely experience in the firm.
- There needs to be an incentive to prevent accidents and to promote a safe workplace, with insurance companies competing for business by devising compensation and rehabilitation products more suited to the company and workers concerned.
- Allowing insurers to take full commercial risk is more likely to encourage competition, not just on rates but also on service, and the development of innovative products suited to the needs of companies and their employees. Profit seeking insurance companies will be better equipped to find appropriate ways of structuring insurance policies so as to achieve both safety and efficiency in the workforce.

WorkCover NSW (Sub 92, p.16) argued against private underwriting, stating that it would introduce instability to the system. It claimed competition would cause discounting of premiums, leading insurers to write business at rates below those required to cover the total cost of claims incurred. It further argued that with private underwriting there is an incentive for insurers to move towards a partially funded system, to free up funds for short term ventures. This would also be to the detriment of future commitments.

The potential problems of premium instability, insurer insolvency and inadequate funding associated with private underwriting can be minimised through monitoring of premium setting, proper prudential supervision, and 'nominal' insurance arrangements. This approach also provides the potential benefits associated with both price and non-price competition.

The Commission recommends that, where private insurers operate in a market, there be private underwriting of workers' compensation insurance, under adequate monitoring of premium setting, prudential supervision and 'nominal insurance' arrangements.

7.3.3 Comcare Australia

The Commonwealth Government is currently a self-insurer. A Commonwealth authority, Comcare, administers an insurance-like system under which agencies contribute to the funding of liabilities through the payment of premiums. However, as a self-insurer, the Commonwealth Government itself ultimately underwrites the scheme.

Premiums are calculated on a fully-funded basis, to provide appropriate price signals to managers. However, the premiums are paid into consolidated revenue, and no separate fund exists. Funds sufficient to cover scheme costs are advanced annually to Comcare. This means, in effect, that the government is running a pay-as-you-go system.

The present Comcare scheme was introduced in 1988, and reviewed after two years of operation. The Review of Comcare Program, commonly known as the Brown Review (Brown 1991), reported to the Government in April 1991. Its major recommendations included that Comcare:

- be allowed to offer more flexible services to its customers and expand into the private sector;
- be allowed to offer claims management services to privatised ex-government business enterprises (GBEs); and
- be restructured to be a commercially competitive enterprise with fund management responsibilities.

The review (p.47) envisaged Comcare offering claims management and consultancy services in other jurisdictions, and providing continuing cover for privatised former Commonwealth Government bodies. This was broadened in the legislation to extending Comcare cover to other entities in competition with Commonwealth Government businesses.

The review recommended the extension of Comcare cover on the grounds that there were fully commercialised bodies which were currently more than 50 per cent owned by the Commonwealth Government, but which could later be privatised. It saw that there were attractions for these bodies from both an industrial relations perspective — being able to retain the same high level of compensation benefit coverage for all workers — and from a management

perspective avoiding the cumbersome necessity of insuring under many different compensation regimes to cover their national workforce.

In addition, because the review proposed to phase in greater freedom of choice for Comcare's clients about the extent of their involvement with Comcare, it was thought appropriate that Comcare be given some avenues for developing its own business activities.

The Government endorsed most of the review's recommendations, and has legislated for their adoption, although it has not acted to grant Comcare fund management responsibilities.

The *Commonwealth Employees' Rehabilitation and Compensation Amendment Act 1992* extended the provisions of the Act to certain corporations outside the Commonwealth public sector. Privatised enterprises which Comcare previously serviced or companies competing with government enterprises are eligible for two types of licence:

- A Class A licence allows a corporation to self-insure, but its claims will be managed by a subsidiary of Comcare; and
- A Class B licence allows a corporation to self-insure, and either self-administer its claims, or tender the claims management function to an agent.

No such licences have been issued pending the outcome of this inquiry.

The Commission's view

The Brown Review was of necessity largely concerned with the Comcare Scheme in isolation from other workers' compensation schemes. It was not in a position to make recommendations regarding Australia-wide workers' compensation arrangements. The review's recommendations were framed in this context. The Commission's inquiry is required to take a national perspective, and its recommendations are framed in this broader context.

The Commission acknowledges inter-jurisdictional competition as a positive force for the improvement of workers' compensation systems. In the past, such competition has largely been limited to competition by comparison, and competition for the marginal employee (by attracting business to a particular jurisdiction by offering lower premiums).

The review's proposed extension of Comcare coverage would add a new dimension to inter-jurisdiction competition. For example, it introduces the possibility of self-insurance to certain corporations currently insured under the Queensland scheme, and would allow certain eligible national companies to take out a national self-insurance licence.

However, it is debatable whether the proposed extension of Comcare is the most appropriate means of developing national competition.

There are two main arguments against the extension of Comcare coverage .

First, competitive neutrality would not be achieved. Comcare would not be a legitimate competitor, as it does not control its own premium fund and is not therefore its own underwriter. In addition, Comcare is not required to make a profit, or to provide a return on capital. These factors may allow Comcare a competitive advantage over private sector insurers and claims managers.

The Independent Committee of Inquiry Report into National Competition Policy (Hilmer 1993) recommended that the Government adopt a set of principles aimed at ensuring government-owned businesses comply with certain competitive neutrality requirements when competing with private firms. An issue arises of whether the Brown Review recommendations would achieve competitive neutrality.

Under the Brown Review scheme, as adopted, Comcare may offer self-insurance or self-administration to some private sector corporations, but the insurers that previously covered those corporations cannot compete for equivalent Comcare business.

Second, the requirement that eligible corporations compete with a current or previous Commonwealth Government authority does not provide the option of national coverage for other corporations which are not eligible on this count. Ministerial discretion on whether a qualified corporation may be licensed may further restrict eligible firms.

The other major recommendation of the Review, that Comcare be given control of the premium fund and act as a commercial entity has already been rejected by Government, as it would entail forgoing the benefits of self-insurance.

Comcare was established as a means of managing the Commonwealth Government's self-insurance function, not as an insurer or regulator of self-insurers. It is not clear that there would be any advantages in converting Comcare to a fully funded insurer with control of its own premium fund, which would then compete for business with other insurers.

The Commission recommends that Comcare return to its core function of managing Commonwealth Government's self-insurance.

7.3.4 A nationally available workers' compensation scheme

The Commission's preference is for competing alternatives for workers' compensation insurance throughout Australia, based on certain fundamental uniform elements. The best means of achieving this is through a nationally available workers' compensation scheme, operating in tandem with existing state schemes, competing for employers' business.

Eligible employers could choose either to insure with existing schemes, or to insure under the national scheme. Under the national scheme they could either: self-insure, with in-house claims management; self-insure and contract out the management of their claims; or purchase insurance from a licensed insurer.

The definition of eligible employer could be as widely drawn as possible, restricted only by any limits on the Commonwealth Government's Constitutional powers. Advice from the Attorney General's Department is that there is no legal requirement for the definition of eligible corporations to be drawn as narrowly as it is in the *Commonwealth Employees Rehabilitation and Compensation Act 1992*. It appears the Commonwealth Government may legislate in respect to all businesses except:

- non-incorporated enterprises which operate within only one State: and
- State government employees.

The authority regulating a nationally available scheme would have a dual role. It would be responsible for setting national uniform benefits structures, monitoring dispute-resolution systems, collecting and publishing data, and setting minimum quality standards for all workers' compensation schemes.

Within this context, the proposed National WorkCover Authority could also co-ordinate a national 'best practice' program on an ongoing basis. State, Territory and Commonwealth Governments should participate in the development of such a program. Such an approach would be consistent in principle, and similar in practice to that taken by the Steering Committee on National Performance Monitoring of Government Trading Enterprises (Steering Committee, 1993).

The National WorkCover Authority would also be responsible for developing comparable and reliable indicators for 'benchmarking' performance. To facilitate comprehensive inter-scheme comparisons, performance indicators should encompass all aspects of scheme performance, including quality of service (see Appendix L). The Victorian Department of Premier and Cabinet (Sub 208, p.19) referred to the system maintained by the National Association of Insurance Commissioners in the USA as a useful example for Australia.

The National WorkCover Authority would also act as regulator of the nationally available scheme. It would license self-insurers and insurers which met

appropriate prudential and service standards. Comcare would be a licensed self-insurer under this authority, as could AOTC Ltd, Australia Post, other GBEs, as well as eligible private sector employers. Private insurance companies would be licensed to insure eligible employers under the national scheme. Commonwealth Government bodies, too, could opt to be insured by private insurers — if this were a competitive alternative for them.

The Authority would also be responsible for the basic regulatory functions associated with running a scheme. For example, it would supervise the collection of data, ensure quality of service delivery of insurers and self-insurers, and monitor premium setting for the national scheme.

The Authority would also prescribe the benefits structure to be applied under the national scheme. This would be adjusted as required to accord with a nationally agreed uniform compensation package.

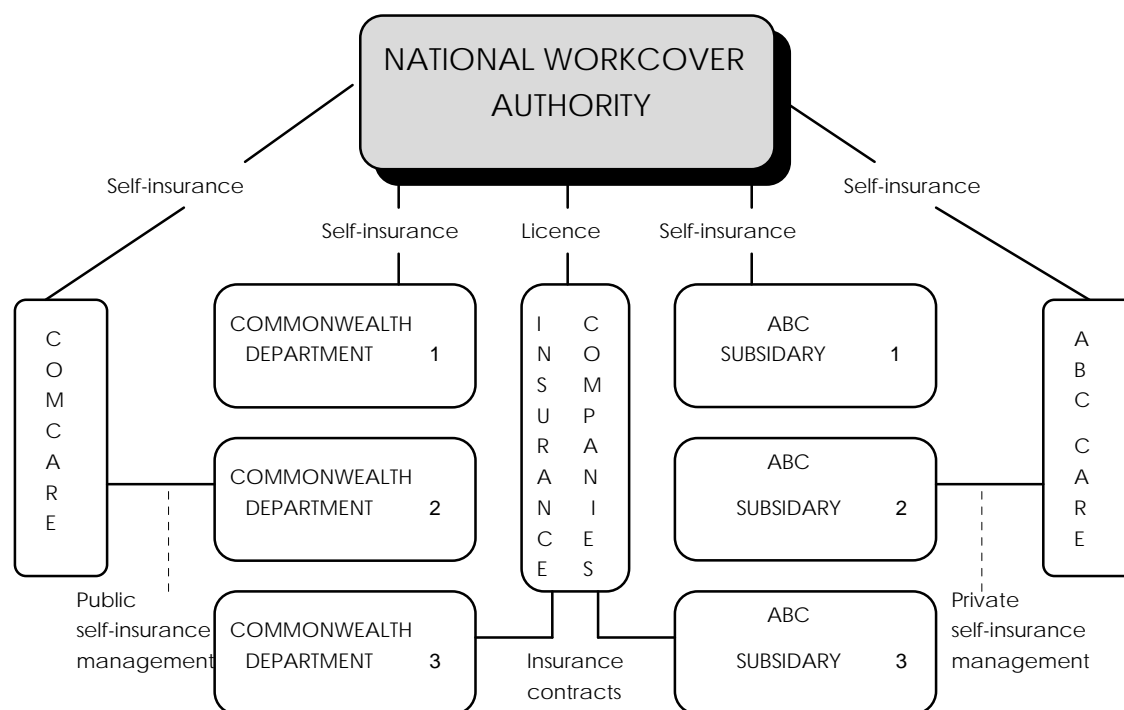
Figure 7.1 illustrates the Commission's proposed model of how a national scheme would operate. There is parallel treatment of the Commonwealth Government as an employer, and a typical large company with several subsidiaries or divisions — represented by a hypothetical company ABC Ltd. The Commonwealth Government could take out a self-insurance licence under the national scheme, and then appoint a self-insurance manager for its departments (Comcare). The company may also take out a self-insurance licence and act as a self-insurance manager for its subsidiaries (the ABC Care model). In addition, individual Commonwealth Government departments or company subsidiaries may opt to take out their own self-insurance licence under the scheme (eg Commonwealth Department 1, or ABC Subsidiary 1), or to purchase insurance directly from an insurance company (eg Commonwealth Department 3, or ABC Subsidiary 3).

This model provides equal treatment of the Commonwealth Government as an employer compared to other employers. In addition, self-insurance under the nationally available scheme is competitively neutral with self-insurance under any other scheme.

The Commission recommends that the Commonwealth Government establish a nationally available workers' compensation scheme which could operate in parallel with existing schemes.

The Commission recommends that a National WorkCover Authority be established to develop minimum national standards and to regulate the nationally available workers' compensation scheme.

Figure 7.1 Proposed nationally available workers' compensation scheme



The Commission recommends that, for all workers' compensation schemes, the National WorkCover Authority:

- **develop common definitions of a worker and a compensable injury or illness;**
- **develop national standards relating to;**
 - compensation;**
 - 'quality of service';**
 - reporting requirements;**
 - insurer and self-insured employer licensing criteria;**
 - scheme-performance 'benchmarks';**
- **monitor scheme performance relating to;**
 - dispute-resolution processes;**
 - 'quality of service'; and**
- **collect and publish data.**

The Commission recommends that, for those in the nationally available scheme, the National WorkCover Authority:

- **license insurers and self-insurers;**
- **supervise the collection of data;**
- **ensure the quality of service delivery of insurers and self-insured employers;**
- **set benefit levels and other components of compensation; and**
- **supervise premium setting.**

The Commission recommends that the Commonwealth Government retain the option of self-insurance. Individual agencies may:

be part of a national self-insurance licence managed by Comcare;

hold their own self-insurance licence; or

purchase insurance from a private insurer under the nationally available scheme.

The Commission recommends that 'eligible' employers be entitled to opt into the nationally available scheme, and:

- **hold a licence to self-insure (and either manage their own claims or contract out claims management); or**
- **purchase insurance from a licensed insurer.**

8 IMPLEMENTING CHANGES

Most jurisdictions are changing their workers' compensation arrangements. However, this is not enough. A focus beyond the specific concerns of individual jurisdictions is required. Greater national consistency in a range of areas is needed, particularly for the level of and access to compensation. To achieve this end, the preferred route is via agreement among jurisdictions. A nationally available scheme is also warranted, to enhance competitive pressures for ongoing improvements in scheme performance and to facilitate consistency in key areas (eg in the definition of a worker). A nationally available scheme would also provide a way for firms to avoid inconsistencies between jurisdictions. In this chapter, the Commission proposes a staged introduction of necessary change.

This report recognises that many aspects of current workers' compensation arrangements need changing. Some — such as the underlying structure of the occupational health and safety (OHS), health and legal systems — are outside the scope of this report. Such arrangements were reviewed only insofar as they interact with workers' compensation.

The Commission has advocated a number of fundamental changes. Taken together, they would: ensure more appropriate incentives for prevention, rehabilitation and return to work; address cost-shifting between individuals, workers' compensation schemes and government programs; and bring greater equity to the compensation of workers. In the process, the incidence and costs of work-related injury and illness would be reduced.

The Commission's recommendations also aim to reduce the administrative and cost burden facing those operating in more than one jurisdiction, and address 'cross-border' problems, by providing the option of nationally available insurance.

They would also facilitate more comprehensive and consistent central data collection.

Some of the recommendations could be readily accommodated within the process of reform already underway. Others are more fundamental, or cut across the responsibilities of jurisdictions. These require agreement of how best to implement them on a national scale. That is the focus of this chapter.

8.1 Changing arrangements at a national level

At the heart of the Commission's proposals is development of an agreed compensation package (see Chapters 4 and 6). To minimise the ability of schemes to engage in 'invidious' competition and cost-shifting, the arrangements should apply in all jurisdictions. A national compensation framework, binding on all schemes, is needed to ensure this.

Some form of national approach is also needed to introduce greater uniformity of prudential regulation and supervision, access to self-insurance, and licensing requirements for insurers and self-insurers (see Chapter 7). Similar requirements are proposed to ensure core data collection and establishment of comparable performance indicators (see Chapters 3 and 7).

Proposed changes in legislation to introduce a nationally available scheme — which affects current Comcare arrangements — will introduce a degree of national uniformity (see Chapter 7), and increase the competition faced by existing schemes. How these change, too, can fit into a national framework needs to be considered.

In the OHS area, a national approach is already apparent with existing moves to greater uniformity.

Greater national uniformity in workers' compensation does not necessarily mean the demise of existing schemes. They could remain and have a continuing role in introducing 'best practice' and regulating aspects outside such a framework. These would include, for example, OHS regulation, dispute resolution processes, rehabilitation and return to work, administration and containment of costs such as medical and legal expenses. Competition to reduce premiums would then focus on improving scheme performance, rather than on eroding benefits.

Possible ways of implementing change at a national level, and a proposal for managing the transition to the Commission's proposed arrangements, are set out below.

8.2 Introducing national consistency

Many submissions accepted that, to achieve greater consistency on issues common to all schemes, a national framework was necessary. However, there was little agreement on what approach to take.

Various approaches were suggested. In essence, they ranged from a national scheme, to national uniformity based on uniform legislation, to jurisdictions achieving consistency by adopting agreed 'best practice'.

The Commission considered three ways of achieving national consistency:

- a national scheme;
- individual schemes, with some uniformity based on common legislation; and
- individual schemes, with consistency achieved through 'best practice'.

8.2.1 A national scheme

A single national scheme could be achieved by transposing an entire existing scheme to the national level. Alternatively, an entirely new scheme could be introduced, drawing on best practice among existing schemes.

A major barrier to this option is the potential unwillingness of governments to relinquish authority within their jurisdictions.

It was argued that the Commonwealth does not have the powers to introduce a single national workers' compensation scheme. The Queensland Confederation of Industry (Sub 77, p.42), for example, stated that section 51 (xiv) of the Constitution denies the Commonwealth Parliament power to make laws with respect to State insurance, except that which extends beyond the limits of the State concerned. The Commission sought advice from the Attorney-General's Department on this matter.

The response suggested that, were it required, the combined powers available to the Commonwealth under the Constitution may indeed sustain a national workers' compensation scheme. Such a scheme could not, however, compulsorily include State government employees.

At present, the ability to contrast the performance of any one scheme against another provides a motivating force for schemes to continually seek and apply improvements. A single scheme would lose this pressure. The Chamber of Commerce & Industry South Australia Inc (Sub 51, p.6) argued that a single scheme would lead to an explosion of costs, and would also be unresponsive to pressure for improvement from industry in any one state. This would weaken incentives for improving scheme performance.

The Metal Trades Industry Association (Sub 71, p.5) argued against a national scheme, claiming it would be accompanied by complex transitional arrangements, likely to result in a more costly and bureaucratic system. It claimed any benefits from such a scheme would be more than offset by substantial implementation and operating costs. It argued national consistency is preferable to a single national scheme.

On the other hand, a national scheme would reduce the administrative costs of firms operating in more than one jurisdiction, arising, for example, from dealing with more than one systems. At present, for example, some firms must pay full premiums to more than one scheme for the same workers. For the nation's 15 000 or so interstate drivers, this costs firms an extra \$15 million each year (Loneragan 1993). The exact extent of such cross-border problem is unknown.

One scheme would also allow administrative efficiencies for firms, such as BHP, seeking to self-insure their operations nationally.

A single national scheme would establish uniform prudential and licensing standards for participating underwriters and insurers (including self-insurers). This objective was sought by the Insurance Council of Australia on behalf of its members. Such uniform standards were supported on the grounds of reducing the administrative burden and costs of complying with multiple standards. A national scheme would also introduce greater equity for workers in coverage and quality of service.

The Commission does not, however, prefer a single national scheme. It recognises that competition between schemes can be beneficial (eg in the areas of prevention and rehabilitation and return to work). A single scheme, by forgoing such beneficial inter-scheme competition and responsiveness to pressures in each jurisdiction, would sacrifice some pressures for ongoing improvements in performance.

Introducing legislation to provide a nationally available scheme (see Section 7.3.4), rather than a single national scheme, would not sacrifice the benefits of inter-scheme competition, as it would provide an alternative to state schemes within their own jurisdictions. This approach also offers a means of applying at least a degree of uniformity. For those who chose to participate in the national scheme, it offers a uniform compensation package and common rules for insurers (including self-insurers). It could draw on 'best practice' elements of the scheme under which Comcare operates (to avoid possibly costly transitional arrangements inherent in setting up an entirely new scheme). This option could be implemented unilaterally by the Commonwealth.

8.2.2 National uniformity from overarching legislation

Uniformity across all jurisdictions for those elements outlined in section 8.1 may also be achieved directly by introducing common legislation (see Figure 8.1). This would allow existing schemes to retain autonomy for the non-common elements of their operations. This was widely supported in submissions calling for greater national uniformity, and would have the advantage of not jeopardising such competition as exists between schemes.

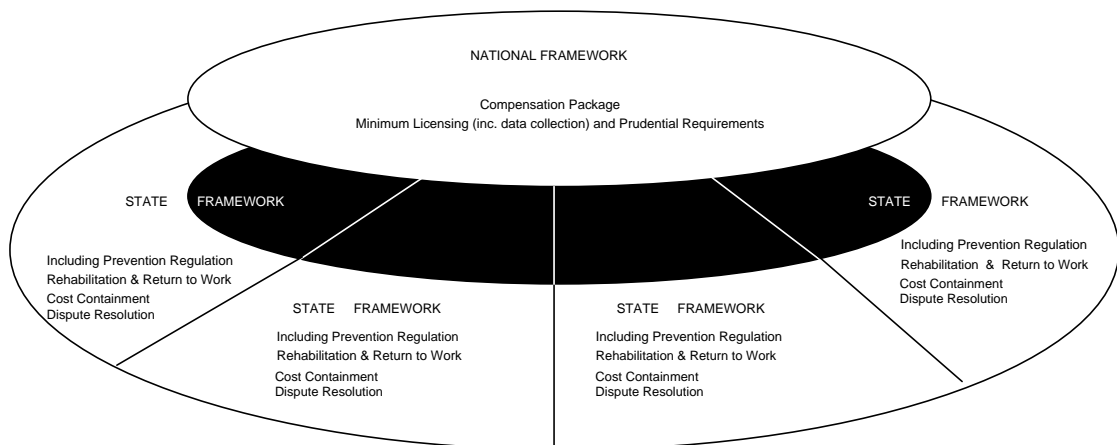
Retaining individual schemes provides ongoing pressure between jurisdictions for improving scheme performance. It provides competition by 'yardstick' comparison between schemes. It may also provide competition for cover of new or expanding employment.

Multiple schemes provide a testing ground to establish 'best practice', and the incentives for its application. Many participants acknowledged inter-scheme competition is a powerful force in the drive to lower system costs and premiums, and to improve performance more generally. Establishing some uniform elements through common legislation still leaves schemes free to pursue harmonisation in other areas through moving to best practice.

If individual schemes remain, benchmark indicators which accurately reflect performance and are truly comparable across schemes will be required to extract the most benefit from such inter-scheme competition. It is therefore important that, where they do not exist, comparable and reliable indicators for benchmarking performance are developed and applied (see Appendix I).

Developing benchmarks to assist 'best practice' will require more comprehensive and flexible national data bases. The Heads of Workers' Compensation Authorities (HWCA), at their September 1993 meeting, have supported the development and effective use of such data bases.

Figure 8.1 National overarching framework



WorkCover Victoria (Sub 89, p.5) noted that national uniformity from common legislation is already a feature in the regulation of financial institutions and of corporations law.

Uniform legislation for financial institutions was introduced by 'template legislation'. Such legislation involves the application, in each State or Territory, of laws enacted in one of these jurisdictions. In the case of common regulation of financial institutions, for example, this was Queensland. However, this approach would not cover Commonwealth Government employees, and is, therefore, an unsuitable vehicle for a comprehensive national scheme. To close this gap, the Commonwealth would need pass matching legislation. This approach, known as the 'applied laws regime', is a more relevant model for a national framework. This approach was used to establish the Australian Securities Commission.¹

Another method of achieving uniformity through agreed overarching legislation for some aspects of schemes lies in Section 51 (xxxvii) of the Constitution. This Section permits the Commonwealth Parliament to legislate with respect to matters referred to it by a State parliament. The resultant Commonwealth law extends only to any referring State (or States) and to those adopting the law.

The path to uniformity through common legislation requires joint Commonwealth, State and Territory co-operation, co-ordination and agreement. However, agreement may be difficult on matters considered inconsistent with, or outside, the concerns of individual schemes. For example, agreement on matters relating to the interaction with social security could be especially difficult. Agreement is also likely to involve delays. The experience of the corporations law regime suggests the negotiation and implementation process could take up to 10 years. Delay of this order would be totally unacceptable.

The willingness of States/Territories to introduce uniform legislation could be enhanced by Commonwealth financial assistance (or penalties). These could, for example, take account of net cost transfers to Commonwealth programs, the results of monitoring dispute procedures (see Chapter 7) and relevant performance indicators.

This would not, however, address the issue of cost-shifting to individuals. For example, where an injured worker receives income from social security, income forgone above that level is a cost borne by the worker. Recovering social security support from schemes would not negate the advantages accruing to

¹ In that case, an Act embodying the necessary legislation was enacted by the Commonwealth in the ACT after agreement with the States and the Northern Territory. Each State and Territory then passed complementary legislation applying the laws in that Act as laws of each jurisdiction. While established by Commonwealth statute, outside of the ACT the powers of the Act are derived from state legislation. As each jurisdiction has identical legislation, the scheme is, in effect, national. Any amendments to the ACT Act apply automatically throughout Australia.

employers within schemes resulting from such transfers to workers before social security entitlements are triggered.

The Commission's preferred approach to achieving national uniformity in key areas of workers' compensation is through overarching legislation using an applied laws approach.

8.2.3 National consistency based on 'best practice'

This approach is essentially the *status quo*. It would leave the schemes as they are and allow them to move to greater consistency at their own pace. This approach also provides for ongoing competition between schemes as they currently exist and facilitates the spread of 'best practice'. Most calls for national uniformity supported this route.

The Victorian Government (Sub 110, p.2) argued there are sufficient mechanisms now in place to identify and address anomalies between schemes. It considered there is no need to create more structural arrangements for national consistency. It claimed that greater uniformity, driven by 'best practice', is already occurring in the workers' compensation arena.

This option could use existing arrangements to progress to uniformity, such as the Ministers of Labour Advisory Council consultations, and the meetings of the HWCA. The Heads of Government Conference process may also contribute to the move to uniformity.

The HWCA are already considering approaches to national consistency. The HWCA, for example, met in September 1993 and decided to collectively pursue agreement to:

- develop a five year plan to achieve national consistency in critical areas; and
- establish an appropriate national resource structure to support the monitoring and effective implementation of that plan.

National consistency could also be achieved more informally via the individual jurisdictions agreeing to strive to apply 'best practice'. WorkCover Victoria (Sub 89, p.6), for example, noted that legislation in Victoria and NSW has become more closely aligned by this route.

The Commission supports moves by the States towards greater consistency, including uniformity on some aspects of benefits. However, change under this approach is focused on the specific concerns of the workers' compensation schemes. It is unlikely to take sufficient account of costs transferred to individuals and interaction with other government programs.

Incentives to address cost transfers could be enhanced by the Commonwealth determining net costs transferred to its programs and, accordingly, applying some financial adjustment to each jurisdiction. This would focus attention more on the interactions of systems and lessen incentives to shift costs to the Commonwealth. It does not, however, resolve the issue of cost-shifting to individuals.

The pace of change under this model is also indeterminate and likely to proceed at the rate of the slowest member. In the meantime, shortcomings will persist. The Commission doubts the adequacy of this approach to implementing the fundamental change it proposes.

8.2.4 The Commission's preferred approach

The Commission preferred approach is one which:

- applies a uniform compensation package in all jurisdictions;
- incorporates those other aspects of national uniformity referred to in Section 8.1; and
- yields the greatest ongoing pressure on schemes for improved performance.

These requirements would be best met through:

- a nationally available scheme (which would incorporate Comcare) — providing the opportunity for self-insurance and for licensed insurers to insure liability under that scheme (see Section 7.3.4);
- the retention of individual schemes;
- setting agreed national standards for key aspects of workers' compensation arrangements (in particular, a uniform compensation package) along the lines of the 'applied laws' approach suggested in Section 8.2.2;
- a National WorkCover Authority to oversee the nationally available scheme and those aspects of uniformity applying to all schemes (see Chapter 7);
- the development and use of comprehensive performance benchmarks; and
- some ongoing review of the national standards and data requirements and collection.

The National WorkCover Authority, in carrying out some of its functions, could be assisted by working groups drawing on representatives of individual schemes. The Commission envisages that the proposed Authority would only need to be a small organisation, because it would be an essentially regulatory body and could draw on existing expertise.

The Commission acknowledges many of the changes it has proposed could not be implemented immediately. Accordingly, it suggests their staged introduction.

The move to a uniform compensation package is a high priority, as is setting up a nationally available scheme, requiring early, ongoing negotiation among governments.

8.3 Transitional arrangements

The move from existing arrangements to those proposed by the Commission is best achieved in stages. A possible way to do this, involving four stages — over say, 3 years — is outlined below.

This accords with the WorkCover Victoria (Sub 89, p.6) comment that:

It would be feasible for the Industry Commission to recommend a process for arriving at national solutions by joint State and Federal actions, based on determining essential minimum conditions to which all Australian workers' compensation jurisdictions must be in compliance within a stated reasonable time.

8.3.1 Stage 1

This would include:

- A. Finalising, in consultation with the States/Territories, those elements subject to national uniformity:
 - a compensation package (including a weekly benefit structure and 'Table of Injuries' and scale of impairment);
 - prudential requirements and oversight; and
 - uniform, minimum licensing requirements for insurers (including self-insurer criteria and core data reporting requirements).
- B. Finalising, in consultation with the States/Territories, the administrative and regulatory functions of the national authority relating to national uniformity which could involve:
 - monitoring compliance with the common workers' compensation framework, monitoring quality of service and data collection;
 - developing the machinery for ongoing review of uniform standards and to account for exceptions to the 'Table of Injuries';
 - developing agreed minimum prudential and licensing standards (including self-insurance criteria and core data requirements); and

- developing agreed benchmark performance indicators.
- C. Defining the administrative functions of each scheme, in consultation with the States/Territories, including the nationally available scheme, covering for example:
 - responsibilities for OHS;
 - responsibilities for rehabilitation and return to work;
 - licensing of insurers and self-insurers;
 - premium regulation; and
 - management of each scheme and cross-border competition where applicable.
- D. Drafting new legislation, in conjunction with the States/Territories, to give effect to the recommendations in Chapter 7 (notably on key areas of uniformity and to provide a nationally available scheme — including forming the National WorkCover Authority and affecting Comcare).
- E. Developing mechanisms for financial adjustments to account for net cost-shifting from schemes to the Commonwealth, if necessary.
- F. Consultation between the Commonwealth, States/Territories and affected parties on the implementation process.

8.3.2 Stage 2

This would include:

- A. The passing of applied laws legislation at Commonwealth and State/Territory levels for elements selected for national uniformity (eg the compensation package and relating to insurers and underwriters) and legislation required for the nationally available scheme.
- B. Ensuring prudential regulations contained in the Commonwealth Insurance and Superannuation Act are adequate.
- C. Informing affected parties (for example insurers and governments) of the new arrangements.

8.3.3 Stage 3

This would include:

- A. The establishment of a National WorkCover Authority and the commencement of central data collection.

- B. Introduction of relevant benchmarking and monitoring.

8.3.4 Stage 4

This would include:

- A. Full implementation of legislation for elements of national uniformity, including:
- a uniform compensation structure, with a common 'Table of Injuries';
 - elimination of general recourse to common law; and
 - application of uniform underwriter and insurer requirements.

Some changes, for example, to weekly benefits structures, could be phased in over an agreed period, say 4 years.

- B. Implement the legislation providing a nationally available scheme.
- C. If required, introduce Commonwealth adjustments to account for net costs shifted to Commonwealth income support or health programs. Possibly provide assistance from the Commonwealth to facilitate implementation of the proposed changes. Suggestions are additional funds for the training of OHS medicine and rehabilitation providers, for OHS research and for improved data collection and dissemination.

WORKERS' COMPENSATION IN AUSTRALIA

PART C

APPENDICES

- A Economic Significance of Workers' Compensation Arrangements**
- B Current Scheme Arrangements**
- C Occupational Health and Safety Legislation**
- D Legal and Medical Costs**
- E Overseas Experience**
- F History of Workers' Compensation**
- G Workers' Compensation Premiums**
- H Changed Incentives and Likely Behavioural Responses**
- I Benchmarking Workers' Compensation and OHS Performance**
- J Occupational Health and Safety Survey Data**
- K State and Territory Injury Data**
- L Conduct of the Inquiry**

A ECONOMIC SIGNIFICANCE OF WORKERS' COMPENSATION ARRANGEMENTS

The economic significance of costs associated with work-related injury and illness extends beyond obvious direct costs of premiums incurred or compensation paid. Indirect costs are also incurred. Taken together these costs — many of which are avoidable — add significantly to production costs, although their impact on industries is uneven. The overall result is increased costs throughout the economy, unnecessarily undermining competitiveness.

A1 Measures of direct costs

An accurate estimate of the direct costs of work-related injury and illness is not available. Not all workers are covered by compulsory workers' compensation and differences in definitions (eg of a compensable injury) hinder the collection of comprehensive and comparable data. Measurement relies on best estimates.

Worksafe Australia (Worksafe 1993d) has estimated on the basis of available data that work-related injury and illness results in at least 500 deaths each year and some 200 000 claims (about 1 worker in 40) involving five or more days off work. Actual numbers — and costs — are much higher as many workers, such as the self employed, are not covered by compulsory workers' compensation, and many cases of occupational disease are never counted. For example, the 500 deaths does not include many of those recorded in the Mesothelioma register kept by Worksafe, which records at least 300 new cases of this fatal occupational disease annually.

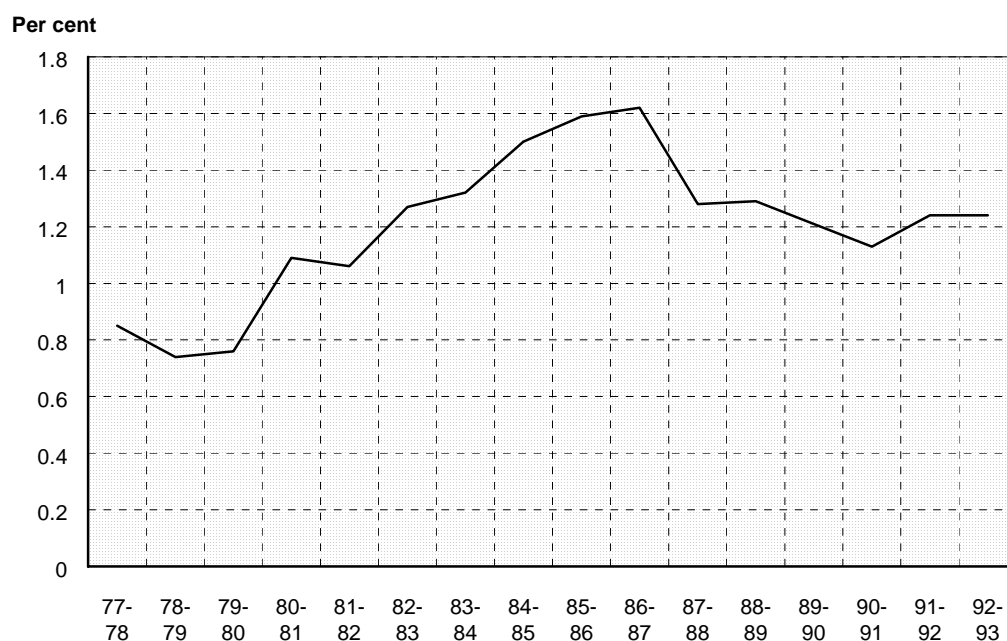
Agriculture is particularly under-represented in workers' compensation data. Such statistics exclude the self-employed (and therefore many farmers) who make up almost three-quarters of the rural labour force. According to the Australian Bureau of Statistics (ABS), 416 000 people were directly employed on farms throughout Australia in 1989–90, or about 5.4 per cent of the workforce. Agricultural activities claim more lives in Victoria than either the manufacturing or construction industries. Worksafe (1993a) estimated that, for 1991–92, the incidence of workplace injury for Agriculture, forestry and hunting was 48 per 1000 workers. This rate is high compared with the average rate of 32 per 1000 workers for all industries.

A1.1 Direct costs as a proportion of gross domestic product

The ratio of the direct cost of workers' compensation claims to gross domestic product (GDP) (Figure A1) is frequently used as an indicator of the significance of work-related injury and illness to the national economy.

Workers' compensation claims as a percentage of GDP exhibited a rising trend in the early 1980s, before experiencing a sharp dip in 1987–88. After a mild rebound in 1988–89, claims appear to be gradually declining as a percentage of GDP.

Figure A1 Workers' compensation claims as a percentage of non-farm GDP, 1977–78 to 1992–93



Source: Worksafe 1993a, pp.19-20

A1.2 Direct labour costs

Workers' compensation costs per employee

Worksafe (1993a) use the ABS Labour Costs Survey to estimate the direct costs of work-related injury and illness, that is, premiums paid and claims costs not met by insurers. The Survey data shows is in current dollars. The data indicate these costs were over \$3.7 billion per annum in each of the five years from 1986–87, but fell to \$3.4 billion in 1991–92.

Worksafe (1993a) estimated that workers' compensation costs have averaged around 2 per cent of labour costs. These average costs were: 2.5 per cent in 1986–87; 2.3 per cent in 1987–88; 2.2 per cent in 1988–89 and 1989–90; 2.1 per cent in 1990–91 and 1.9 per cent in 1991–92.

The Survey data were used to estimate the average workers' compensation cost per employee for the five highest-cost industry groups, and the average for all industries, in constant dollar terms (shown in Table A1). These figures represent averages across all schemes, and will differ widely within jurisdictions. In 1986–87, for all industries the average was \$712, and has declined to \$593 in 1991–92.

Table A1 Average workers' compensation cost per employee, five highest cost industries and all industries, 1986–87 to 1991–92 (constant 1992–93 dollars)

<i>Industry</i>	<i>1986–87</i>	<i>1987–88</i>	<i>1988–89</i>	<i>1989–90</i>	<i>1990–91</i>	<i>1991–92</i>
Mining	1 854	1 819	1 731	1 665	1 478	1 432
Construction	1 397	1 399	1 169	1 110	1 059	1 076
Manufacturing	1 178	1 099	1 013	1 083	1 135	1 040
Electricity, Gas & Water	919	1 048	1 097	1 009	1 160	1 187
Transport, Storage & Communication	939	949	917	930	964	910
All industries	712	678	666	669	646	593

Source: Worksafe 1993a, p.23

The significant variation across states in average workers' compensation costs per employee — in current dollar terms — is indicated in Table A2 and Figure A2. Although aggregated for all industries, and thus taking no account of the influence of the different industry mix within state economies, it does provide an indication of variations in average cost between jurisdictions.

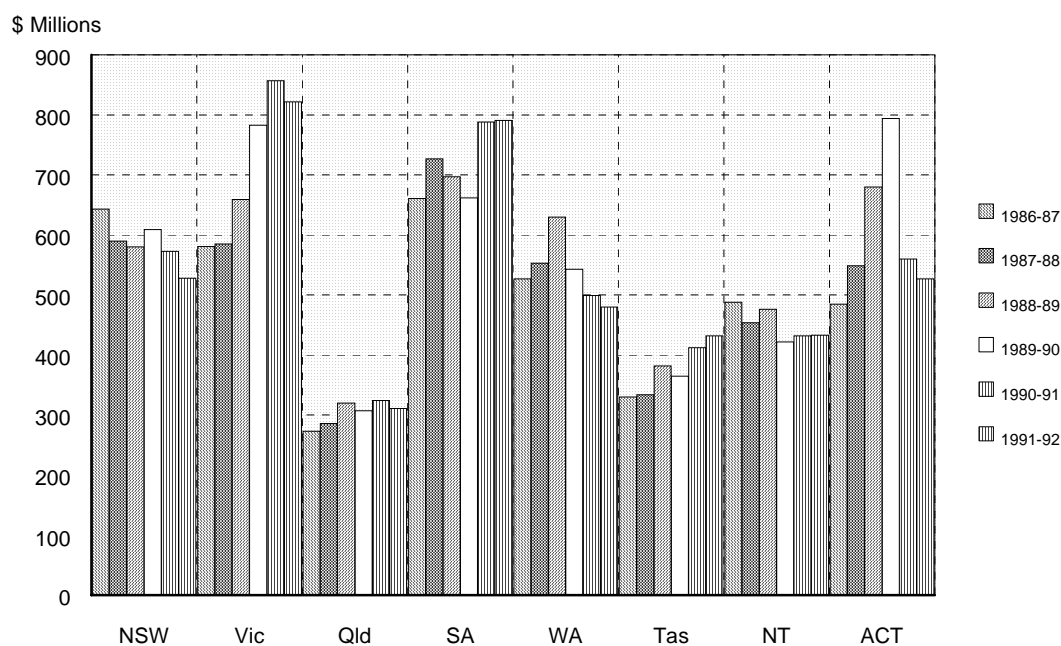
Table A2 Workers' compensation, average cost per employee (\$), 1986–87 to 1991–92

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
1986–87	643	581	273	661	527	330	488	485
1987–88	590	585	286	727	553	334	454	549
1988–89	580	659	320	697	630	382	476	680
1989–90	609	783	307	662	543	365	422	794
1990–91	573	857	324	788	499	412	432	560
1991–92	528	822	311	791	480	432	433	527

Source: ABS, *Major Labour Costs*, Cat. no. 6348.0

Note: These figures are in nominal dollars

Figure A2 Workers' compensation cost per employee, by State 1986–87 to 1991–92



Source: ABS, *Major Labour Costs*, Cat. no. 6348.0

Number of claims

Worksafe has estimated the number of workers' compensation claims involving five or more lost working days at around 200 000 per year. The Commission requested information from workers' compensation authorities on the number of claims received in 1991–92. This request covered claims for less than five

working days lost, and for five or more days lost. The information provided was subject to some error, particularly in Victoria — where employers faced an excess arrangement under which they bore the cost of claims for five or less working days lost. Accordingly, the figures for that State are likely to underestimate the true number.

The responses are summarised in Table A3. A total of some 425 000 claims were received in 1991–92, almost two-thirds of which involved less than five working days lost.

Table A3 Claims received, 1991–92

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>	<i>Comcare</i>	<i>TOTAL</i>
<5 days ^a	105 717	37 835	52 958	31 110	13 548	17 080	2 769	1 477	17 373	27 9867
>5 days ^b	51 077	30 643	26 125	9 270	19 676	2 395	1 174	2 311	2 592	14 5263
TOTAL	156 794	68 478	79 083	40 380	33 224	19 475	3 943	3 788	19 965	42 5130

a Claims involving less than 5 lost working days (except Victoria - less than or equal to 5 lost working days).

b Claims involving 5 or more lost working days.

Source: Industry Commission 1993, Survey A

Information on the number and proportion of workers receiving benefits at the end of each financial year was also requested. Responses are summarised in Table A4. A wide variation was observed. For example, at 30 June 1992, South Australia had 16.3 per cent of workers covered receiving benefits compared with 2.3 per cent in Victoria.

Table A4 Number of workers receiving benefits* 1988–92

<i>As at:</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>Tas</i>	<i>NT</i>	<i>Comcare</i>
30/6/88	111831 (7.5)	78000 (6.8)	35320 (13.2)		2714 (5.5)	
30/6/89	62181 (4.0)	83000 (6.7)	51120 (19.1)	13633 (9.1)	2957 (5.4)	
30/6/90	45124 (2.9)	83000 (6.5)	56490 (21.3)	22131 (14.2)	3060 (5.0)	46770 (17.4)
30/6/91	36867 (2.4)	77000 (6.1)	49300 (17.8)	20208 (14.1)	3419 (5.7)	36978 (13.5)
30/6/92	32692 (2.3)	79000 (6.2)	40380 (16.3)	19439 (13.5)	3099 (5.7)	36678 (13.1)

* Percentage of workers on benefits shown in parentheses.

n.a. Not available.

Note: Data for NSW was not provided.

Source: Industry Commission 1993, Survey A

This variability may be due to different methods of estimating the number of workers covered by a jurisdiction, and the exclusion by Victoria of claims involving less than five lost working days. WorkCover SA cautioned that the

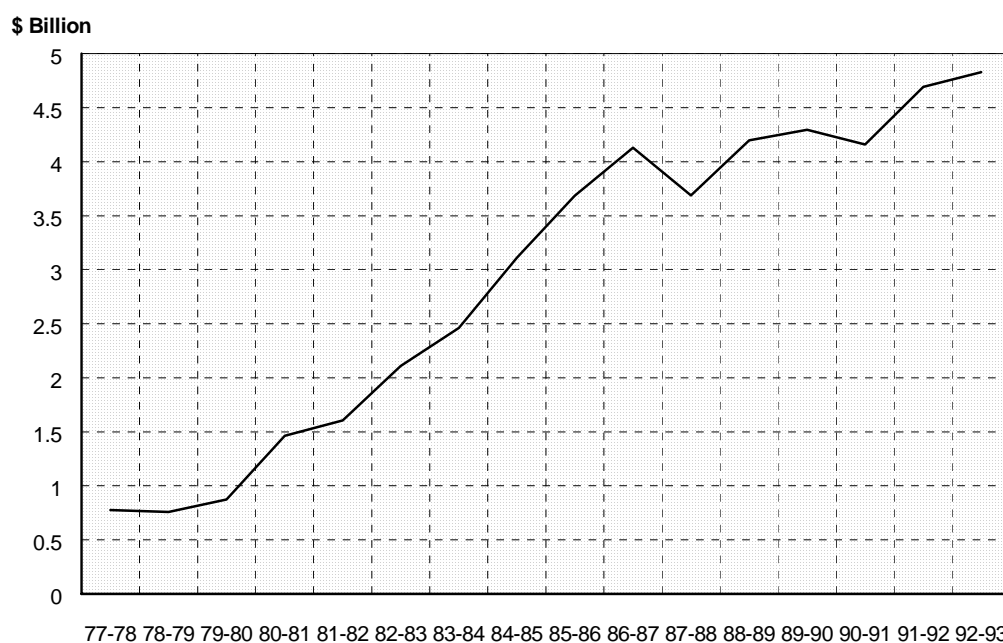
figures for workers receiving benefits 'grossly overstates the true picture', as case managers do not regard flagging closed cases as a high priority and case closures occur in surges.

The cost of compensation claims

Estimates based on national accounts data measure the expected cost of workers' compensation claims incurred in a particular period. This includes claims paid, and the increase in provision for outstanding claims. On this basis, for 1992–93, Worksafe has estimated the cost of workers' compensation claims at \$4.8 billion. Data from 1977–78 are shown in Figure A3.

Workers' compensation claims costs rose rapidly during the late 1970s and early 1980s, before dipping sharply in 1987–88, and rebounding in 1988–89. Claims costs have plateaued since then.

Figure A3 Workers' compensation claims, 1977–78 to 1992–93
(constant 1992–93 dollars)



Source: Worksafe 1993a, pp.19–20

The Commission asked workers' compensation authorities for a breakdown of their claims payments for 1991–92. The results are shown in Table A5. For those jurisdictions which responded, weekly benefits averaged 47.8 per cent of

claim payments, lump sums averaged 28.2 per cent of claim payments, and medical expenses 24 per cent.

Table A5 **Payments by compensation authorities* 1991–92**

	<i>Weekly benefits</i>		<i>Lump sums</i>		<i>Medical</i>		<i>Total</i>
New South Wales	225	(45.4)	122	(24.6)	148	(29.8)	496
Victoria	426	(51.4)	223	(26.9)	178	(21.5)	828
Queensland	105	(41.5)	1055	(41.5)	44	(17.4)	253
South Australia	108	(54.3)	33	(16.6)	58	(29.1)	199
Western Australia	84	(37.5)	88	(39.3)	52	(23.2)	224
Tasmania	32	(54.2)	11	(18.6)	15	(25.4)	59
Northern Territory	10	(58.8)	2	(11.8)	5	(29.4)	17
Australian Capital Territory	na		na		na		na
Comcare	na		na		na		na
Total	991	(47.8)	584	(28.1)	499	(24.1)	2 075

* Figures may not add due to rounding.

n.a. Not applicable.

Source: Industry Commission 1993, Survey A

The differing ratios between payments in jurisdictions may be partially due to different methods of estimating workers covered by a jurisdiction and, for Victoria, the exclusion of some claims involving five or less lost working days.

A1.3 Prevention and compliance costs

All business enterprises incur costs in complying with occupational health and safety (OHS) requirements. The Metal Trades Industry Association (MTIA, Sub 71) estimated these costs at 0.14 per cent of total costs in 1991–92. Due to the difficulties of objectively measuring compliance costs, these estimates were considered by MTIA to understate the full cost.

However, the costs of compliance with OHS regulations must be set against the benefits in term of reduced incidence of work-related injury and illness. Improved safety standards, for example, may prevent many accidents.

Where authorities responsible for OHS are funded from public funds, the cost falls on taxpayers. Where funded through workers' compensation premiums, the cost may be reflected in lower profits/wages, or paid by consumers in the form of higher prices (or most likely some combination). Australian OHS Authorities are generally funded in part through workers' compensation premiums.

A2 Measures of indirect costs

Direct costs represent only part of total costs incurred by industry and individuals as a result of work-related injury and illness. Individuals bear some of the costs where compensation is inadequate. Firms incur additional costs due, for example, to the absence of employees, the need to hire replacement workers and from having equipment idle. Where work tasks are interdependent or where injured workers have unique skills, incapacity can lead to substantial reductions in output and productivity.

A2.1 Personal costs

Direct financial costs

The personal costs of work-related injury and illness include direct financial costs such as uncompensated loss of income and medical and rehabilitation expenses. Less-than-full compensation transfers some of the costs of work-related injury and illness onto worker. Personal costs are difficult to quantify, and have seldom been measured.

Andreoni (1986) has estimated the share borne by workers of the total cost of occupational injuries at about 25 per cent.

The Commission commissioned a consultant to conduct a limited sample survey examining the direct and indirect costs of work-related injury and illness. One finding based on the 15 respondents was that, at the time of interview, 10 were receiving less than 50 per cent of their pre-injury earnings while the other five were receiving between 50 and 75 per cent.¹

The consultant estimated the total income loss from the time of cessation of work to the interview. Two respondents, who had stopped working in the first half of 1993, had estimated losses of less than \$10 000. Three respondents, of whom only one had ceased work more than 12 months prior to the interview, had estimated losses of between \$10 000 and \$30 000. Eight respondents had estimated losses of between \$30 000 and \$80 000, while the remaining two had estimated losses in excess of \$100 000. Each of the ten respondents whose estimated losses were in excess of \$30 000 had ceased work at least three years prior to the interview.

Income losses of such magnitude cause major disruptions to the lifestyles of affected workers. Prolonged unemployment without full income compensation

¹ Three of the 10 respondents earning less than half their pre-injury income received a lump sum payment, as did one of the five respondents earning between 50 and 75 per cent of pre-injury income.

is likely to result in dissaving and eventual mounting debts. This can result in the forced sale of family assets to avoid this situation. This could culminate, for example, in the family home having to be sold.

Some claim-related needs are not compensable. For example, it might be necessary to have power steering fitted to the car owned by an injured worker. This may not be claimable. Over a long period, there may be a large number of small medical expenses related to work injury that are not claimed, thereby adding to the costs borne by the injured worker (or Medicare). In addition, there may be substantial travel and time costs associated with attending medical appointments.

Where relatives or friends care for an injured or ill worker, further personal costs are incurred if these are uncompensated. For example, the Administrative Appeals Tribunal (AAT) rejected a claim by an injured worker seeking compensation for nursing services provided by his spouse. The fact that the wife had given up her job to care for her husband was held not to be relevant (AAT, No. W92/210).

Delays in reimbursement add to the costs of injury. A claimant may need to borrow money from family and friends to pay bills due to such delays. The consultant cited the case of two respondents who had been waiting for years to receive 'Table of Maims' settlements. Both respondents were in financial hardship; one was forced to sell his home, which may have been avoided with a more timely payment.

Lost future earnings are a significant component of personal costs of work-related injury or illness. The consultant observed scepticism among respondents concerning their re-employment prospects. They perceived a reluctance among employers to hire people who have been on 'compo'. Even in the case of an individual who successfully returns to work, there may be significant forgone future earnings due to reduced promotion prospects or delays in promotion.

Evidence from the survey was that rehabilitation is likely to entail out-of-pocket expenses for the claimant. Disputed claims are a barrier to timely rehabilitation. One respondent began her own retraining due to her disillusionment with the rehabilitation provider. In this case rehabilitation did not begin until 12 months after injury, and even then there was no formal rehabilitation program.

Direct intangible costs

Work-related injuries and illness also have consequences of an intangible or non-financial nature. Associated pain, suffering and discomfort are examples of intangible costs. Such costs also include reductions in opportunities for leisure

and social interaction, reduced employment opportunities and diminished levels of occupational skills, diminished social status and loss of self-esteem.

A common misperception is that workers' compensation claimants have increased leisure opportunities due to a reduction in the hours of paid work. The finding of the consultant was that respondents reduced their level of socialising after ceasing work. This was in part a result of no longer being at work in the company of workmates. Other leisure activities had been cut short due to lack of money or due to the disability or associated pain arising from the occupational injury.

Reduced employment opportunities and skills may also entail intangible as well as financial costs. The intangible costs may be due to a reduction in the work choices of an individual due to occupational injury. It is expected that a loss of job satisfaction would be associated with a loss of skills. Among respondents who returned to work, there was a feeling that they were given 'light duties' inappropriate to their injuries, discouraging continuing employment.

Another intangible cost is the effect on the social structure of the family of an work-related injury or illness. It can, for example, reduce the capacity of an individual to care for dependents. Other members of the worker's family and friends can also suffer emotional trauma which is not compensated.

The Commission received a number of submissions from workers detailing personal costs they incurred as a result of work-related injury or illness. The case study in Box A1 is taken from one of those, and provides an injured worker's perspective of the consequences of her injury.

Box A1 Injured worker case study

I was employed as a nurse. I was injured at work. My employer failed in his responsibility to provide a safe work site.

Because of the extent of my injury I am unable to fulfil the duties of a nurse (lifting patients). Therefore I was terminated after what my employer termed meaningful rehabilitation. I have spent the last four years in No Mans Land.

The laws of the land do not apply to Injured Workers. I have lost the rights every other Australian citizen enjoys:

(1) Right of Patient/Doctor confidentiality - all my medical history becomes the knowledge of insurers.

(2) Compulsory Medical Examinations - Where I have been physically and verbally assaulted, man-handled (roughly), insulted, ignored (not a word was spoken by one doctor) not examined, over-examined to a point of a doctor wanting to perform an internal vaginal examination.

(3) Loss of freedom to my Information - until I get into court.

I am discriminated against as a married woman, after all I have a husband to look after me. I am not able to obtain home help - My husband can do the vacuuming, washing and ironing if I can't. WorkCover tells me there are government benefits available, but not for me, not as a married woman. My husband is busy working at least 2x16 hour shifts a week, trying to make up for the loss of my income, where does he find the time to do the work I mentioned?

At job interviews I find more discrimination, I am compelled to disclose my injury and compensation claim. As soon as I disclose this information the interview is terminated abruptly. It is no coincidence as I have had around 30 interviews over the last two years. I have been told "off the record" that I should consider myself UNEMPLOYABLE, I refuse to do so.

In the last four years I have been physically and verbally assaulted, insulted, stereotyped, labelled and devalued as a human being. But I am still here, unemployed, injured or disabled, a chronic pain sufferer and it's my credibility that is constantly being questioned.

The treatment I have endured for the past four years is criminal. Any self esteem you have is soon torn away. You are powerless to protect yourself. The lack of power over your life decisions is demoralising.

I am a Victim of a work related injury. I did not do anything wrong. I am not guilty of anything except going to work.

A2.2 Employer costs

Employers face a variety of indirect costs associated with work-related injury and illness, in addition to the direct cost of premiums or claims costs incurred as self-insurers or in the form of excesses.

Indirect costs may arise from lost production time due to accidents, damage to plant, and the cost of overtime or the training of new workers to replace those injured. Worksafe (1993d) has estimated that new cases of work-related injury and illness involving five or more days off work result in the loss of 7.2 million

working days per year.² This represents an average time lost of 36 working days per injury. The total is ten times the number of days lost through industrial disputes.

Various accident-analysis studies indicate that for every serious injury there are a number of minor injuries and many more near misses or incidents which result in material damage to plant or equipment. Table A6 summarises some major studies cited by Andreoni (1986). Andreoni warns that each of these studies apply to specific cases. The indications they give can therefore only be generalisations and referred to with caution.

Table A6 **Distribution of work accidents by consequences**

<i>Study</i>	<i>Subject industry</i>	<i>Major injury</i>	<i>Minor injury</i>	<i>First aid</i>	<i>Material damage</i>	<i>Accident no injury^a</i>
Heinrich (1959) ^b	various enterprises	1 'major injury'	29 'minor injuries'			300 'accidents no injury'
Bird (1969)	297 enterprises	1 'major injury'	10 'minor injury'		30 'material damage'	600 'no injury or damage'
British Safety Council (1975)	2000 British enterprises	1 'over 3 days off work'	3 '1-3 days off work'	50 'first aid only'	80 'material damage'	400 'no injury or damage'

a May include some accidents with material damage in some cases.

b Based upon a particular type of accident occurring repeatedly. The other studies are based on all types of accidents.

Source: Andreoni 1986, p.47

Indirect costs are often hidden in various items of an enterprise's accounts. To remedy this problem, Andreoni suggested an enterprise would have to set up 'occupational injury accounting' as part of its accounts (1986, p.67). This would attribute the costs of occupational injuries to 'risk centres' at the points where they arise; allocating costs to the department or section responsible for them. Such systematic location of costs would provide valuable information when devising measures to eliminate or reduce occupational risks.

A2.3 Other costs

Work-related injury and illness also result in other costs to the wider community in providing support and assistance to affected workers.

² This does not include those — such as the self employed — who are not covered by workers' compensation, nor many cases of occupational disease.

Some organisations, such as charities, provide material and moral help to such workers. This help may form part of the general assistance given to those in need, or may be specifically targeted to those suffering a work-related injury or illness.

The Commission received submissions from several support groups, specifically for persons suffering from work-related injury or illness:

- The Victorian Injured Workers Centre;
- The Hunter Action Group Against WorkCover;
- The Northern Region Injured Workers' Support Group; and
- The Self-Help Network for Injured Workers.

These associations play an important role where other assistance is absent or inadequate. Their funding relies on voluntary contributions, with some government support in some cases.

Many persons suffering from work-related injury or illness rely on support and assistance from trade unions. The Communication Workers' Union noted that an area of unrecorded costs "is trade unions who continually incur costs when providing assistance to members with claims" (Sub 60, p.1). Mr. McIntyre (Sub 21, p.6) noted that unions often did all the research for workers' compensation cases without receiving any payment.

Where productive but unpaid work is performed as voluntary community work by a worker who is subsequently incapacitated or dies from a work-related cause, this productive work may be forgone. This represents a cost to the community.

Another general community cost is the loss of 'human capital', that is, the loss of society's investment in trained, productive workers. There is also the loss of a person's investment in their own human capital. There has been little work done in this area. A study done by Lambert, Wood and Morrison (1992) of the determinants of the duration of workers' compensation claims has attempted to explicitly account for depreciation of human capital.

A2.4 Estimates of indirect costs

Estimates of the indirect costs vary widely depending on the costs included and how such costs are estimated. Overseas and Australian studies have attempted to quantify these indirect (or non-compensation) costs.

Andreoni (1986 p.88) summarised earlier overseas work, finding a range of estimates between 1:1.58 to as high as 1:20, with a median of 1:4. He stressed that the data are far from giving a uniform picture:

The research concerned was carried out by different people at different times. It also relates to economic sectors in which the potential risks are different. The methods of calculation used are also different, as are the definitions of the various categories of occupational injury and costs. Finally, the headings used in the formation of costs are themselves different. ... National legislation also has an effect in this field; it can at a given point in time transfer certain costs from enterprises to insurance institutions or other bodies (national health services etc.).

Oxenburgh (1991) referred to an unpublished survey of Australian employers which found 'hidden costs' of between nil and 3.7 times direct workers' compensation costs — with a median of 1.75.

A more recent study by Mangan (1991) found that non-compensation costs of industrial accidents in Queensland were at least 6 times greater than compensation costs.

Where submissions provided estimates of the ratio of direct to indirect costs, these ranged from 1:4 (MEND, Sub 15), 1:4 to 1:6 (SECV, Sub 16, p.1) to 1:8 (QDEVTIR, Sub 63, p.12). It is important to note that these studies were undertaken by various researchers at different times using different definitions of direct and indirect costs.

Worksafe has adopted a conservative ratio of 1:1 to calculate the total costs of occupational injury and disease to the community. As it estimated direct costs at some \$4.8 billion in 1992–93, it estimated total costs at some \$9.6 billion.

A3 Effects of reducing workers' compensation costs

A3.1 State and industry incidence of costs

Workers' compensation is a significant element of labour on-costs. Table A7 shows for each State/Territory and for Australia, for 1991–92, workers' compensation as an average cost per employee, as a proportion of total major labour costs,³ as a proportion of earnings, and as a proportion of major labour on-costs.⁴ (These aggregates conceal considerable differences for industries and firms within jurisdictions.)

³ Total major labour costs include earnings, superannuation, payroll tax, workers' compensation and fringe benefits tax.

⁴ Major labour on-costs include superannuation, payroll tax, workers' compensation and fringe benefits tax.

Table A7 Workers' compensation and major labour costs 1991–92

<i>Workers' comp. as:</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>	<i>Australia</i>
Average cost per employee \$	528	822	311	791	480	432	433	527	586
% total major labour costs	1.6	2.6	1.1	2.7	1.6	1.6	1.4	1.6	1.9
% earnings	1.8	2.9	1.2	3	1.7	1.8	1.6	1.7	2.1
% labour on-costs	14.1	22	11.4	23.9	16.6	16.5	17	17.8	17.2

Source: ABS, Major Labour Costs, Cat. no. 6348.0

Average workers' compensation costs per employee vary significantly between jurisdictions; from \$334 in Queensland to \$893 in Victoria. Similarly, workers' compensation as a proportion of major labour costs vary from 1.2 per cent in Queensland and 1.4 per cent in the NT, to 2.9 per cent in Victoria and SA. As a proportion of earnings, workers' compensation costs vary from 1.4 per cent in Queensland to 3.4 per cent in Victoria. Workers' compensation as a proportion of major labour on-costs vary from 12.5 per cent in Queensland, to 22.4 per cent in Victoria.

For some industries, workers' compensation costs per employee can be significant (Table A8). In 1990–91, they ranged from an Australian average of \$286 for Finance, property and business services to \$1412 for Mining. Electricity, gas and water exhibited the greatest variation between jurisdictions, with a gap of \$1793 between the ACT and Queensland. In all but two sectors, the most expensive State was at least double the most inexpensive State.

Table A8 Workers' compensation costs per employee by State and industry 1990–91 (\$)

<i>Industry</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>	<i>Australia</i>
Mining	2 041	1 913	1 013	1 385	822	1 359	1 030	775	1 412
Manuf.	925	1 427	714	1 267	824	700	529	970	1 082
Electricity, gas & water	1 277	1 436	323	746	648	449	198	2 116	1 087
Construction	995	1 181	428	1 593	961	785	882	1 392	991
Wholesale & retail trade	445	431	222	602	393	230	281	498	421
Transport & storage	1 003	1 628	431	1 593	787	723	425	1 603	1 042
Commun- ication	673	743	532	550	646	554	523	734	658
Finance. property & business services	277	281	177	545*	317	156	268	479	286
Public admin & defence	552	1 322	370	535	436	497	554	730	720
Community services	315	949	166	608	345	257	404	542	499
Recreation & personal services	330	382	137	522	336	164	244	372	319
TOTAL	567	893	334	792	508	391	431	655	630

Source: ABS, Information Consultancy based on Major Labour Costs Survey data

The proportion of labour on-costs accounted for by workers' compensation (Tables A7 and A8) lends credence to claims that some employers may base location decisions, at least partly, on workers' compensation costs. Certainly, some governments have at various times viewed workers' compensation premiums as a tool of industry policy.

Workers' compensation costs may have a marginal effect on firms' decisions on where to locate or incrementally increase their employment. For example, Craigie, Cumpston and Sams (1986, p.12) found that:

... the relative levels of workers' compensation premiums were increasingly being presented to State Governments by employers as reasons for the relocation of industries between States and even for relocation overseas ...

Of themselves, however, premiums are unlikely to be sufficient to determine the relocation of a business.

Workers' compensation costs can represent a significant impediment to the competitiveness of Australian industry. Because workers' compensation costs

vary between states and industries, and because enterprises have differing labour/capital ratios, improving Australia's workers' compensation performance will impact differentially on different industries, sectors and states.

A3.2 Modelling reductions in costs

Cerasani (1990) used ORANI to model complete removal of workers' compensation premiums as part of the total removal of labour on-costs. The usefulness of that study is limited by its assumption that labour on-costs can simply be abolished.

Meagher and Parmenter (1987) simulated the economic effects of realising workers' compensation cost savings Australia wide, using the ORANI-NAGA model. They found a moderate expansion of output and employment would result. The accompanying expansion in the tax base would yield an increase in net government income at constant tax rates or allow cuts in tax rates without an increase in the public sector borrowing requirement.

Most of the expansion occurred in sectors of the economy subject to international trade. These sectors within the model are very sensitive to cost changes which directly effect their international competitiveness. Export industries experienced above average cost reductions.

Cerasini's results can be adapted to illustrate the inter-sectoral effects of a more realistic assumption of a 20 per cent fall in unit costs. An ORANI simulation incorporating this assumption was undertaken for this inquiry. Unlike previous simulations, a long-run environment was depicted. In the long-run environment, it is assumed that there has been sufficient time for new capital investments in response to changes in industry profitability. Real wages vary to keep unemployment fixed at some 'natural' level, although the participation rate may vary. In the long-run simulation, unit cost reductions of workers' compensation schemes are represented as productivity improvements in all factors of production.

The result are in Table A9. In agriculture, output rises by 0.4 per cent, with a decrease in employment of 0.1 per cent. The corresponding rises in output in manufacturing and mining are 0.3 and 0.8 per cent respectively. Employment increases are 0.1 per cent for manufacturing and 0.2 per cent for mining.

Table A9 Illustrative long-run effects of reduced workers' compensation costs (Percentage change)

<i>Economy wide effects</i>		<i>Sectoral effects</i>		
			<i>Output</i>	<i>Employment</i>
Real GDP	0.5	Agriculture	0.4	-0.1
Exports (volume)	0.7	Mining	0.8	0.2
Imports (volume)	0.2	Manufacturing	0.3	0.1
Real after-tax wage	0.5	Services	0.3	0.0
Real government expenditure	0.3			

Source: Industry Commission 1993, ORANI simulations

An important point illustrated by use of the model is that gains from reform are magnified by flow-on effects beyond each workplace. For example, if a particular industry is able to reduce its workers' compensation costs, while leaving workers as well off as before, the reduction in costs would tend to be passed on through lower prices. Hence, producers in other industries would face lower production costs, in turn encouraging expansion. Through such inter-industry linkages, the overall gain to the economy would be much larger than that estimated through a 'partial equilibrium' approach. The latter approach would only take account of the direct benefits to the sector where the reforms occur.

An economy-wide effect of this efficiency improvement is that there is an increase in real GDP of \$1.75 for each dollar by which workers' compensation costs are reduced, while leaving workers as well off as before.

B CURRENT SCHEME ARRANGEMENTS

Each Australian State and Territory has its own workers' compensation scheme. In addition, there is federal jurisdiction which has schemes for Commonwealth employees, and seafarers. Practices vary widely with regard to compensation paid, access to common law, rehabilitation practices, and so on.

B1 New South Wales

B1.1 Legislation and administration

The WorkCover Authority of NSW (WorkCover) administers NSW's workers' compensation arrangements, which are governed principally by the *Workers' Compensation Act 1987*. WorkCover is also required to; encourage research, training and rehabilitation; collect and analyse statistics; make recommendations to the Minister; provide advisory and legal services; and provide legal aid.

WorkCover is an integrated compensation and OHS body.

B1.2 Compulsory insurance

Employers are required under the Act to insure with a licensed workers compensation insurer. Licensed insurers are responsible for the assessment of the correct tariff classification for premium setting purposes, the collection of premiums, administration of claims, and investment of funds. The licensed insurers do not underwrite the WorkCover scheme. They hold workers compensation funds in trust and must keep them separate from other insurance funds. Certain specialised insurers have a restricted license allowing them to underwrite specific classes of business, such as shipping or mining industries. The WorkCover Authority has the function of monitoring the financial viability of the Scheme, establishing premium and benefit levels, monitoring the performance of licensed insurers and controlling the investment of funds.

Larger employers with a capacity to meet long term liabilities may be licensed under the Act as self insurers. At June 1993 there were 49 licensed self insurers. Self insurers are expected to be adequately capitalised and have a strong financial position, profit history and positive cash flow demonstrated by audited financial statements for the previous five financial years. They are

expected to have no less than 1000 employees in NSW and to lodge with the Authority either a deposit or a bank guarantee to secure outstanding claims liability, as actuarially assessed.

B1.3 Benefits

A totally incapacitated worker is entitled to 26 weeks of compensation at their current weekly rate (ie their award rate) with an upper statutory limit of \$1052 per week, indexed. Payments are then reduced to 90 per cent of average weekly earnings, with an upper limit of \$247.40, and additional amounts for dependent spouse or children.

Partially incapacitated workers are entitled to make-up pay. If a worker is employed, make-pay is the difference between their pre and post injury average weekly earnings. If a worker is unemployed, make-up is the difference between their pre-injury award rate, and the post-injury award rate they are estimated as being able to earn if they were in suitable employment.

If an employer cannot provide suitable duties for a partially incapacitated worker, job search and rehabilitation training benefits apply instead of the general partial incapacity rate.

Job search benefits comprise four weeks paid at the award rate (\$1052 maximum) and then 48 weeks at the total incapacity rate (ie the award rate (\$1052 maximum) or at the statutory rate (maximum \$247) depending on what the injured worker would be entitled to if they were totally incapacitated.

Workers undertaking rehabilitation training receive award rates (maximum \$1052) during 22 weeks of training, and a further 4 weeks of post-training job search are paid at the same rate, rather than at the long term total incapacity rate (maximum \$247). During any other approved period of training, up to a total period of 52 weeks, the beneficiary is paid at the total incapacity rate.

Journey claims were restricted under the *Workers Compensation (Amendment) Act 1989*. Where the worker is partly at fault, no claim may be heard. Journey to or from a 'place of abode' now means the boundary of the property, and so accidents on staircases or in driveways are not compensable.

Lump sums are payable to the families of deceased workers, or to workers with permanent injuries. Pain and suffering are also compensable by lump sum, but only for payments of more than 10 per cent of the maximum applicable. Weekly benefits are commutable to lump sums only in certain circumstances. Death benefits are a lump sum plus dependant allowances.

B1.4 Common law

The 1987 Act abolished common law claims. However, common law was reintroduced in modified form in 1989. Workers must elect, generally irrevocably, between claiming common law damages or receiving statutory lump sums (Table of Disabilities and pain and suffering). The election does not affect statutory entitlements to weekly income support or medical expenses while the common law claim is still pending. Eventual receipt of damages usually operates also as settlement of any outstanding workers compensation rights.

In addition, thresholds apply to restrict common law claims to seriously injured workers. For damages for non-economic loss, a monetary threshold of \$37 900 applies, and a maximum of \$214 650. For damages for economic loss, a threshold of loss equivalent to 25 per cent under the Table of Disabilities applies, or a monetary threshold of \$50 500.

B1.5 Rehabilitation and return to work

The rehabilitation of injured workers is actively encouraged by WorkCover. All employers must have a work-based rehabilitation program in place which must be displayed. In the case of small employers, the Government has issued a standard program.

The WorkCover Authority operates a retraining scheme to cover the costs of retraining workers while this is necessary, and a JobCover Placement Program to encourage employers to employ partially incapacitated workers. The JobCover Placement Program offers a payment of up to \$300 per week for 12 weeks; a workers compensation premium exemption for 12 months for each worker engaged under the program; plus waiver of excess and claims experience exclusion should the worker suffer a recurrence within six months of employment.

The common law right of an employer to sack an injured worker has been mitigated by statute. It is an offence to dismiss a worker within six months of incapacity solely because of the injury. However, this does not apply where on the basis of a medical certificate, the employer believes that the employee will be permanently unfit for the duties in question.

New initiatives are the WorkCover/TAFE Retraining Project which aims to provide better access to TAFE for injured workers, and the establishment of a Rehabilitation Centre which will provide intensive physical and psychological upgrading programs for the small number of injured workers who are at risk of becoming longer term claimants on the scheme.

B1.6 Premiums

WorkCover previously operated on a cross-subsidised basis, but the Insurance Premiums Order 1990-91 introduced a user-pays principle. Employers are categorised according to industry, but for employers with a base premium of over \$2000, payments are adjusted to reflect claims history. Average premium for 1991-92 was 1.8 per cent. The WorkCover Scheme is fully funded.

B1.7 Dispute resolution

As soon as is practicably possible, the injured worker is required to advise the employer of the claim. If the claim is disputed by the insurer, a conciliation officer intervenes, and if the matter is still unresolved, it is then taken to a Commissioner, registrar or to a single Judge of the Compensation Court. Appeals are to the Supreme Court, and only on points of law, or a rejection of the evidence. Matters heard in the Compensation Court are to be held with as little formality and technicality as possible, although parties are entitled to legal representation. The Court is not bound by strict legal precedent, and must decide each case on its merits.

B1.8 NSW Joint Coal Board

The Joint Coal board was established in 1947, under Commonwealth and State legislation (*Coal Industry Act 1992*.) Since 1948 the Board has provided workers' compensation insurance cover for the NSW coal industry. The Board sets its own premium rates and premiums collected vest in the Board and are managed solely for the benefit of the NSW coal industry.

The Board also has various powers related to the health and welfare of coal miners in NSW. These are:

- to provide occupational and rehabilitation services for workers engaged in the coal industry, including providing preventive medical services, monitoring workers' health and investigating health matters;
- to monitor, promote and specify adequate training standards in relation to health and safety for workers engaged in the coal industry;
- to monitor dust in coal mines.

In December 1991 the Board established a Health and Safety Trust to fund research into occupational health and safety of coal miners. The Trust operates independently of the Board.

Benefits

Special provisions apply in relation to workers' compensation benefits for NSW coal mine employees relative to other workers in NSW. These have been brought about by both the industrial awards under which coal miners work, and the terms of special provisions of the Workers' Compensation Act. Generally these provide for a higher standard of benefits for coal mine employees. For example, the Act provides coal miners with total incapacity benefits in cases of partial incapacity, and the Award increases the amount of those benefits to an average of around \$630 per week, compared to an average of around \$500 per week for coal miners under normal NSW benefits. The award also extends the period for which coal miners can receive pre-injury income related benefits to 78 weeks, rather than the standard 26 to 34 weeks. (In both cases benefits may then continue at the statutory rate).

B2 Victoria

B2.1 Legislation and administration

Through the *Accident Compensation (WorkCover Insurance) Act 1992* and the *Accident Compensation (WorkCover Insurance) Act 1993*, the previous WorkCare scheme was replaced with the WorkCover scheme. Its change of name reflects its closer alignment with the NSW scheme.

B2.2 Compulsory insurance

Employers are required to insure against their liabilities through authorised insurers. As yet, there is no private underwriting of the scheme. and the Victorian WorkCover Authority still bears the ultimate risk. Firms with at least 1000 employees in Victoria, and an excess of assets over liabilities of at least \$200 million are permitted to apply for a licence to self-insure. However, a number of other factors are taken into account, such as safety performance and capacity to operate as a self-insurer.

B2.3 Benefits

Compensation is only payable for injuries or diseases where work was a "significant contributing factor".

If totally incapacitated benefits are 95 per cent of the worker's pre-injury earnings (maximum \$603) for the first 26 weeks, or if partially incapacitated the

difference between the worker's notional earnings and 95 per cent of his pre-injury earnings. After this period, benefits depend on the degree of incapacity. Incapacity is strictly defined, and is subject to assessment by medical panels, whose decisions are binding on conciliators. For the seriously injured (those assessed as being at least 30 per cent impaired) benefits are reduced to 90 per cent of pre-injury earnings (maximum \$603). Totally and permanently incapacitated workers (assessed as being less than 30 per cent impaired) are given 70 per cent of their pre-injury earnings until retirement age (but not beyond 65 years of age).

For partially incapacitated workers, benefits drop to 60 per cent of pre-injury earnings, minus notional earnings. Notional earnings are defined as the greater of the current weekly earnings and the amount the worker is deemed to be able to earn in suitable employment, regardless of whether the worker has been able to obtain such employment. These benefits last for a maximum of 2 years. The maximum payment is \$362 per week.

The Table of Maims was extended in the new legislation to cover things like severe disfigurement. The maximum payment is \$93 080. Where the worker recovers \$10 000 or more under the Table, he or she may be entitled to up to \$50 000 for pain and suffering.

Journey claims are not covered under the workers' compensation scheme, and are covered by the *Transport Accident Act* if the worker is injured in a transport accident.

B2.4 Common law

Common law claims are only available to seriously injured workers (who are at least 30 per cent incapacitated or found to have a serious injury). Claims must be for at least \$29 860 in damages. Workers may claim for loss of earning capacity and pain and suffering. Loss of earning capacity claims are subject to a maximum of \$671 960 and a minimum of \$29 860, less compensation payments already paid. To calculate loss of earning capacity, the courts must use a maximum wage of \$603 per week. The maximum pain and suffering damages are \$184 740. Damages are not awarded in respect of medical and like expenses.

B2.5 Rehabilitation and return to work

The scheme concentrates on workplace-based rehabilitation. Employers with a payroll of over \$1 million, or with a worker off work for at least 20 days are required to establish an occupational rehabilitation program. This program must

identify workplace return to work policies, a co-ordinator for return to work activity within the workplace, a return to work plan for every worker off work for more than 20 days, and activities to enhance prevention.

Employers are required to make suitable job offers, or face a fine of up to \$25 000. Workers are required to accept suitable job offers. Failure to do so may mean benefits are discontinued.

B2.6 Premiums

The method of setting premiums is mandated by WorkCover. Insurers may only compete on service.

The method of setting premiums is a full experience rating system. This means that premiums are based on last year's premium, which is adjusted to take into account recent experience. The new system took effect on 1 July 1993.

B2.7 Dispute resolution

The scheme aims for non-adversarial dispute resolution. Conciliators are employed, who must quickly and efficiently conciliate disputes. In that context they have the power to make recommendations to the parties for the resolution of the dispute. In relation to disputes about weekly payments, where the Conciliation Officer is satisfied that there is no genuine dispute, he or she can direct that weekly payments be made for a period of up to 12 weeks prospectively and up to 10 weeks retrospectively. Legal representation is not permitted without the consent of all parties.

The next stage is either the County Court, the Magistrate's Court, or the Administrative Appeals Tribunal (AAT), depending on the size of the claim. Appeals are to the Supreme Court, on points of law. Representation is allowed, and normal court rules apply to costs.

B3 Queensland

B3.1 Legislation and administration

Queensland's workers' compensation arrangements are governed by the *Workers' Compensation Act 1990* and administered by the Workers' Compensation Board (WCB). This Act updates the previous 1916 Act, retaining many of its key features. Queensland's scheme is one of the oldest in

Australia. The WCB has employer, employee and State government representatives.

There is no formal link with the Division of Workplace Health and Safety, which is responsible for occupational health and safety regulation.

B3.2 Compulsory insurance

Insurance for workers' compensation liabilities is compulsory. The Act makes employers liable to pay compensation to workers injured "out of and in the course of employment". Employers are also required to insure for an unlimited amount for other liabilities arising from work injury, such as common law claims.

Employers face an excess of a full day's wage on the date of injury for state award workers, but no excess for federal award workers.

Employers must insure with the WCB, operating as a government monopoly. Self-insurance is not permitted. There is no role for the private insurance market in this system.

B3.3 Benefits

Weekly benefits are award wages for the first 39 weeks of incapacity. For those not covered by an award, benefits are registered industrial agreement wages, or, for many government employees, weekly salaries or wages. Those not covered by these arrangements are awarded the greater of the prescribed base rate or 80 per cent of their weekly payment under their contract of service. There are also special provisions for certain waterside workers.

After 39 weeks, benefits are reduced to the prescribed base rate (currently \$271.20), with allowances for dependants.

Weekly benefits cease when they reach a total of \$71 310.

Permanent impairments are compensated under the Table of Injuries (with a maximum of \$71 310). Loss of bodily function is compensable if assessed by the Medical Assessment Tribunal. Disfigurement or scarring are compensable.

Death benefits are paid as lump sums and weekly benefits to dependants. Funeral expenses are also paid.

Medical and rehabilitation expenses are paid. Severely injured workers may also receive a caring allowance. Travel to obtain medical treatment may also be reimbursed in some cases.

B3.4 Common law

Common law access is unlimited by the Act. There is no maximum amount of damages. Actions are only limited by the *Limitations of Actions Act 1974*.

Workers may receive workers' compensation until common law damages are awarded, and damages are reduced by the amount of compensation already paid.

B3.5 Rehabilitation and return to work

Under the 1991 Act, the WCB has the power to take actions against employees refusing to undertake rehabilitation programs. Previously such programs were voluntary. The WCB may take such action and spend as much money as it feels is necessary or expedient to rehabilitate workers. Initiatives to develop work-based programs have been introduced, and a new rehabilitation centre has been established.

WCB initiatives in the area include personal case management, a job placement, and training courses for employers and unions. Rehabilitation advisers are employed to encourage workplace-based rehabilitation.

The *Industrial Relations Amendment Bill 1992* aimed to achieve better protection for jobs after injury. The Bill seeks to make it an offence to dismiss an employee on benefits within 3 months of the injury solely on the basis that the employee is unfit for work.

B3.6 Premiums

Premium rates are determined on an industry basis by the claims to premium ratio of the preceding three years, the estimated future costs of incurred claims, and administrative costs. As a risk management incentive, a merit bonus scheme exists, under which employers with good safety records may receive a rebate on their premium. The scheme runs on a fully funded basis, and is a non-profit organisation.

Average premiums in Queensland are 1.6 per cent of payroll.

B3.7 Dispute resolution

Medical Assessment Tribunals determine medical questions such as:

- whether the worker has suffered an 'injury' in terms of the Act;
- in instances where a claim has previously been allowed by the Board, whether the incapacity is related to the original injury;

- whether an injured worker has suffered a permanent or temporary disability, and the extent of this disability.

Workers have the right to legal representation before the Tribunal, but these costs are not recoverable. Decisions of the Tribunal are final and conclusive and there is no right of appeal.

A worker who disputes the WCB's decision regarding claims may appeal to the Industrial Magistrate. Either the worker or the WCB may appeal this decision before the Full Bench of the Industrial Court of Queensland. Costs are at the discretion of the Industrial Court, subject to regulation. There are no further appeal mechanisms.

B4 South Australia

B4.1 Legislation and administration

SA's workers' compensation arrangements are primarily governed by the *Workers Rehabilitation and Compensation Act 1986*, which commenced September 30 1987. The Workers' Rehabilitation and Compensation Corporation (WorkCover) administers and enforces the Act.

The Board is made up of members from union and employer representative backgrounds, as well as those with general experience in related fields.

There is no formal link with the occupational health and safety body.

The State Government has conducted a review of the present system and plans to restructure of the administration of workers' compensation in the South Australia.

B4.2 Compulsory insurance

Insurance under the Act is compulsory, either through WorkCover or by self-insurance. Common law liabilities are covered as well as liabilities arising under the Act. All employers must be registered with the Corporation.

Firms with at least 200 employees are permitted to apply for a licence to self-insure. In 1992, 98 large employers were self-insured, covering 35 per cent of the workforce. In granting licence to self-insure, WorkCover may take into account such things as the employer's capacity to meet its claims and procedural responsibilities, the employer's safety and rehabilitation record, and its record in providing suitable employment for injured workers.

Exempt employers (self-insurers) are required to pay a special levy to WorkCover to cover administrative costs, review and appeal costs, insolvencies and exempt employers. Exempt employers must also have bank guarantees to cover liabilities in the event of their ceasing to retain exempt status.

The private insurance market has no formal role in workers' compensation in this State.

B4.3 Benefits

A totally incapacitated worker is entitled to twelve months (cumulative) on full notional weekly earnings, which is reduced by 20 per cent at the end of the year. A partially incapacitated worker who returns to work gradually or in a lower paying position is entitled to make-up pay equivalent to the difference between the old wage and the new for one year, after which the payment is 80 per cent of the difference. A worker who cannot find work as a result of a compensable injury is treated as totally incapacitated unless WorkCover can establish that employment for which the worker is reasonably fit is available.

Dependant spouses and children of workers who have died as a result of a compensable injury are entitled to a lump sum and weekly payments. A totally dependent spouse is entitled to 50 per cent of notional earnings, and a totally dependent child (under 18 or a full-time student under 26, or due to a mental or physical disability unable to earn a living) is entitled to 25 per cent of the wage if orphaned, or 12.5 per cent if not orphaned. Partially dependent spouses and children have their payments reduced proportionally.

All reasonable medical expenses (including rehabilitation) are payable under the scheme, as well as compensation for damage of property (subject to limits set by regulation).

Journey claims are also covered.

Lump sums are payable in respect of permanent disabilities and non-economic loss. Weekly payments may be commuted to lump sums only in limited circumstances at the corporations discretion.

B4.4 Common law

Common law recovery was abolished by legislative amendment in December 1992. The tail of claims is expected to end during the 1994-95 financial year. Common law rights against third parties may exist, for example a worker may have a right of action against a manufacturer of faulty equipment.

B4.5 Rehabilitation and return to work

WorkCover places a great emphasis on rehabilitation in a bid to reduce the long term costs of claims. Programs are established and approved, and advisers are appointed. Rehabilitation costs are covered under the scheme, as are associated costs such as travel, accommodation and child care. Benefits may be suspended if a worker refuses to undertake an appropriate rehabilitation program.

Employers are required to provide suitable employment for workers who are capable of returning to work, unless it can be proven that it is not practicable to do so. Termination of an injured worker can only take place with the corporation's approval. Unreasonable or unjustified dismissal can result in supplementary levies being imposed to the extent of the worker's claims costs.

B4.6 Premiums

WorkCover is fully funded as of June 1993, two years ahead of the target date, 1995 (Workers' Compensation report No. 214 October 7 1993). The presiding officer attributes some of the improved performance to the bonus/penalty scheme that was introduced in July 1990, which has led employers to be aware of the link between safety performance and levies. The maximum bonus was set at 30 per cent of the levy and the maximum penalty at 50 per cent, with a supplementary penalty of another 50 per cent for large employers with a very poor record. This extra penalty is levied with intensive assistance from WorkCover to help the employer improve safety and claims performance.

During 1991-92, the targeted average levy rate was 3.8 per cent. This has been reduced for 1992-93 to 3.5 per cent. The average levy rate for 1993-94 has been targeted at 2.86 per cent.

Employers pay the first week of income maintenance, which can itself be insured through the 'buy-out' option for the payment of a small additional levy.

B4.7 Dispute resolution

Any worker or employer may request that WorkCover review any decision. The Review Panel, which has recently been transferred to the Department of Labour to increase its perceived independence, is the next stage of the appeal process. The types of decisions which are subject to formal review are prescribed in the legislation. Medical Advisory Panels, which are seldom used, can be convened at the request of a review authority, but the review authority is not bound by the panel's advice. Unresolved matters are then referred to the Workers' Compensation Appeals Tribunal, and then on to the Supreme Court by leave.

Review authorities are to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms, or strict adherence to the rules of evidence. Legal representation is allowed but not mandatory.

B5 Western Australia

B5.1 Legislation and administration

The *Workers' Compensation and Rehabilitation Act 1981* governs workers' compensation arrangements in WA.

The Workers' Compensation and Rehabilitation Commission administers the Act. Its functions include undertaking rehabilitation, occupational or vocational training for workers, dealing with insurance matters and providing advice to the general public.

B5.2 Compulsory insurance

Insurance with an approved insurer or self-insurance is compulsory for statutory liabilities arising under the Act.

A General Fund exists which covers workers whose insurer no longer exists or who have died. If an employer has failed in his duty to insure, the Fund will cover the worker, but will sue the employer for the amount paid. There are fines for not insuring, and premiums going back up to five years are recoverable.

The Governor by Order in Council may exempt an employer or group of employers from the requirement to insure, under limited circumstances. The exempt employer must keep a separate fund for workers' compensation purposes deposited with the Treasury. When deciding whether to grant an exemption, the number of workers and the risk category are looked at, as well as the material and financial resources of the firm.

B5.3 Benefits

Payments are based on a reduction in earning capacity. Thus a worker who is unable to find work of any sort is deemed totally incapacitated, and a worker who is earning an amount equal to his pre-injury weekly wage is considered not incapacitated at all, even if the worker is carrying a permanent disability.

For a partially incapacitated worker, the weekly benefits are the difference between current weekly earnings and normal (pre-injury) earnings. Benefits are not adjusted for the number of dependents. Entitlements cease when they reached the prescribed amount (\$100 000), unless otherwise ordered by the Conciliation Review Directorate.

All reasonable medical, hospital, rehabilitation, and ancillary costs are to be met by the employer, up to a set limit. Upon the death of a worker, weekly payments are made to the dependants, as well as a lump sum.

Lump sums are available in limited circumstance. Specific injuries mentioned in a Table of Maims are compensable by lump sum by election of the worker. Weekly benefits may be redeemed by a lump sum in limited circumstances.

There is a duty imposed on employers to continue to keep an injured workers' position available during the worker's incapacity for a period of 12 months from the day the worker becomes entitled to receive weekly payments.

A worker may be disentitled to compensation if under the influence of alcohol or drugs, or if the injury occurred due to a failure to use protective equipment provided by the employer, without due cause. Serious wilful misconduct, fraud and malingering are also bars to compensation. Payments may be discontinued or suspended by agreement with the workers, by order of the Conciliation review Directorate, or by a unilateral action of the employer where a medical practitioner has provided evidence that the worker is fully or partially recovered. Refusal to submit to a medical examination, or to under go rehabilitation may also lead to payments being suspended.

Journey claims are not covered under the Act.

B5.4 Common law

Workers have the right to sue for damages at common law if they suffer a serious disability, that is:

- 30 per cent of schedule 2 of the *Workers' Compensation and Rehabilitation Act 1981*, which is a table of compensation payable for permanent disability; or
- \$100 000 for future economic loss. Workers who do not have a serious disability will now be eligible for expanded prescribed benefits and lump sum payments for permanent injury which will include payouts for back, neck and pelvic injuries.

B5.5 Rehabilitation and return to work

The Commission tries to take an active role in rehabilitation matters. If a worker has been off work for more than four weeks consecutively or for over 12 weeks in a 12 month period, then the insurance company is obliged to forward the details to the Commission. The Commission has the power to require the employer to take reasonable steps to rehabilitate the worker. The Board can require a worker to undertake such training as it considers necessary. The Rehabilitation Services Division of the Commission focuses on early intervention.

B5.6 Premiums

The Premium Rates Committee fixes the categories of business and recommends the premium to be charged. It does so on the basis of statistics from the insurance companies. Insurance companies may discount these by any amount, or may charge up to a 50 per cent loading.

Average premium is 2.86 percent of payroll (1991-92).

B5.7 Dispute resolution

Conciliation Officers will attempt to resolve disputes by agreement. Review Officers will hear and determine disputes not resolved by conciliation. Review Officers may refer a matter to the Compensation Magistrates Court on points of law only. Any appeal of the Magistrate's decision are heard by the Supreme Court (also on points of law only).

B6 Tasmania

B6.1 Legislation and administration

The *Workers Compensation Act 1988* governs workers' compensation in Tasmania. The Act is administered by the Department of State Development and Resources and the Workers Compensation Board. The Workers Compensation Board, is made up of employers, workers, medical practitioners, a person nominated by the Treasurer and insurers. Its role is to advise the Minister generally, to oversee the operation of workers compensation procedures, to review the costs of occupational injuries and diseases, and to review the performance of insurers, self-insurers and the Nominal insurer, and to advise the Minister on rehabilitation.

As the Department of State Development and Resources administers the Workers Compensation and Occupational Health and Safety Legislation, a link does exist. The Government has also accepted the proposal to effectively amalgamate the Workers Compensation Board and the Industrial Safety Health and Welfare Board.

B6.2 Compulsory insurance

The Act imposes a duty on employers to insure with an approved insurer or to self-insure (with a permit from the Workers Compensation Board). The employer must insure for full liability arising under the Act and independently of the Act.

B6.3 Benefits

Benefits for totally incapacitated workers are average weekly earnings or the ordinary time rate of pay for work in which the worker was engaged immediately before the period of incapacity, whichever is the greater. A worker is deemed totally incapacitated when the incapacity is partial but the worker has attempted but failed to find suitable employment. A partially incapacitated worker who is able to find work is entitled to an amount which is the difference between current weekly earnings and previous employment wages. There are no time limits on these weekly benefits, however they are subject to a statutory upper monetary limit (\$95 069).

Lump sums are payable upon the death of a worker, with additional sums available for dependents. All medical and related expenses are payable by the employer, including rehabilitation costs. Weekly benefits may be commuted to lump sums after three months, and agreements to do so must be registered by the Secretary, who may refer the matter to the Commissioner if he feels the agreement is inequitable. Lump sums are also payable for specific injuries, according to a Table of Maims.

Journey claims are covered under the Act.

B6.4 Common law

Workers have unrestricted rights to common law actions, and are able to accept both workers' compensation payments and damages. However, damages are reduced by the amount of compensation already received.

B6.5 Rehabilitation and return to work

Where a worker is incapacitated for 12 weeks, or is likely to be permanently incapacitated for the job previously held, the insurer or the self-insurer is obliged to notify the Workers Compensation Board, including any details of rehabilitation programs proposed by the employer or the insurer. The Board may take action to insure that appropriate and effective rehabilitation programs are provided. It may direct the employer or the insurer to take such action as it considers necessary.

There is no duty imposed on the employer to re-employ an injured worker under the Act. Common law and award rules would apply.

B6.6 Premiums

Premiums are set by licensed insurers. The Board oversees the performance of the licensed insurers, and of the appropriateness of premiums, assisted by the Premiums Monitoring Committee. Merit bonus rebates are encouraged.

The average premium rate is 1.90 per cent of payroll when notional premiums for self-insurers are included. Excluding self insurers the average premium rate is approximately 1.5 per cent. (The decrease in the average premium rate is explained by the fact that majority of firms self insuring under the Tasmanian scheme are involved in relatively high risk industries).

B6.7 Dispute resolution

In the event of a dispute over a compensation claim, the employer, the insurer or the worker may refer the claim to the Workers' Compensation Commissioner. The Commissioner constitutes a division in each Court of Requests known as the Workers' Compensation Division of that Court.

The Registrar of the Division will, when appropriate, conduct pre-hearing conferences with the parties to determine the circumstances of the dispute and to encourage parties to agree to settlement. Approximately 50 per cent are settled at this point without need for a formal hearing.

The Commissioner may refer a case to the Supreme Court (single Judge) if the case involves a question of law of public and general importance. Further appeals may lie in the Full Court of the Supreme Court.

The Commissioner may either refer a medical question to a panel of three medical practitioners selected by the Commissioner or to a single appropriately qualified medical practitioner, subject to the objection of the parties.

Generally, parties are to bear their own costs, unless stipulated by the Commissioner.

B7 Northern Territory

B7.1 Legislation and administration

Workers' compensation arrangements are governed principally by the *Work Health Act 1988*. This Act also contains occupational health and safety regulations for the NT. It is administered by the Work Health Authority, which is a combined workers' compensation, rehabilitation and occupational health and safety body.

The Authority is constituted by the Chief Executive Officer.

The Work Health Advisory Council is representative of a board cross section of the community including employers and unions and provides advice to the Minister.

B7.2 Compulsory insurance

Insurance is compulsory under the Act, with private insurers who are approved by the Authority.

Exemptions may be granted to self-insurers who must also gain approval from the Authority. This is only in the case of corporations who can provide adequate service and show financial viability, as well as produce the required statistical information and meet other requirements of the Authority.

In the case of an employer or insurer who has defaulted on his obligations, workers are covered by the Nominal Insurer.

B7.3 Benefits

For the first 26 weeks of incapacity, workers are entitled to their normal weekly pre-injury earnings less any amount actually earned. After this, a worker is entitled to 75 per cent of loss of earning capacity, or up to 150 per cent of average weekly earnings for the Territory, whichever is the lesser. Loss of earning capacity is defined as the difference between normal weekly earnings and the amount the worker is capable of earning in a week during normal working hours in work he or she is capable of undertaking if he or she were to engage in the most profitable employment, if any, which is reasonably available

to him or her. There is no special allowance for dependents, except in the calculation of the minimum weekly rate and in the case of a death of a worker, where dependent children are entitled to 10 per cent of average weekly earnings.

Lump sums are awarded for permanent impairment assessed as at least 5 per cent, subject to a sliding scale if less than 15 per cent. The maximum amount is 208 times average weekly earnings in the Territory. Weekly benefits may be commuted to lump sums where the sum involved is disproportionately small compared to the associated administrative costs, or in other limited circumstances. Lump sums are also payable upon the death of a worker.

Except in certain circumstances journey claims involving motor vehicles have been removed from the Act. Such claims are covered under the *Motor Vehicles (Compensation) Act*. However, journey claims that do not involve a motor vehicle are covered by the Work Health Act.

B7.4 Common law

Common law actions are abolished under the Act.

B7.5 Rehabilitation and return to work

There is no statutory bar to an employer terminating the services of an employee who is receiving workers compensation payments, but an employer is obliged to take all reasonable steps to provide the injured worker with suitable employment or to assist him or her to find suitable employment, and as far as is practicable, to retrain the worker.

Employers are required to pay all rehabilitation costs, including workplace modification, additional travel costs, and household and attendant care. A worker who unreasonably refuses to take part in a rehabilitation program may have his payments reduced.

B7.6 Premiums

Premiums are set by the individual insurance companies and are subject to market forces. Premiums are monitored by the Premiums Monitoring Committee. Average premiums for 1992-92 were 1.6 per cent of payroll.

B7.7 Dispute resolution

A worker who is dissatisfied with an employers decision may make application to the Work Health Court, which has jurisdiction to hear all claims under the

Act. Persons may appear personally or represented. Further appeals go to the Supreme Court on points of law.

In matters involving a difference of medical opinion as to the workers capacity for work, the worker or employer may ask for a medical panel (of three medical practitioners) to determine the capacity issue.

In permanent impairment assessment matters, a person aggrieved by the level of assessment, may request a reassessment. Such reassessment is arranged by the Work Health Authority who convenes a panel of three medical practitioners. The Panel's assessment is final.

Following an independent review of dispute resolution processes under the Act, revised legislation and attendant regulations will come into effect on 1 January 1994.

The changes will involve a three stage dispute resolution process, namely:

- Mediation: an informal conference convened outside the court process to attempt to resolve the matter in dispute.
- Conciliation/Directions Conference: A conference convened by the Work Health Court Registrar with the aim of conciliating the matter in dispute.
- Work Health Court: Formal hearing by a magistrate.

The system has been amended to make it less formal and technical. Rules of evidence have been abolished and a claimant is able to represent him/herself throughout the process.

The current medical review provisions will be repealed, however the Court will have the power to seek independent medical advice.

Australian Capital Territory

B8.1 Legislation and administration

Workers' compensation arrangements in the ACT are governed by the *Workers' Compensation Act 1951*. The Chief Minister's Department of the ACT Government is responsible for administering the Act.

B8.2 Compulsory insurance

Insurance is compulsory for full liability under the Act, and for an unlimited amount for liability arising independently of the Act. Provision for exemption is

at the discretion of the Minister. Joint policies are allowed. The Nominal Insurer may compensate an injured worker where an employer defaults on his or her liability or there is no workers compensation insurance policy in place. The workers compensation Supplementation Fund provides compensation where the insurer or employer is insolvent.

B8.3 Benefits

For the first 26 weeks of incapacity, workers are entitled to the equivalent of sick pay. A totally incapacitated worker is then entitled to a weekly payment (\$243.47, indexed) with further allowances for dependants. A partially incapacitated worker is paid either the difference between his pre-injury earnings and what he or she is capable of earning now, or the difference between what the worker is capable of earning now and what he or she would have been paid if totally incapacitated, whichever is greater.

Partial incapacity payments are subject to a statutory maximum, but payments upon the total incapacitation or death of the worker are not.

There is no legislative definition of partial incapacity, but it has been held that a worker who is unable to find work at times other than at full employment is totally incapacitated.

Upon the death of a worker, lump sums and weekly payments are payable to dependants, as well as a sum for reasonable funeral expenses.

Lump sums are also payable for specific injuries and disabilities, according to a schedule.

Payments are not made if the injury is a result of serious and wilful misconduct (unless it results in death or serious injury) or from intentional self-infliction. Payments may be suspended if the worker ceases to reside in Australia or refuses to undergo a medical examination.

B8.4 Common law

Common law actions are unlimited, but any compensation paid must be repaid out of damages.

B8.5 Rehabilitation and return to work

The Act makes no specific reference to rehabilitation.

B8.6 Premiums

Premium rates are recommended by the Insurance Council of Australia although there is discounting in the market. The Minister has the power to set rates but has not done so to date.

The 1991-92 average premium rate is 1.98 percent of payroll.

B8.7 Dispute resolution

Arbitration proceedings are essentially adversarial, and are held by a magistrate who is given wide discretionary powers, especially regarding procedure. As of right appeals exist to the Single Judge of the Supreme Court of the ACT.

B9 Federal jurisdiction—Comcare

B9.1 Legislation and administration

The principal Acts regarding compensation and health and safety for Commonwealth employees are the *Safety Rehabilitation and Compensation Act 1988* (SRC Act) and the *Occupational Health and Safety (Commonwealth Employment) Act 1991*. The former sets up the Safety, Rehabilitation and Compensation Commission, which has responsibility for regulatory functions including occupational health and safety, premium setting and regulation of licensed self-administrators; and Comcare Australia which has responsibility for the administrative and service functions under the Act and provides support to the Commission.

The Commission is a nine member representative body which comprises:

- a part-time Chairperson;
- an Executive Commissioner (CEO of Comcare Australia);
- two ACTU representatives;
- two employer representatives (one representing the administering authorities and the other representing authorities other than administering authorities);
- three other members with qualifications or experience relevant to the Commission's functions, or the exercise of its powers..

The *Occupational Health and Safety (Commonwealth Employment) Act 1991* provides that the Commonwealth may contract with the State regulatory

agencies to make arrangements in accordance with the provisions of the *Public Service Act 1922*, for the officers of the public service to provide investigatory services.

B9.2 Compulsory insurance

Commonwealth Departments, Statutory Authorities and Government Business Enterprises secure their workers' compensation liability through payment of a premium to Comcare Australia.

Certain authorities may be licensed by the Commission and have similar powers and functions to Comcare Australia. The licence arrangements are follows:

- Class 1, which allows the authority to self-insure. The authority does not pay a premium but Comcare Australia manages the authority's claims;
- Class 2, under which the authority manages its own claims but pays a premium to Comcare Australia to insure its workers' compensation liability; and
- Class 3, under which the authority both self insurers and manages its own claims.

Telecom Australia and Australia Post, who had previously operated as self administrators were deemed to have been granted a Class 3 licence from 30 June 1992.

The SRC Act has been further amended to allow Commonwealth authorities that have been, or are about to be, privatised to apply for the grant of a Class A or B licence as follows:

- Class A, which allows the authority self-insurers and contracts with subsidiary of Comcare Australia for the management of its claims;
- Class B, which allows the corporation to self-insurers but manages its own claims in-house or contracts with another agency to manage this service.

There is no role for the private insurance market in this scheme, although under the recent extension of coverage private sector agencies may enter into contract with certain licence holders for the provision of claims management services.

The *Commonwealth Employees' Rehabilitation and Compensation Amendment Act 1992* added provisions which enabled coverage to be extended to Commonwealth authorities which had been, or were about to be privatised, and to authorities (although implementation has been delayed until at least the outcome of this inquiry).

B9.3 Benefits

Benefits are normal weekly earnings for the first 45 weeks, minus any income that the worker is earning, or is able to earn. After 45 weeks, payments are reduced to 75 per cent of this amount. The maximum amount payable after 45 weeks is 150 per cent of average weekly earnings of full-time adults. The minimum is the lesser of a statutory amount or 90 per cent of the worker's normal weekly earnings. The formula used encourages the return to work in that it allows the worker to earn more as more hours are worked.

Reasonable medical and associated travel, accommodation and household service expenses are paid, as well as the cost of alterations to the place of work, residence, vehicle or article required by the worker (especially if in conjunction with a rehabilitation program).

Lump sums are payable upon the death of a worker, and weekly payments are made to children. Lump sums are also payable for permanent impairment (of at least 10 per cent), non-economic loss, and as a redemption of weekly payments in limited circumstances.

No compensation is payable if the injury is the result of serious and wilful misconduct, unless it results in death or serious injury. (Being under the influence of alcohol or non-prescribed drugs constitutes serious wilful misconduct.) Weekly payments will be discontinued when the worker turns 65, is imprisoned, or if a false declaration has been made by the worker. Payments may also be suspended if he or she refuses a medical examination.

Journey claims are allowed.

B9.4 Common law

Common law claims against the Commonwealth have been abolished for economic loss, but a worker may sue for non-economic loss for up to \$110 000 if he or she makes an irrevocable decision to take common law instead of statutory compensation for permanent impairment and non-economic loss.

B9.5 Rehabilitation and return to work

The Commission, licence holders, the Secretary of the Department or the principal officer of a Commonwealth authority may determine that an employee should attend a rehabilitation program. Comcare Australia or a licence holder may approve such programs. Comcare attributes the fall in the number of

claims lasting more than 28 days from 28.5 per cent under the previous scheme to 14.1 per cent at the end of June 1991 to its rehabilitation efforts.¹

B9.6 Premiums

Departments and Authorities contribute to a fund, based on claims history. A premium reconciliation is invoiced at the end of twelve months experience after that premium has been levied. Premiums are set to fully fund the scheme. Funds are not invested separately, however, and go into Consolidated Revenue.

Comcare's average premium is 1.6 per cent (*Workers' Compensation Report*, June 17, 1993, p.1).

B9.7 Dispute resolution

Comcare Australia must determine claims accurately and quickly, try to minimise the duration of claims (through rehabilitation programs), cooperate with other bodies to try to reduce the number of injured, and to engage in research.

Appeals are to the AAT. If the employee is successful costs may be payable. As a general rule each party bears their own costs.

B10 Federal jurisdiction—Seafarers' scheme

B10.1 Legislation and administration

Compensation for injured seafarers underwent radical legislative change in 1992. Previously, seafarers were covered by the *Seamen's Compensation Act 1911*. Following the 1988 Review of Seamen's Compensation by Professor Luntz, there were extensive consultations with industry employers, the ACTU and maritime unions. In June 1991, the Government approved the development of legislation to implement new rehabilitation and compensation arrangements for Seafarers. The result was a package of four Acts which govern the new scheme. These Acts are:

- the *Seafarers Rehabilitation and Compensation Act 1992*. This is the principal Act, outlining entitlements, benefits, administrative structures, how claims are to be determined, and the dispute resolution process. The scheme is structured around individual employer liability with an employer

¹ Comcare, *Annual Review 1990-91*, p.9.

operated “safety-net” fund. The Fund acts as the nominal insurer in the event of an employer being unable to meet its liabilities. The fund also covers industry pool employees if injured while undertaking certain training courses or while reporting in at a Seafarers Engagement Centre.

- the *Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Act 1992*. This Act repeals the 1911 Act, and provides for transitional arrangements between the two schemes.
- the *Seafarers Rehabilitation and Compensation Levy Act 1992*. This Act allows the Government to levy employers to enable the Seafarers Safety, Rehabilitation and Compensation Authority to operate the safety-net Fund. This is essentially a fall back position for the Government and would only take effect if the industry Fund ceased to operate, or if its approval were withdrawn.
- the *Seafarers Rehabilitation and Compensation Levy Collection Act 1992*. This Act allows for the collection of monies under the previous Act.

The principal Act established the Seafarers Safety, Rehabilitation and Compensation Authority to administer the new scheme. The Authority comprises a Chairperson, Deputy Chairperson, two members nominated by employer interests and two members nominated by employee interests. This addresses the complete lack of any administrative authority under the 1911 Act. The Department of Transport and Communications provides administrative support and funding for the Authority.

The new Authority’s responsibilities include:

- monitoring the operation of the Act;
- promoting high standards of claims management and effective rehabilitation procedures;
- encouraging safe workplaces;
- publishing material relating to these functions;
- advising the Minister

The authority has other powers, including the collection of injury statistics, monitoring insurance or indemnity agreements, and monitoring the Fund.

B10.2 Compulsory insurance

The new Act makes it compulsory for employers to insure against their workers’ compensation liabilities. Insurance must be with an insurer authorised under the *Insurance Act 1973*, or a protection and indemnity association belonging to the

International Group of Protection and Indemnity Associations. Under the 1911 Act, there was no such obligation, although it was common practice to do so.

B10.3 Benefits

Benefits are aligned to those for injured Commonwealth employees. They are normal weekly earnings for the first 45 weeks of incapacity, minus any amount earned in suitable employment. After 45 weeks, they are reduced to 75 per cent of normal weekly earnings. A statutory maximum and minimum apply. Benefits generally cease when the worker reaches 65 years of age. Benefits cannot be topped up by award payments. An employee must irrevocably elect whether to receive compensation benefits under the Act or payments under an award.

For the partially incapacitated, the total amount received in benefits and wages increases with more hours worked, offering incentives to return to work.

Redemption of weekly benefits are not allowed, except where there is partial permanent incapacity and the weekly benefit involved is not more than \$63.18.

Lump sums are available for permanent impairment and non-economic losses (eg pain and suffering). Lump sum benefits are generally not payable for injuries which do not meet a 10 per cent “whole person impairment” threshold. The maximum amount for permanent impairment is \$101 080.90, and for non-economic loss \$37 905.34, including pain and suffering.

Reasonably required household help and attendant care allowances are available, with a maximum of \$252.70 per week for each.

Death benefits are lump sums for specific relatives, and weekly benefits are paid to dependent children.

All benefits are indexed on 31 July each year in accordance with movements in the Consumer Price Index.

B10.4 Common law

Common law access for economic loss is abolished. Seafarers may go to common law in respect of permanent impairment/non-economic loss, but the maximum amount of damages that can be awarded by a court is \$138 570.52. An employee who elects to pursue a common law action loses any entitlement to a lump sum benefit under the Act, irrespective of the outcome of the common law action.

There are no restrictions on a dependant's rights to sue under common law in respect of the death of an employee, but the employer may recover the lesser of damages or any amounts paid under the Act to prevent double dipping.

An employee similarly has unlimited access to sue third parties, with the employer able to recover the lesser of the damages or any amounts paid under the Act.

Under certain circumstances an employer may sue a third party on the employee's behalf.

B10.5 Rehabilitation and return to work

The new Act places great emphasis on rehabilitation, a definite improvement on the position of the 1911 Act, in which rehabilitation was not even mentioned.

A rehabilitation assessment must be made of any seafarer whose injury lasts or is expected to last more than 28 days. The employee is to take part in the choice of rehabilitation provider, and in drawing up the rehabilitation plan.

An employee who fails to undertake rehabilitation may have his or her benefits suspended.

The employer is required to provide an employee who has completed a rehabilitation program with employment, or assist the employee in finding suitable alternative employment.

B10.6 Premiums

There are no special legislative requirements regarding premium setting. This is left to the individual insurer.

B10.7 Dispute resolution

A claimant who disputes a decision regarding a claim may request the employer to reconsider the decision. The employer must then obtain advice from a special industry panel or a Comcare officer. This independent advice, which must be provided to both the employer and the claimant, is not binding on the employer. The employer must notify the claimant of the reconsidered decision, giving reasons.

If dissatisfied with the employer's reconsidered determination, the claimant can require the employer's decision to be reviewed by the Administrative Appeals Tribunal (AAT). There is provision in the Act for the AAT to award costs against the employer, but not against the claimant.

C OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

Each Australian State and Territory has its own occupational health and safety legislation. In addition, there is a federal jurisdiction which has separate legislation for Commonwealth employees and for Seafarers. Significant inconsistencies exist in legislative provisions across the jurisdictions, despite moves toward rationalisation and national uniformity¹.

C1 Introduction

OHS is regulated through jurisdiction specific legislation which sets minimum safety standards in workplaces by imposing responsibilities for safety on both employers and employees.

The various Acts impose penalties for non-compliance on employers and, in some cases, employees. Failure on the part of employers to comply with these provisions may also provide an avenue for employees to pursue legal actions for compensation (damages).

The employee may sue for breach of statutory duty. This is often easier to prove than common law negligence, as it does not require the employee to prove fault, but simply show that the employer did not comply with requirements in the statute. However, in some jurisdictions, OHS legislation restricts the right to bring private civil actions for damages. The Crown may bring a criminal action against the employer under breach of statutory duty punishable by a fine or imprisonment.

A major overhaul of all Australian OHS legislation followed the release of the Robens Report in 1972 (concerning OHS legislation in Britain). A number of states conducted reviews of their own OHS legislation, the outcomes of which generally supported recommendations (or the approach taken) in the Robens Report. The reform of OHS legislation, encompassing Robens principles, took over 17 years, with the first to reform being SA in 1972 and the last being Queensland in 1989.

¹ For recent changes to OHS legislation in each jurisdiction refer to appendix j.

Existing legislation has been criticised for its inconsistency across jurisdictions. However at a Special Premiers' Conference in November 1991, it was agreed that by the end of 1993, national uniformity should be achieved in the regulation of OHS goods (including dangerous goods) and occupations. In March 1992, Worksafe established a tripartite National Uniformity Taskforce in order to achieve consistency in a number of areas. This will assist in the harmonisation of existing OHS standards and the development of appropriate new standards.

This appendix provides an overview of the existing OHS regulation in each of the states and territories and Commonwealth jurisdictions.

C2 The Robens Report

Prior to federation each colony adopted relevant British OHS legislation and amended it as required. Legislation in both Britain and Australia was based largely on standards which specified detailed requirements for various workplaces, industries and industrial processes. This resulted in largely uncoordinated and fragmented systems of legislation, which were slow to change.

In 1970, a Committee of Inquiry under the Chairmanship of Lord Robens was established to examine the OHS system in Britain and make recommendations for changes to existing legislation. The release of the report in 1972 provided the impetus for change in the underlying philosophy and operation of existing OHS legislation, in Britain and later in Australia.

Robens made fundamental criticisms of the existing structure and content of legislation, namely:

- apathy was the most important cause of accidents;
- the punitive approach had failed since penalties for non-compliance were insignificant and Magistrates rarely imposed the maximum fine; and
- employers and employees had become complacent and had lacked the incentive to make positive provision for health and safety in the workplace.

Robens recommended that:

- legislation be replaced by a single Act to be administered by one separate and self-contained authority;
- the content of the Act should be enabling in character and should cover matters applicable to most employers, particular hazards and industries;

- greater emphasis on the education and training of employees in OHS matters;
- workplaces with more than 10 employees should have a written OHS policy stating OHS objectives;
- there should be one unified inspectorate with inspectors being allowed to issue improvement and prohibition notices;
- workers and unions should be allowed to request the establishment of workers' safety committees and elect representatives;
- the system of reporting accidents should be streamlined;
- more obligation should be placed on employers and further statutory responsibility on manufacturers; and
- penalties for non-compliance should be increased.

The *British Health and Safety at Work, etc. Act 1974* introduced changes to the existing legislation, largely following the recommendations in Robens.

Following this, the Australian States and Territories began a slow process of reform. Several of the states established committees to review their existing legislation and recommend possible changes. The most comprehensive reports included those of the SA Select Committee (1972), the NSW Williams Committee (1982), the SA Steering Committee (1984) and the Niland Report (1989). First to reform their OHS legislation was SA in 1972, followed by Tasmania in 1977, Victoria in 1981, NSW in 1983, WA in 1984, NT in 1986, and Queensland in 1988.

Because each of the States and Territories incorporated many of Robens' recommendations, the remainder of this appendix presents features of each State, Territory and Commonwealth system which differ from the general Robens model. For a brief description and comparison of existing legislative arrangements, refer to Attachment C2.

C3 Occupational health and safety legislation in Australia

C3.1 New South Wales

In 1979, the NSW Government established a Committee of Inquiry into OHS in NSW headed by Commissioner T. G. Williams. In his report (1981), Commissioner Williams' concluded that existing NSW legislation lacked cohesion; was difficult to locate; was fragmented in subject matter and administration; and lacked comprehensiveness. His criticisms and recommendations were similar to the approach adopted in the Robens report.

The *Occupational Health and Safety Act 1983* imposes an absolute duty of care on employers (s.15), this is, however, subject to the defence (s.53) of what is considered reasonably practicable and whether the cause of the offence is considered to be beyond control. Employers and self-employed persons also owe a duty of care to persons other than employees in the workplace (s.16). Persons in control of the workplace owe a duty of care to non-employees using that workplace (s.17); and manufacturers and suppliers owe a duty of care referred to in ss.15–18, expressed as being absolute, s.19, which deals with the duty of care between employees at work, requires only that 'reasonable care' be demonstrated.

Under s.50 directors of corporations and other managers are liable for breaches committed by corporations. This is a standard provision in NSW legislation. It is a defence that the manager or director was not actively involved in the corporation's business, or if involved, that he or she has acted with due diligence.

Section 22 maintains rights in respect of civil actions but prevents the creation of a right of action for breach of the duty of care provisions in this Act.

The Act provides for the establishment of OHS committees in workplaces of more than 20 people where a majority of employees request it or at the direction of the WorkCover Authority. However, there is no provision for the appointment of health and safety representatives.

Legislative penalties in NSW are amongst the highest in the country. Maximum penalties are \$250 000 for corporations and \$25 000 for individuals. Prohibition and improvement notices, and on-the-spot fines can also be issued to employers and employees for a number of minor occupational health and safety offences as an alternative to prosecution.

C3.2 Victoria

The *Occupational Health and Safety Act 1985* was introduced on 1 October 1985. The Act went much further than previously, especially in terms of the powers of health and safety representatives. It introduced provisions for union selection of health and safety representatives and their powers to issue provisional improvement and prohibition notices. Safety representatives also have the power to order the cessation of work where there is an immediate threat of serious injury or death.

Employers' duties are required to be observed 'so far as practicable'. The Act sought to define the word 'practicable' (s.4) whereas the previous Act contained no such definition.

It is the only act which provides for some minimum as well as maximum penalties for offences, although for the most part the maximum fines are not as high as those in NSW. Generally, the maximum penalty for a body corporate is \$40 000 and \$10 000 for an individual, whereas in NSW the maximum penalty for a corporation is \$100 000. Some sections of the Act have separate penalties, for example, offences relating to inspections carry a fine of up to \$250 000 and up to \$10 000 and/or 5 years imprisonment for individuals. The Victorian government is at present considering minor reforms to OHS legislation and its administration.

C3.3 Queensland

The Queensland Green Paper was released in 1987 and recommended that the existing legislation be reformed in Robens style. Brooks (1991) argued that although the duties of employers appear to be limited in scope, the employers duty is not specified as being to take 'reasonable care' to ensure safety. This may imply an absolute duty to take care as in the NSW Act.

Following the Green Paper, the *Workplace Health and Safety Act 1989* was introduced, generally following approach recommendation by the Robens Report.

The Act imposes general duties of care on employers, self-employed persons, persons in control of workplaces, manufacturers of plant and substances for use at workplaces, and employees and other persons at the workplace.

The Act requires that health and safety officers, 'with suitable qualification', be elected by employers in workplaces with more than 30 employees, or where the Workplace Health and Safety Authority deems it necessary. It also provides for the election of health and safety representatives and OHS committees.

The penalty for the breach of duties of care is currently \$12 000 for a body corporate and \$3000 and/or six months imprisonment for an individual. However in cases of death and serious bodily injury, the penalty is \$120 000 for a body corporate and \$30 000 and/or six months imprisonment for individuals.

C3.4 South Australia

The *Occupational Health, Safety and Welfare Act 1986* (OHSW) largely followed recommendations from the SA Steering Committee Report (1972).

The Act places duties on: employers; occupiers of a workplace; designers and owners of buildings; manufacturers, importers and suppliers of plant; and employees and self employed persons.

A general duty of care is placed on employers to ensure that, so far as is reasonably practical, an employee is safe from injury and risk to health and safety while at work. Employers are also required to prepare and maintain a health and safety policy.

The Act provides for elected health and safety representatives and joint employee/management health and safety committees.

Elected health and safety representatives are entitled to paid leave to attend approved health and safety training courses. Elected representatives have a range of rights and functions covering inspection of the workplace, access to information, being consulted about proposed policies, practices and procedures, representing employees in discussions with management, investigating complaints made by employees, issuing default notices and — if there is an immediate threat to health and safety — to direct that work cease. Default notices and directions to stop work must be made after consultation with the employer.

Joint employee/management health and safety committees have five main functions. These are to: encourage cooperation between management and employees; help resolve health and safety issues; help formulate, review and distribute health and safety policies, practices and procedures; consult on any proposed changes to policy, practice and procedures; and help in the return to work of employees who have suffered a work related injury.

The Act is enforced by inspectors of occupational health and safety who are employed by the department of labour.

Offences against the Act are summary offences with penalties set out in various sections and regulations as divisional fines. Fines range from up to \$1000 for a division 7 offence to \$100 000 for a division 1 offence. Aggravated offences can incur imprisonment for a period of up to five years. Aggravated offences are those where it is proven that a person has knowingly and, with reckless indifference, seriously endangered the health and safety of another.

The SA Government is currently reviewing its occupational health and safety regulatory system and plans to involve the WorkCover Corporation in the administration of OHS regulation (including education of employers and employees, research, implementation of regulations, and policing and enforcement. The SA Occupational Health and Safety Commission is in the final stages of preparing a consolidated set of regulations under the OHSW Act. When these regulations are introduced they will result in the repeal of the six Acts, their associated regulations and 16 sets of regulations under the OHSW Act.

C3.5 Western Australia

WA implemented a two-stage development of its OHS legislation. Following a WA Public Discussion Document in 1983, the *Occupational Health, Safety and Welfare Act 1984* was introduced for the purpose of establishing the Occupational Health, Safety and Welfare Commission and to make further recommendations with regard to the form that OHS legislation should take.

The 1984 Act was amended in 1987 with provisions which imposed general duties and granted rights of participation to employees. The concept of a general duty of care is the principal upon which the Western Australian OHS legislation is based. As in most of the states (except NSW) employers are required to ensure the safety of their employees 'so far as practicable'. Manufacturers are required to ensure that the design and construction of plant is safe. In addition, manufacturers of dangerous substances must ensure that adequate toxicological data is provided. This is somewhat of a limited duty since they are only required to provide data with regard to the substances rather than also be required to test and examine them as in NSW, Victoria and SA. It includes provision for safety committees in workplaces of more than 20 people where the majority of the people in the workplace request that a committee be established. Not less than half the members of the committee must be workers elected by their peers and their functions are similar to OHS representatives.

The employee's duty under the Act is to take reasonable care for their own health and safety at work and to avoid harming the health and safety of other people through any act or omission at work. The Act also requires self employed people to take reasonable care for their own health and safety at work and, so far as practicable, to avoid harming the health and safety of other people.

Similar to most other Acts, the WA Act provides for OHS representatives and committees, inspectorates and also a separate section on the notification of accidents and dangerous occurrences.

The Act makes no reference to the issue of whether employees have a right to civil damages for breaches of statutory duty.

The Act provided for penalties of up to \$50 000 and \$250 per day for an employer or body corporate and \$5 000 and \$50 per day for an employee.

C3.6 Tasmania

The *Industrial Safety, Health, and Welfare Act 1977* is similar to the SA Act. The Act established the Industrial Safety, Health, and Welfare Board. Employers and occupiers are required to take 'reasonable precautions' to provide

a safe workplace and system of work even though their employees need not be employed for reward. For example, an employee may include persons who are present in educational or training establishments.

The Act makes no provision for manufacturers except to reproduce requirements set out in the *Factories, Shops and Officers Act 1965* which prohibit the sale of dangerous machinery. Provisions for safety representatives apply to workplaces with 10 or more workers but the Secretary may exempt the workplace from that requirement if it has a safety Committee with employee representatives.

C3.7 Northern Territory

The *Work Health Act 1986* provides for both workers' compensation and the prevention of industrial injury, through general duties of care. It is the only jurisdiction to administer OHS and workers' compensation through one Act and one authority.

Employers are required to ensure the safety of their employees 'so far as is practicable'. The Act also requires that occupiers ensure that the means of access and egress from the workplace are safe and without risks to health. It makes no provision for health and safety representatives.

Similar to the NSW Act, s.34(a) expressly negates any private right of action for breach of general duties.

Amendments to legislation in 1991 increased penalties to \$50 000 for employers and \$5000 for employees, who failed in their responsibilities to ensure safety in the workplace. It also disallowed the contracting out of responsibilities under the Act and extended the general duty provisions to manufacturers and importers.

C3.8 Australian Capital Territory

The ACT introduced the *Occupational Health and Safety Act 1989* imposing general duties on employers, contractors, self-employed persons, manufacturers and employees for the private sector.

The ACT requires the formation of designated work groups by all employers with 10 or more employees. These work groups may elect to have trained health and safety representatives.

The Act provides substantial powers for health and safety representatives, including conducting inspections, accompanying inspectors on their inspections,

issuing of provisional improvement notices and ordering a direct cessation of work in situations where there is an immediate risk of death or serious injury.

All serious accidents are required to be reported, and are investigated by Departmental inspectors.

The Act provides penalties for the breach of general duties of \$100 000 for a body corporate and \$20 000 for individuals.

The ACT Government (sub. 61, p.6) pointed out that there have been some difficulties with the co-existence of ACT and Commonwealth legislation. Although the two sets of legislation are basically consistent, they suggested difficulties arise because:

... individual private sector employees and employers may be subject to either or both pieces of legislation at different times when working on Commonwealth premises.

C3.9 Other legislation

A number of State Acts relating to OHS exist for specific industries which are usually characterised as being particularly dangerous, such as the mining, construction and oil industries. Other Acts deal with areas of general responsibility which usually apply to all industries, such requirements for the maintenance of clean air and water.

A list of the main relevant Acts in each State is contained in Attachment C1.

C3.10 Commonwealth legislation

The *Occupational Health and Safety (Commonwealth Employment) Act 1991* establishes OHS standards in the federal jurisdiction and provides for the selection of workplace health and safety representatives. Committees must be established in workplaces where there are more than 50 employees, or in cases where a health and safety representative or union official requests it (Ministerial Review Committee, 1990).

The *Safety Rehabilitation and Compensation Act 1988* created the federal compensation scheme known as Comcare, primarily aimed at covering Commonwealth employees. However, the Federal Government recently announced changes that would allow Comcare to offer workers' compensation to organisations in competition with present or past GBEs and their competitors.

Seafarers

There are a number of Marine Orders under the *Navigation Act 1912* which prescribe specific measures relating to health and safety on ships (eg cargo handling equipment standards, accommodation standards, machinery guards).

These requirements are similar in approach to the old style factory act legislation which preceded the development of modern 'Robens style' OHS arrangements by the States and Territories.

In December 1991, the Federal Government set up a tripartite working group to develop proposals for modern OHS arrangements for the maritime industry.

The report of the Working Group on Occupational Health and Safety in the Maritime Industry (1992) recommended that:

- legislation be introduced consistently with International Labour Organisation Conventions Nos. 155 (Occupational Safety and Health) and 134 (Prevention of Accidents) and modelled on the *Occupational Health and Safety (Commonwealth Employment) Act 1991*;
- the legislation should reflect the special nature of the shipping industry;
- subsidiary legislation be based on national standards and codes of practice where practicable;
- the legislation should provide the same coverage as Part II of the Navigation Act;
- there be consultation with the States and Territories over jurisdictional arrangements;
- legislation should cover offshore industry mobile units when in transit;
- industry-wide codes of practice should be developed by the offshore petroleum industry covering workplace arrangements on mobile units;
- the Australian Maritime Safety Authority should perform inspectorate functions;
- the Seafarers Safety, Rehabilitation and Compensation Authority administers the legislation;
- packages for general OHS training of maritime industry workers should be developed by the industry and an appropriate training course for OHS representatives be developed by the Seafarers Safety, Rehabilitation and Compensation Authority in consultation with the industry; and
- an appropriate training course for inspectors should be developed by the Australian Maritime Safety Authority in conjunction with industry.

The Occupational Health and Safety (Maritime Industry) Bill 1993, based on the recommendations of the working group, was introduced into Parliament in September 1993.

The new OHS arrangements are expected to take effect in mid-1994.

Attachment C1: Legislation

Commonwealth

Principal legislation

National Occupational Health and Safety Commission Act 1985
Occupational Health and Safety (Commonwealth Employment) Act 1991
The safety, Rehabilitation and Compensation Act 1988
The Seafarers Rehabilitation and Compensation Act 1992
The Administrative Decisions (Judicial Review) Act 1977
The Administrative Appeals Tribunal Act 1975
Coal Industry Act 1946
Commonwealth of Australia Constitution Act 1900
Commonwealth Places (Application of Laws) Act 1970
Environment Protection (Nuclear Codes) Act 1978
Federal Court of Australia Act 1976
Industrial Chemicals (Notification and Assessment) Act 1989
Industrial Relations Act 1988
Navigation Act 1912
Quarantine Act 1908

New South Wales

Principal legislation

Occupational Health and Safety Act 1983
Factories, Shops and Industries Act 1962
Construction Safety Act 1912
WorkCover Administration Act 1989

Other legislation

Clean Air Act 1961
Clean Waters Act 1970
Coal Mines Regulation Act 1982
Dangerous Goods Act 1975
Electricity Development Act 1945
Environmentally Hazardous Chemicals Act 1985
Environmental Offences and Penalties Act 1989
Food Act 1989
Industrial Relations Act 1991

Liquefied Petroleum Gas Act 1961
Local Government Act 1993
Mines Inspection Act 1901
Mines Rescue Act 1925
Mining Act 1992
Nurses Act 1991
Pesticides and Allied Chemicals Act 1978
Petroleum Act 1955
Petroleum (Submerged Lands) Act 1982
Poisons Act 1966
Public Health Act 1991
Radiation Control Act 1990
Rural Workers Accommodation Act 1969
Therapeutic Goods and Cosmetics Act 1972
Waste Disposal Act 1970

Victoria

Principal legislation

Occupational Health and Safety Act 1985
Labour and Industry Act 1958
Boilers and Pressure Vessels Act 1970
Lifts and Cranes Act 1967
Scaffolding Act 1971

Other legislation

Abattoir and Meat Inspection Act 1973
Aerial Spraying Control Act 1966
Agricultural Chemicals Act 1958
Building Control Act 1981
Coal Mines Act 1958
Dangerous Goods Act 1985
Drugs, Poisons and Controlled Substances Act 1981
Environment Protection Act 1970
Extractive Industries Act 1966
Fertilisers Act 1974
Health Act 1958
Liquefied Petroleum Gas Act 1968
Local Government Act 1958
Marine Act 1958

Mines Act 1958
Petroleum Act 1958
Petroleum (Submerged Lands) Act 1982
Pipelines Act 1967
Psychological Practices Act 1965
Shearers Accommodation Act 1976
State Electricity Commission Act 1958

Queensland

Principal legislation

Workplace Health and Safety Act 1989

Other legislation

Building Act 1975
Clean Air Act 1963
Coal Mining Act 1925
Electricity Act 1976
Explosives Act 1952
Gas Act 1965
Health Act 1937
Industrial Relations Act 1990
Local Government Act 1936
Mines Regulation Act 1964
Petroleum Act 1923
Petroleum (Submerged Lands) Act 1982
Psychologists Act 1977
Radioactive Substances Act 1958

South Australia

Principal legislation

Occupational Health, Safety and Welfare Act 1986
Boilers and Pressure Vessels Act 1968
Lifts and Cranes Act 1985

Other legislation

Agricultural Chemicals Act 1955
Building Act 1971
Clean Air Act 1984

Dangerous Substances Act 1979
Electrical Products Act 1988
Electrical Workers and Contractors Licensing Act 1965
Explosives Act 1936
Harbours Act 1936
Industrial Relations Act 1972
Local Government Act 1934
Marine Act 1936
Mines and Works Inspection Act 1920
Petroleum Act 1940
Petroleum (Submerged Lands) Act 1982
Psychological Practices Act 1973
Public and Environmental Health Act 1987
Radiation Protection and Control Act 1982

Western Australia

Principal legislation

Occupational Health, Safety and Welfare Act 1984
Mines Regulation Act 1946

Other legislation

Factories and Shops Act 1963
Builders' Registration Act 1939
Coal Miners' Welfare Act 1947
Coal Mines Regulation Act 1946
Electricity Act 1945
Environment Protection Act 1986
Explosives and Dangerous Goods Act 1961
Fire Brigades Act 1942
Health Act 1911
Industrial Relations Act 1979
Industrial Training Act 1975
Local Government Act 1960
Marine and Harbours Act 1981
Mine Workers' Relief Act 1932
Mining Act 1978
Painters Registration Act 1961
Petroleum Act 1967
Petroleum Pipelines Act 1969

Petroleum (Submerged Lands) Act 1982
Poisons Act 1964
Psychologists Registration Act 1976
Radiation Safety Act 1975
Shearers' Accommodation Act 1912
Timber Industry Regulation Act 1926

Tasmania

Principal legislation

Industrial Safety, Health, and Welfare Act 1977

Other legislation

Dangerous Goods Act 1976
Fire Service Act 1979
Hydro-Electric Commission Act 1944
Industrial Relations Act 1984
Local Government Act 1962
Mines Inspection Act 1968
Pesticides Act 1968
Petroleum (Submerged Lands) Act 1982
Poisons Act 1971
Psychologists Registration Act 1976
Public Health Act 1962
Radiation Control Act 1977

Northern Territory

Principal legislation

Work Health Act 1986

Other legislation

Building Act 1983
Dangerous Goods Act 1980
Electrical Workers and Contractors Act 1978
Fire Service Act 1983
Marine Act 1981
Mine Management Act 1990
Mining Act 1980
Radiation (Safety Control) Act 1978

Australian Capital Territory

Principal legislation

Occupational Health and Safety Act 1989

Machinery Act 1949

Other legislation

Building Act 1972

Dangerous Goods Act 1984

Electricity Act 1971

Fire Brigade Act 1957

Public Health Act 1928

Radiation Act 1983

Scaffolding and Lifts Act 1957

Attachment C2: Details of Occupational Health and Safety Legislation in Australia

	New South Wales	Victoria	Queensland	South Australia	Tasmania	Western Australia	Northern Territory	ACT	Commonwealth	Seafarers
Main Act		Occupational Health and Safety Act 1985	Workplace Health and Safety Act 1989	Occupational Health, Safety and Welfare 1986	Industrial Safety, Health and Welfare Act 1977	Occupational Health, Safety and Welfare Act 1984	Work Health Act 1986	Occupational Health and Safety Act 1989.	Occupational Health and Safety (Commonwealth Employment) Act 1991.	Occupational Health and Safety (Maritime Industry) Act 1993
Administration of Act	WorkCover Authority	Occupational Health and Safety Authority	Division of Workplace Health and Safety	Department of Labour enforces the Act. OH&S Commission recommends changes to the Act, regulations and codes of practice	The Department of State Development and Resources	Dept. of Occupational Health, Safety and Welfare	Work Health Authority	Chief Ministers' Department - ACT Occupational Health and Safety Office	Comcare & the Safety, Rehabilitation and Compensation Commission	Seafarers Safety, Rehabilitation and Compensation Authority
Persons to whom the duty is owed	all persons (including those who are not employees) at any workplace	employees including independent contractors and their employees	all persons (including those who are not employees) at any workplaces	employees	any person employed or engaged at that workplace or in that industry including any person who uses machinery in an educational or training establishment	employees and other persons (including those who are not employees) at any workplace	workers or any other persons working at the workplace	All persons (including those who are not employees) at any workplace	Employees	Employers, contractors or third parties
Persons on whom the duty is placed:	employers, manufacturers, suppliers, importers, designers, installers of plant and equipment, importers, employees, and the self-employed	employers, manufacturers, suppliers and installers of plant and equipment, importers, employees, and the self-employed	employers, employees, self-employed persons, persons in the control of workplaces, manufacturers of plant and substances for use in workplaces, employees and other persons at workplaces	employers, designers, manufacturers, importers and suppliers of plant and substances for use at work	employers, principal contractors, occupiers, owners of premises and employees	employers, employees, principal contractors and self employed persons, occupiers, manufacturers, suppliers, importers, designers of plant and substances for use in workplaces	employers , self employed and general principals of independent contractors, occupiers , manufacturers and workers	employers, employees, self-employed persons, manufacturers and installers	employers, employees, manufacturers, suppliers and installers	employers, employees, manufacturers, suppliers, installers, repairers and stevedores
Private Right of Action for Damages	threshold requirements on claims for damages for both economic and non-economic loss	s.28 - expressly negatives private action for breach of general duties	no limits	no limits	no limits	no reference	s.34 expressly negatives private right of action	no limits	Threshold limits covered by Workers' Compensation Act)	Threshold limits (covered by Seafarers Rehabilitation and Compensation Act)
Maximum Penalties				penalties are set out in divisions						
employers/ body corporate	\$250 000	\$250 000	\$120 000	Division 1 up to \$100 000 to Division 7 up to \$1 000	\$50 000	\$50 000	\$50 000	\$100 000	\$100 000 (GBE's only)	\$100 000
employees	\$25 000	\$50 000	\$3 000 and/or 6 months imprisonment	up to \$1 000	\$10 000	\$5 000	\$5 000	\$20 000	\$5000 (GBE's only)	\$5000
On the spot fines	yes	no	no	Possible under section 60a, but not currently used	no	no	yes	no	no	no
Provision for OHS committees	workplaces with more than 20 employees where a majority of employees requests it, or where the WorkCover Authority directs it	HSRs have the right to request committees	on direction of the Authority or on request of a HSR	on request of HSRs , a majority of employees or a prescribed number (5) of employees in workplaces with more than 20 workers	no provision	on request of HSRs if there are more than 10 employees	in workplaces with more than 20 employees where the majority of employees requests it	not required but there are guidelines for where they are established	workplaces with more than 50 employees, or where a HSR or union official requests it	Where a HSR or union requests it
Provision for health and safety representatives (HSRs)	no provision	at the request of unions	on request of employees	designated work group is entitled to a representative	workplaces with 10 or more employees	employee may request it	no provision	workplaces with 10 or more employees	may be selected for each designated work group	May be selected for each designated work group
Power of HSR to accompany inspectors	n.a. - employees or union officials may accompany inspector if requested	only during normal working hours	no	yes	Only when requested	only when requested	no provision	yes	yes	yes
Right of HSR to direct cessation of work	n.a.	yes	no	yes	n.a.	only inspectors	workers themselves may refuse dangerous work	where supervisors can not be contacted	yes	yes

D LEGAL AND MEDICAL COSTS

This appendix examines issues relating to legal and medical costs, and identifies 'best practice' in relation to cost-minimisation measures.

D1 Role of lawyers

Lawyers perform several roles in a workers' compensation scheme. They may be involved in conducting common law actions, they may participate in the dispute-resolution process, and they may act as information sources for injured workers attempting to negotiate the workers' compensation system.

D2 Common law

D2.1 History

Laws which permit one person to claim damages from another who has caused injury, date back to the twelfth or thirteenth century. In the traditional master/servant relationship, where an injured worker could show his injuries were caused through the fault of an employer, the loss could be shifted to the employer through the courts. However, during the nineteenth century, the courts devised a series of defences available to employers which severely restricted the availability of this form of redress.

These restrictions on common law access led to pressures for the introduction of a no-fault system. This resulted in the English *Workmen's Compensation Act 1897*. This Act provided the basis for subsequent Australian statutes.

The original no-fault workers' compensation legislation in Australia provided for employees in certain dangerous occupations to be eligible for financial assistance from their employers in the event of industrial accident. By 1914 every Australian State had introduced some form of workers' compensation legislation. Workers' compensation provisions have been progressively extended in all jurisdictions to cover virtually all employees who are injured in the course of employment, although the self employed and many rural workers are generally not covered by workers' compensation arrangements.

Despite the introduction of no-fault legislation, access to common law remained so that workers generally had a choice of either statutory or common law compensation. However, in recent years, the NT and SA have abolished access to common law, while Victoria, WA and the Commonwealth (Comcare) have introduced restrictions in the form of thresholds. In July 1989, NSW reintroduced limited access to the common law.

Where access to the common law is allowed, it generally attracts a large number of cases. Reasons cited for heavy use of the legal system include:

- the absence of cultural determination to resolve disputes privately;
- the desire to cast blame for misfortune;
- minimum cost risks for plaintiffs;
- oversupply of lawyers seeking clients; and
- the inadequacy of no-fault benefits.

D2.2 Third party common law actions

Common law actions are not restricted to actions by employees against negligent employers. The following situations may be distinguished.

Employee pursuing a common law action against a third party

No schemes restrict an employee from pursuing a common law action against a third party, for example making a claim under product liability law if they are injured by a faulty product.

If damages are awarded, the employer is entitled to be repaid any workers' compensation previously paid or the amount of damages, whichever is less. The employee also ceases to be entitled to any further workers' compensation benefits.

Provision is also made for an employer to institute proceedings on behalf of an employee against a third party. In this case the employee retains their right to workers' compensation benefits once the common law award is exhausted.

Dependents pursuing a common law action against the employer or fellow employee or a third party

Similar arrangements to those applying to injured workers apply to dependents, if dependents have access to statutory benefits.

D2.3 Criticisms of common law

Access to common law in the context of a statutory no-fault workers' compensation scheme has been severely criticised on many grounds.

Delays in settlement

Delay is inevitable in a common law system. An injury must stabilise before a single lump sum assessment of damages can be made. There are also procedural and tactical delays during the hearing of a common law claim. This has a detrimental effect on the financial position of the claimant, may effect incentives for rehabilitation and return to work, and adds to the complexity of the compensation process.

The ACT Branch of the Construction, Forestry, Mining and Energy Union (CFMEU) (Sub 27, p.91) cited a Mercer Campbell Cook and Knight report *Policy objectives for workers compensation in the ACT*, finding an average delay of 5.2 years in settling common law claims in the Supreme Court, with one third of cases delayed over 7 years.

Delay consisted of the following components:

- delay from injury to notification of claim;
- delay from notification of claim to definition of issues;
- delay from definition of issues to initial hearing; and
- delay from initial hearing to settlement.

Often further delay will be governed by the need to await stabilisation of the claimant's medical condition.

The Commission asked the workers' compensation authorities for information on the length of claims. For those schemes that answered this question, Table D1 shows the tendency of common law claims to be delayed longer than non-common law claims. Part of this delay may be explained if claimants with more serious injuries choose common law rather than statutory benefits. This is also likely where thresholds restrict access to common law to those with more serious injuries. However, there do appear to be significant delays inherent in the common law system.

For example, in Victoria 55 per cent of non-common law claims are closed within 5 days. In contrast, it takes 365 days for 48 per cent of common law claims to be closed. Over 50 per cent of common law claims take over one year to close, while only 5.6 per cent of non-common law claims last over a year.

Table D1 Proportion (percentage) of common law and non-common law claims closed within certain time periods. Claims received between 1 July 1986 and 30 June 1992

<i>Length of claim</i>	<i>Victoria</i>		<i>New South Wales</i>		<i>Queensland</i>		<i>South Australia</i>	
	<i>Common law claims</i>	<i>Non-common law claims</i>	<i>Common law claims</i>	<i>Non-common law claims</i>	<i>Common law claims</i>	<i>Non-common law claims</i>	<i>Common law claims</i>	<i>Non-common law claims</i>
0-5 days	11.9	55.6	0.0	0.0	0.0	66.0	4.5	77.6
6-30 days	6.3	19.6	7.4	11.0	0.0	29.6	4.8	12.3
31-90 days	12.9	12.3	0.0	24.9	0.0	3.2	9.8	5.0
91-180 days	7.7	3.9	8.8	26.5	3.3	0.6	7.9	1.5
181-365 days	9.5	3.0	20.6	21.5	8.0	0.5	8.5	1.1
1-2 years	17.8	2.9	36.8	10.3	22.2	0.2	13.1	1.1
2-3 years	14.2	1.4	19.1	3.5	51.2	0.0	9.3	0.5
3-4 years	10.0	0.7	5.9	1.6	10.4	0.0	12.7	0.4
over 4 years	9.6	0.6	1.5	0.8	4.9	0.0	29.3	0.5

Source: Industry Commission 1993, Survey A

Incompatibility with rehabilitation and return to work

The adversarial common law relationship can threaten the employment relationship. It may be unreasonable to expect employer cooperation in the rehabilitation and return to work of an employee who is bringing a case against the employer. The Australian Chamber of Manufacturers (ACM) (Sub 29, Attachment 1, p.3) cited the case of "Andrea" who instituted a common law claim for workers' compensation. Although she was an employee of "long service and excellent reputation" her employer "read the accusations of negligence contained in the writ and determined never to allow her back into the workplace".

In addition to the adversarial nature of common law claims, the long delay in settling common law claims has led to arguments that common law is not compatible with efficient rehabilitation.

In this context it is helpful to distinguish between medical rehabilitation, which should begin immediately after an injury occurs, and occupational rehabilitation, which may not commence until the injury has stabilised, although it too should be commenced as soon as possible for best results.

Medical rehabilitation may be delayed by workers attempting to maximise their disability for the purposes of a common law claim. Similar incentives may exist

for workers to avoid occupational rehabilitation, as this may reduce their potential common law damages.

On the other hand, the NSW Bar Association and NSW Law Society (Sub 78, p.41) stated that:

Various arguments are advanced by several rehabilitationists to the effect that the provision of lump sum settlements and common law verdicts is antipathetic to proper rehabilitation. Reference to the material generally quoted in this area reveals that in fact all the evidence claimed to support these arguments is in fact only anecdotal.

There has been much academic controversy concerning this subject matter over the years and suffice it to say, the legal profession agrees with the proposition stated by the dissenting members of the committee of enquiry into the Victorian Workers' Compensation System 1983–84:

"that the loss to both parties of their expressly desired right to a lump sum is too high a price to pay simply for the espoused cause that the loss will be conducive to rehabilitation."

Rehabilitation and common law action may operate on disjointed time frames. While medical rehabilitation in particular is usually most successful when initiated in the first few weeks of a claim, common law action is likely to take much longer.

WorkCover NSW stated (Sub 92, p.1) that:

NSW experience shows that common law cases are not commenced until about 18 months after the accident. This allows time for the injury to stabilise. A statement of claims may be issued by the claimant's solicitor at that time, and, if the insurance company issues a defence to the action, investigations will commence. The case usually takes two to three years to get into the courts but there may be court mentions before this time.

The ACT Branch of the CFMEU (Sub 27, p.92) suggested 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. This would be consistent with the common law principle which requires the plaintiff to mitigate (minimise) damage.

Occupational health and safety incentives

It has been argued that the existence of a common law claim may discourage an employer from improving safety at the workplace. Employers may fear that instituting new safety provisions may be used as evidence that the workplace was previously unsafe. Amcor (Sub 46, p.6) argued that:

...common law actions are a disincentive, as safety improvements are frequently used by workers to establish that an injury that arose prior to the improvement must have

been caused by the employer's negligence. In this there is a clear disincentive for employers to make improvements...

On the other hand, others have argued that common law actions can provide an incentive for employers to maintain OHS standards in the future.

However the strength of this incentive is muted by the indirect and delayed link between a common law action and its reflection in future workers' compensation premiums. Common law actions are comparatively rare for small employers, and are usually given only partial weight in determining future premiums because of the difficulties of differentiating between good and bad risks on the basis of rare events. In addition, the common law claim may not be finalised for a number of years, effectively divorcing any ensuing incentive from the original event.

Common law costs

The method of settling compensation claims is a profound influence on cost. Wood and Morrison (Sub 14, p.1) stated that:

It has been found that after taking into account claim duration, the size of weekly compensation benefits and other factors, a claim that becomes the subject of a common law settlement can be expected to increase costs by a multiple of four.

The existence of common law introduces two key elements of cost:

- legal costs associated with bringing a common law claim; and
- the size of common law awards.

Common law legal costs

Each common law legal case theoretically involves an individually assessed damages award. Significant legal and medical costs are associated with determining the appropriate amount of damages.

Tables D2 to D4 illustrate the cost of common law claims in Victoria, Tasmania and Queensland. Common law costs in Victoria and Tasmania have accounted for up to 69 per cent of settlements. That is, for every dollar in common law settlements received by an injured worker, 69 cents is spent on legal costs. Queensland appears to be a little more successful in controlling legal costs, but common law legal fees still amount to well over 30 per cent of common law settlements.

Unfortunately, separate figures distinguishing common law legal costs and other settlement costs were not available for the other schemes. For example, WorkCover NSW reported only a small number of common law claims which

had been finalised, most of which had been negotiated settlements which were made inclusive of costs.

Inquiry participants cited a figure of 10.2 percent for legal costs as a proportion of all claims payments for WorkCover NSW. This figure is not comparable with the figures for Victoria, Tasmania and Queensland, which express common law costs as a proportion of common law settlements, not of total claim payments.

Table D2 Common law costs, Victoria*

<i>Year</i>	<i>Common law settlements (\$m)</i>	<i>Common law legal costs (\$m)</i>	<i>Costs as % settlements</i>
1991-92	110.591	54.190	49.0
1990-91	55.918	38.887	69.5
1989-90	26.674	9.881	37.0
1988-89	10.016	1.665	16.6
1987-88	3.493	0.780	22.3

* During these periods Victoria had no restrictions on common law claims.

Source: Industry Commission 1993, Survey A

Table D3 Common law costs, Tasmania*

<i>Year</i>	<i>Common law settlements (\$m)</i>	<i>Common law legal costs (\$m)^a</i>	<i>Costs as % settlements</i>
1991-92	4.768	2.451	51.4
1990-91	2.426	1.674	69.0

* During these periods Tasmania had no restrictions on common law claims.

a Includes common law legal costs, investigation and fraud and dispute resolution legal costs.

Source: Industry Commission 1993, Survey A

Table D4 Common law costs, Queensland*

<i>Year</i>	<i>Common law settlements</i>	<i>Common law legal costs^a</i>	<i>Costs as % settlements</i>
1991-92	65.657	23.793	36.3
1990-91	43.320	19.484	45.0

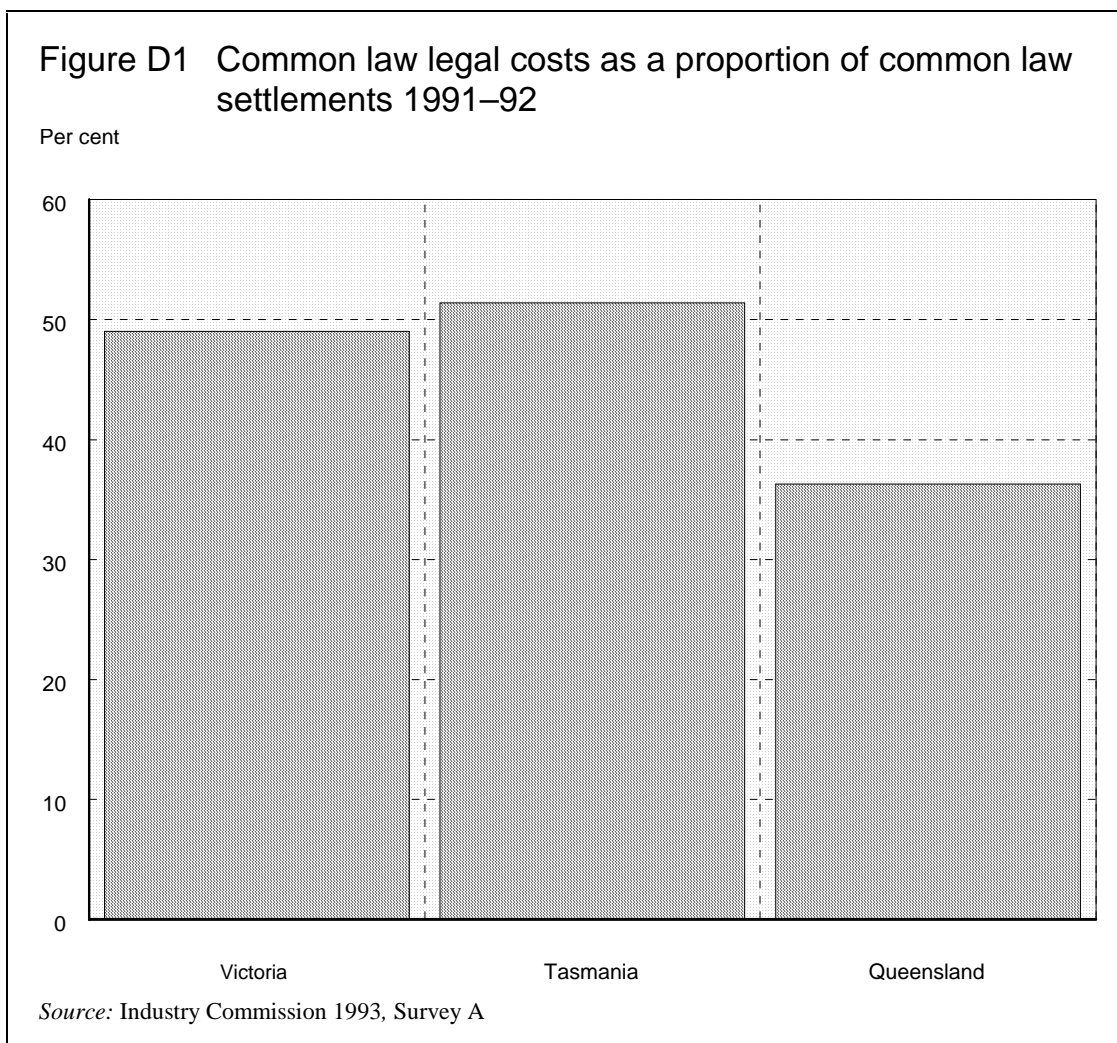
* During these periods, Queensland had no restrictions on common law claims.

a Includes common law legal costs, and investigation and fraud costs.

Source: Industry Commission 1993, Survey A

Figure D1 shows common law legal costs as a proportion of common law settlements in 1991-92. In 1991-92, in Victoria 49 cents was spent on legal costs for every dollar of common law compensation. In Tasmania, the ratio was

51 cents in costs for every dollar in compensation, and in Queensland 36 cents for every dollar.



The ACM (Sub 29, p.5) noted that:

In the 1991-92 financial year, the average common law settlement in Victoria was \$22 000. The average legal cost of obtaining that sum was \$10 000. It was not uncommon for the workers' solicitor to receive more in payment than the worker eventually received.

The Insurance Council of Australia (ICA) (Sub 65, p.16) estimated that in the previous Victorian WorkCare system, over 50 per cent of claim payments for common law claims went to solicitors in legal fees.

This contrasts with claims by the Queensland Law Society (Sub 50, p.9) that:

More than 60 % of personal injury claims arising out of motor vehicle accidents in Queensland are settled by negotiation between the solicitor for the claimant and the

insurer without the need to issue process. As a result of the high ratio of settlement of claims without issuing proceedings or without the necessity of trial, professional costs have been maintained in the vicinity of 10 per cent of the total cost of claims. Constant review of rules of court and practice directions for personal injuries cases has also assisted in achieving this result in respect of claims arising out of motor vehicle accidents. It is anticipated that should the Board maintain and expand its pro-active settlement program in respect of common law claims arising from industrial accidents that similar economies of cost will be achieved.

Judge O’Meally, in the Compensation Court of NSW, described a case as testimony to the “debt of gratitude” which the legal profession owes to the insurance industry. He said that “Irrespective of the outcome, the cost of prosecuting and defending the claim will exceed its value.”¹

Estimates of legal costs may in fact underestimate the legal costs which the common law system generates. The cost of legal advice to workers which the insurer is not ordered to pay, and the costs of the legal system itself are not counted in scheme estimates of legal costs. In addition, the legal costs involved in common law settlements out of court may be subsumed in a lump sum payment and not be counted separately.

Common law actions also involve unquantified indirect costs such as:

- distraction of management;
- psychological effects on plaintiffs and defendants; and
- associated medical costs.

Size of awards

In addition to common law legal costs, common law damages themselves contribute to the overall costs of a workers’ compensation system.

For example, common law systems may provide additional compensation to cover full pecuniary loss and/or non pecuniary loss, beyond that prescribed by the statutory benefits package.

In addition, the level of court assessed damages tends to rise more quickly than statutory benefits. This may be characterised as either an advantage, in that injured workers receive an appropriate current valuation of damages, or as a disadvantage, with courts awarding excessive damages which the scheme cannot afford to pay. In both cases, access to common law places pressure on the level of statutory benefits to keep pace with common law awards.

¹ Compensation Court of NSW, No. 30892-91

For example, the Institute of Actuaries of Australia (Sub 6, p.7) argued that the reasons for escalation in claims costs in the late 1970s and early 1980s were:

... largely to do with judgements setting precedents with increasingly large awards, increasing levels of general damages awards in smaller common law claims, and the flow-on effects of these trends to other categories of liability payments.

Similarly, the Insurance Council of Australia (ICA) (Sub 65, p.15) argued that:

A key issue with common law is that control over the size of awards is placed with the courts outside the scheme. This can lead to substantial blow outs in the size of awards — such as was experienced in New South Wales and Victoria in the early part of the 1980's - without regard to the cost implications for the system as a whole. For example, in NSW between 1979–80 and 1984–85 common law payment and associated legal costs increased 177 per cent (24 per cent per annum). As awards increase so does the incentive for claimants to reach a common law solution. Consequently it is important to introduce restrictions if costs are to be contained.

Lump sums

Common law actions are also criticised for awarding damages in the form of lump sums.

The assessment of lump sum amounts is subject to several areas of uncertainty, including:

- claimants' expected earnings if the accident had not occurred;
- changes in claimants' capacity for work in the future;
- future rates of inflation;
- future interest rates; and
- future tax rates.

Neaves and Howell (1992) examined the adequacy of common law damages awards received by injured road accident victims in South Australia. They examined the extent to which people were under or over compensated when their damages were measured against the restitutionary objectives of the common law.

The study showed (p.85) that:

- 16.3 per cent of those surveyed were living in families which were below the poverty line (compared with 12.3 per cent in the general population);
- 11.6 per cent were below the poverty line after housing costs were taken into account (compared with 10.6 per cent in the general population);
- 18.5 per cent were reliant on social security for reasons related to the accident;

- 21.8 per cent were rated by interviewers as financially insecure because of the accident; and
- 52.6 per cent said their compensation was insufficient to cover their accident related losses.

At the time of settlement, 60.4 per cent of interviewees were satisfied with the amount of compensation they received. By the time of interview (8 to 9 years after settlement) only 24.0 per cent were satisfied (p.51).

The pre-accident incomes of these accident victims were significantly higher than for a population of comparable age and sex. The post-accident income distribution in the interview group was no higher than the expected income distribution for a population of comparable age and sex.

This decline in the income position of compensated road accident victims relative to uninjured people in the general population suggests that they may not have received damages sufficient to cover their economic loss.

The study raised considerable doubts as to the suitability of lump sums, and concluded that:

In the long run, under-compensation and over-compensation caused by inflationary pressures and wrong predictions can only be prevented by a statutory scheme providing indexed periodic payments for economic loss (p.87).

Under-compensation also occurs in cases resolved by verdict, rather than pre-verdict settlement. Since court verdicts are based on examination of the effect of the accident on the particular individual, it would be expected that under-compensation would be less common in this group than among those whose claims are settled. In a discussion of 17 cases resolved by verdict, the NSW Law Reform Commission found that in 16 of the 17, predictions about the future circumstances of the accident victim proved inaccurate and in 14 of these cases this inaccuracy disadvantaged the injured person.

The study found that severely incapacitated workers were particularly poorly served. There was a close relationship between severity of handicap, poverty, and insecurity, throwing doubt on the extent to which the common law returns severely injured people to their pre-accident position.

The common law may also be prone to over-compensation. Neaves and Howell (p.82) found a number of people who received relatively generous awards, when considered in the light of their present situation. This problem cannot be addressed simply by limiting the overall size of awards, since this would have the harshest impact on severely injured people. Only a system of periodic payments can prevent the under or over compensation caused by incorrect predictions.

Dissipation of lump-sums

A further criticism of common law damages is the scope for dissipation of the lump sum, potentially leading to 'double dipping' by the plaintiff on the social security system.

The Neaves and Howell study (p.57) asked interviewees about how they used their lump sum in the year after their claim was resolved.

Although it was not possible to determine the number of people who mismanaged their lump sum, ... there were undoubtedly some people ... who had dissipated their compensation, either through mismanagement or bad luck.

Many people found it daunting to have to manage their money to cover future losses and costs. Some accident victims told us they had been pressured by family or friends to lend them money which had not been repaid. Several people had invested in a business which failed. A few young people commented that they were "too immature" to handle their lump sum and regretted having spent it unwisely. When people who felt their compensation was inadequate to cover their financial loss were asked to comment on the reasons for this inadequacy, 21.8 per cent referred to mistakes made in investing their lump sum .

It is sometimes argued that the problems which injured people experience in investing their compensation could be overcome by providing them with financial advice. However, in the Neaves and Howell study, 27.5 per cent of those who followed professional advice in the management of their compensation were financially insecure, compared with 20.6 per cent of those who did not use professional or legal guidance.

Periodic payments

A possible modification of the common law system to overcome the dissipation of lump sums would be to give courts the power to make orders for periodic payments.

Periodic payments are available through court awards in SA for all common law damages, in NSW for future economic loss for motor vehicle accidents and injuries at work, and in WA for motor vehicle accidents. In general however, such awards have not been sought.

However, the NSW Law Reform Commission (1982, p.69) noted that the power to award periodic payments was infrequently exercised, and postulated that litigants and insurers prefer the finality of a lump sum payment. There may also be tax advantages associated with lump sums.

A majority of the UK Pearson Royal Commission on Civil Liability and Compensation for Personal Injuries (1978), recommended a stronger approach whereby courts would be required to make an order for periodic payments

unless satisfied that a lump sum would be more appropriate in the circumstances.

Relationship with medical costs

Common law legal action can also have a significant effect on the size of medical costs.

The legal process may require the use of medical services as evidence of the nature of injury. The plaintiff lawyer's incentive is to increase medical costs to demonstrate the nature of the injury, for example requiring extensive diagnostic tests. The medical service provider is placed in the position of not only treating the injury, but also providing evidence of the extent of injury that is consistent with legal rather than medical requirements.

Inconsistency with a no-fault scheme

It is also argued that the existence of common law rights is inconsistent with the adoption of a no-fault compensation scheme. A large majority of injured workers are unable to establish fault liability. For example, in Victoria in 1991-92, only 8 per cent of claims were for common law damages (Industry Commission Survey A)². Should a small proportion of workers obtain additional compensation because they are in the fortuitous position of being able to prove fault? This shortfall was one of the driving forces behind the adoption of no-fault schemes of workers' compensation.

However, the Queensland Law Society (Sub 50, p.5) argued that traditional common law remedies can co-exist with an arrangement to pay statutory benefits to all workers however injured:

Successful common law claims restore injured workers to their pre-accident condition, while workers' compensation benefits provided a basic safety net.

D2.4 Arguments in favour of common law

Workers' rights

It is argued that access to common law when injured by another person's negligence is a basic legal right of all persons. The Queensland Law Society (Sub 50) argued that:

² This figure may not indicate the true proportion of claimants who may have been able to prove fault. The existence of statutory benefits may have dissuaded some claimants from undertaking action at common law. This figure has also been influenced by the unusually large number of common law claims experienced by WorkCare when limits on common law action were mooted.

To remove common law remedies is to negate the basic duty of care each of us owes to others. (p.5)

Common law rights should not be abrogated merely because the worker has crossed the threshold into the workplace, neither should there be arbitrary limits placed on damages when breach of duty occurs within the workplace. (p.8)

The courts are also presented as the ultimate guardian of the claimant against unjust or capricious administrative action. The worker may have their claim heard in open court by tenured judges who are distanced from the management concerns of the government and its agencies. However, it does not follow from this argument that the claimant should be given the right to sue their employer at common law. Rather, the claimant should have access to an efficient and fair dispute resolution system which recognises the principles of natural and administrative justice.

Justice

It is argued that the common law accords with the community's sense of justice. The common law provides an opportunity for public scrutiny of workplace accidents and injury in open court. It is further argued that common law achieves 'just' outcomes.

Slater and Gordon (Sub 81, p.32) stated that:

In many cases, especially those involving fatal or crippling injuries and diseases, there is a sense of public chastisement of wrong-doing associated with a common law verdict. Similarly, the victims of injury experience a sense of restitution from the process. These are not insignificant or unimportant considerations, but a very real and important part of the satisfaction of an individual or community expectation, one which is rarely met by penalties imposed under occupational health and safety provisions.

However, nearly all common law actions are settled without any ruling by the court. The worse the perceived negligence of the employer, the more likely the case will be settled out of court. Generally only the doubtful cases will go to trial on liability, and result in adverse publicity for the employer.

An employee need not sue their employer to provide for public scrutiny. This is more properly the role of OHS authorities, who have powers to bring actions against employers for breaches of OHS standards.

Damages

Advocates of the common law negligence action suggest it protects the severely injured by ensuring individual assessment of their losses rather than payment by reference to statutory formulae. The common law aim is to restore the worker, as far as money can, to the position they were in before the accident. In an

unrestricted system it meets the full loss of earning capacity, and non-pecuniary loss is also explicitly compensated.

It is argued that the common law provides a more accurate, individualised assessment of damages than a statutory scheme. Statutory benefits are necessarily standardised, through the use of impairment schedules and tables of injuries. This results in inequities which flow from standardisation, particularly for the seriously injured.

The NSW Bar Association, and Law Society of NSW (Sub 78, p.2) argued that:

It is paramount that the law determine an injured worker's loss of earning capacity not by reference solely to barren arithmetical formulae but by having regard (in a broad and practical context) to the likely impact of the injuries and disabilities suffered for the remainder of his/her working life so as to reflect the true loss sustained by each individual.

Critics of a statutory compensation system also argue that compensation based on pre-injury earnings tends to particularly disadvantage apprentices and others at the beginnings of their working life, and women working temporarily or part time. Arguably these people are under-compensated for losses of future earnings they would have enjoyed but for their accident.

Neaves and Howell (1992) examined common law damages to determine whether the amounts allowed for non-economic losses did reflect individual plaintiff's situations.

It would be expected that individual assessment of the non-economic loss would result in awards varying with age, sex and degree of disfigurement. ...In fact, the Table suggests the adoption of a tariff, with almost all injured people receiving very similar amounts. ... Comparison of the amounts received by these ... plaintiffs suggests that individual assessment of loss may have little effect on the size of non-economic loss payments (p 83).

That is, they found that awards were standardised, rather than assessed individually.

Finality

It is also argued that the award of a common law lump sum provides finality for both the injured worker and the workers' compensation insurer. The worker receives a final payment with which they can do as they like, free of the continued scrutiny of their eligibility for compensation and the oversight of their use of the funds. The insurer can close the file on a particular case, saving administrative costs. The insurer has also made concrete an expense which would otherwise have run on indefinitely into the future.

The NSW Bar Association and Law Society of NSW (Sub 78, p.14) argued that lump sums act as a positive inducement for a worker to come to terms with the disability and to find a suitable place within the workforce and the community. They also argued that capital can be used to greater effect than relatively small weekly payments.

However, as argued in the section on lump sums, lump sum awards often prove inadequate, particularly for the seriously injured. The difficulties of predicting future earning capacity, medical expenses, interest rates and inflation rates mean that claimants are often over or under-compensated. In addition, lump sums are often dissipated, leaving claimants reliant on social security.

Benefit levels

The availability of common law may act as an incentive to maintain the adequacy of statutory benefits. If statutory benefits are inadequate, recourse to common law will become more attractive.

On the other hand, it may be argued that different levels of common law and no-fault benefits are inequitable. If no-fault benefits are inadequate, should the few who are able to prove fault be entitled to some improvement in the amount of compensation which they receive?

D2.5 Options for reform

Cost minimisation measures

Various strategies have been adopted to minimise the costs of common law claims. For example, there has been a deliberate policy on the part of successive NSW governments to force claims for damages (in all common law actions, not just workers' compensation) downstream from the Supreme Court to the District Court, and to the Workers' Compensation Court, and down from those courts to administrative settlements.

This may be achieved by requiring all claims to pass through an administrative process, possibly involving conciliation or arbitration, before they may proceed to common law. In addition, the jurisdiction of lower courts or tribunals may be expanded by increasing the amount of damages they may award, thereby increasing the proportion of claims they may hear.

The Queensland Workers' Compensation Board was reported in the Workers Compensation Report (Issue No 206, June 17 1993, p.1) stating that Queensland's tighter rein on common law costs was bearing fruit. Procedural changes included limits on the use of barristers, using legal firms on the basis of price and performance, and introducing new mediation processes.

Kahn and Clahr (Sub 207, p.1) argued that the present interlocutory steps and complex court procedures make common law expensive. They suggested the creation of a special Accident Tribunal with simplified procedures.

Abolition of common law rights

The simplest way to reduce common law costs is to remove all access to common law for workplace injury and disease claims.

It may be noted that in New Zealand, after nearly two decades of the total abolition of the right to sue for personal injury arising out of not only work accidents, but all accidents, there appears to be little call for the reinstatement of such rights.

Partial abolition of common law rights

A less extreme approach would be to restrict access to common law. Access could be limited in a number of ways:

- access could be limited to non-pecuniary loss only;
- access could be limited to 'serious' claims only;
- claimants could be required to elect between statutory benefits and common law before commencing a claim; or
- common law damages could be capped.

The common law generally provides for a single sum to be awarded as compensation for pecuniary loss and non-pecuniary loss (such as pain and suffering and loss of enjoyment of life) resulting from the plaintiff's injuries.

The limitation of common law claims to non-pecuniary loss removes the difficulties inherent in calculating future loss of earnings and future medical expenses. It also avoids the problems associated with delivering compensation for future expenses and loss of future income via a lump sum payment.

The UK Pearson Royal Commission on Civil Liability and Compensation for Personal Injuries (1978) recommended the continued limitation of common law to non-pecuniary loss in the UK, but considered that too much was paid out to plaintiffs for minor or transient non-pecuniary losses.

Similarly, Neaves and Howell (1992) found that:

It is questionable whether compulsory third party funds should be directed towards damages for non-economic loss for people suffering minor injuries. There is a strong case for raising the existing statutory threshold on non-economic loss to exclude a large

number of cases. An alternative approach would be to provide compensation for non-economic loss only in cases of permanent impairment.

The NSW Bar Association and Law Society of NSW (Sub 78, p.22) proposed that:

... further consideration should be given to increasing the access of those hurt through fault to sue, but ensuring that only those who are seriously injured have the right and those with trifling injuries should be excluded ... there should be caps and thresholds provided same are carefully and frequently monitored.

A study by Trowbridge Consulting found that a disability threshold of 25 per cent would eliminate 70 to 80 per cent of WA workers' compensation common law claims. Most of these are settled for less than \$50 000, and their abolition would cut common law costs by approximately \$20 to \$30 million per year. Weekly compensation payments were estimated to increase by around 10 per cent, costing an extra \$5 million a year, leading to net annual savings of \$15 to \$25 million.

Another method of discouraging common law claims is to require workers to make a pre-trial choice between common law or scheme benefits, as occurs in NSW. If their common law claim is unsuccessful, the worker cannot then claim statutory benefits.

However, Slater and Gordon (Sub 81, p.36) argued that elections between common law and compensation under a no-fault scheme are unsatisfactory and actually have the effect of promoting common law proceedings. This approach also has implications for cost shifting onto social security and Medicare, where an injured worker's common law claim is unsuccessful.

Schemes could also place a cap on possible damages, limiting awards for specific injuries to particular amounts. A similar approach is to place restrictions on the methods by which courts assess damages, or to designate a higher discount rate to be applied in the calculation of workers' compensation damages.

D3 Dispute resolution

Dispute resolution is critical to the efficient and equitable operation of any workers' compensation scheme. Many of the tensions inherent in a workers' compensation scheme surface in disputes. Setting the rules to govern dispute resolution is an essential part of the framework of any workers' compensation scheme.

Disputes can arise at many stages, for example over:

- the acceptance or rejection of a claim (eg the nature of injury, or its work relatedness);
- compensation payments (eg weekly benefits, or reasonableness of medical and other costs);
- degree of disability (eg in relation to lump sum payments and continuing payments for totally and permanently disabled);
- reduction of benefits (eg notional earnings tests, or reaching statutory limits where the scheme has discretion to continue benefits); and
- termination of benefits (eg refusal of job offer or rehabilitation).

All jurisdictions provide for appeal or review, often at more than one level. Frequently after internal administrative processes, there is an appeal to a specialised internal tribunal, followed by a later appeal to a higher court such as the Full Court of the Supreme Court.

Expeditious dispute resolution is crucial to the quality of service in any scheme. Inefficient processes may result in delays which are not only unfair, but are also an important driver of cost and lead to poor relations between employers and employees.

The absence of a fair and efficient method of resolving disputes may also contribute to cost shifting between workers' compensation schemes and other government programs and individuals. The dispute resolution process should not be a vehicle for the erosion of benefit levels or denial of access to entitlements.

Imposing uniform dispute resolution processes as initially proposed in the Draft Report would reduce the scope for non-uniform application of benefits. However, there are several compelling arguments in favour of jurisdictions retaining control of their own dispute resolution processes.

A jurisdiction in control of its own dispute resolution system has an incentive to develop the most appropriate process for its particular circumstances. Such a system is also likely to be more responsive to change than a single national structure. Different approaches to dispute resolution provide an area where schemes can pursue competitive advantage, creating a breeding ground for innovation and the development of best practice. It also avoids the possibility of the dispute resolution system being captured at a national level by particular interest groups.

In addition, the mere existence of uniform measures would not necessarily mean that those measures would be applied uniformly across jurisdictions. Some form of monitoring or oversight would be necessary to regulate the application of the uniform procedure. If monitoring or oversight is to be adopted in any

case, it is preferable that schemes compete to provide the most efficient dispute resolution system, with oversight to ensure whatever system is adopted is fair and fairly applied.

Performance indicators such as the proportion of claims disputed by an insurer, the proportion of disputes upheld, and the average duration of disputes may be used to identify unusual trends in dispute resolution processes.

A workers' compensation Ombudsman could also play a role in ensuring that the dispute resolution process is fair, by responding to complaints from dissatisfied claimants, employers and insurers.

D3.1 Elements of best practice

Although dispute resolution systems need not be uniform across schemes, there are certain elements which are essential if a scheme is to be regarded as fair, and other elements which contribute to best practice.

Boden (1988) identified the following principles as 'best practice' in dispute resolution:

- 'Friction' should be deterred by minimising lawyer involvement and disputation;
- information should be exchanged as a first step;
- duelling experts should be eliminated;
- the evidence of the treating practitioner should be given 'best evidence' status;
- the quality of primary decision making should be improved;
- extreme medical positions and the range of probabilities in medical decision making should be reduced; and
- ambit claims should be discouraged.

WorkCover Victoria commissioned a report on *Best Practice in Dispute Resolution*, from Transformation Management Services (TMS) in 1993. The study (pp.22–3) identified the following elements of a best practice dispute resolution model.

Primary decision making should be improved, with appropriate incentives and disincentives rewarding a “getting it right first time” approach, for example, disputation penalties.

There should be a meeting between the claims officer, worker, employer and rehabilitation team before a decision is made by the claims agent to alter benefits.

The regulator should monitor and enforce the entitlement to benefits of all those with an entitlement. They should take responsibility for informing workers and employers of entitlements, by sponsoring worker and employer advisers.

Conciliation officers, mediators, referral officers or evaluators should exchange all relevant information at the earliest opportunity. Review should be limited to evidence made available to the primary decision maker.

Administrative review and/or conciliation should be mandatory, with mediation available at any stage of the dispute. Conciliation and mediation processes should be confidential, with complete flexibility in resolution techniques, and the power to vary primary decisions if necessary.

The treating practitioner's opinion should be relied upon in determining entitlements, and final offer arbitration should be introduced in disputes involving subjective medical assessment.

Guidelines should be developed for both the process of medical examination, and the framework for reporting, as well as clear standardised evaluation guidelines for determining incapacity. Medical arbitrators should be available for more complex disputes.

Lawyer involvement should be limited to cases dealt with by courts or tribunals. Most cases should be kept out of court. Appeals from conciliation should be at the cost of the appellant unless the appeal is upheld.

D3.2 Alternative dispute resolution (ADR)

In ADR a neutral third party seeks to bring the parties to agreement, using a variety of techniques and strategies. The one dispute resolution body may apply the whole range of techniques at various stages of a dispute, keeping 'ownership' of the dispute within the one body.

The various ADR stages include: mediation, where the parties determine the outcome of a dispute, aided by a neutral third party; conciliation, where the third party proposes a range of solutions to the dispute and the parties agree to an outcome; and arbitration, where the parties agree to accept the decision of a third party without knowing the content beforehand. If agreement still cannot be reached, the parties may proceed to formal court adjudication.

Schemes which use administrative review and ADR at the early stages of disputes should be more effective at reducing costs and delay. The earlier a

dispute is addressed in the course of its history, the less likely it is to need complex application of the various ADR techniques, or recourse to a court imposed decision.

Alternative Dispute Resolution (ADR) mechanisms satisfy many of the elements of best practice. Disputation is minimised, the exchange of information is encouraged and facilitated, and the chance of a satisfactorily negotiated outcome is maximised. Unlike the traditional adversarial system ADR is conducive to maintaining an ongoing relationship between the employer and employee.

D3.3 Payment of benefits

There should be no incentive for workers or employers or insurers to commence frivolous or vexatious disputes.

There is an incentive for employees to dispute claims if benefits are paid during the period of a dispute. Even where a dispute is settled in favour of the employer, the employee has gained by receiving the amount of the benefit for the period of the dispute, and may not have the resources to repay the benefit, even if required to do so by a “clawback” provision.

The payment of benefits should follow the latest decision of a review body . That is, if the latest review body ordered benefits to be paid, benefits should continue to be paid if the decision is appealed. If the external review body ordered that benefits be stopped, benefits should not be paid during an appeal.

However, there should also be an incentive for insurers or employers to make speedy and justifiable decisions relating to benefits. They should be encouraged to pursue speedy resolution of disputes, and to ensure that genuine injured workers do not face a dramatic drop in income while awaiting acceptance of their claim, or hearing of a dispute.

This may be achieved by placing a penalty on an insurer where there is a reversal of the insurer’s decision regarding benefits. An insurer may avoid this penalty by agreeing to pay benefits during the period of a dispute, pending the outcome of the dispute, on the understanding that they are not accepting liability.

There should also be strict time limits on decision making by insurers, after which a claimant’s position is deemed accepted if not denied by the insurer. These time limits should also form part of the licensing requirements of an insurer. For example, in *Re Switzerland General Insurance Co Ltd*³, the

³ [1970] WCR 132 (NSW)

disputation of claims for financial advantage was regarded as unethical and an insurer's licence cancelled.

Granting the dispute resolution body discretion to award costs would further discourage capricious disputes, but not prevent the hearing of genuine grievances. The discretion could be restricted if necessary, to direct the dispute resolution body not to award costs against the claimant unless satisfied that "the claim was frivolous, or vexatious, fraudulent or made without proper justification"⁴.

D3.4 Initial decision making

Initial decision making must balance the need for informality, cost effectiveness and administrative efficiency, while safeguarding equity and natural justice.

The quality of first instance decision making is important, but it is recognised that it is in essence a sifting of eligibility and compensation assessment based on bulk decision making. There is a strong inquisitorial role for the decision maker, placing the onus on the scheme to obtain the necessary information to determine the claim. There should be minimal need for early legal representation, particularly for workers.

The quality of some initial decision making has been questioned. The Communication Workers Union of Australia (Sub 60, p.2) stated that:

... the system within the Commonwealth legislation where employees who lack the necessary training, skills and expertise may handle the compensation decision-making process is, in our view, unsatisfactory. ... The reasons [for determinations] furnished by compensation delegates fall far short of what the law requires and highlights lack of understanding of the decision-making process.

Similarly, Toyota (Sub 23, p.5) found several problems with the role of claims agents and insurance companies including:

... a lack of understanding on the part of claims agents about the workplace. There needs to be a closer relationship between the employer and the claims agent to facilitate this.

... a gross lack of understanding of medical issues.

The skills and expertise of claim agent staff in dealing with medical matters are critical factors in determining the successful management of claims. Poor skills result in delays in processing/settling claims and increased costs to the employer.

⁴ Section 18(4) of the Compensation Court Act 1984 (NSW)

Best practice requires appropriate training of decision making officers, adequate resources and incentives to make correct decisions the first time, in order to reduce the number of disputes.

D3.5 Review and appeal

Review procedures vary markedly from one jurisdiction to another. They can range from a fully inquisitorial function at one end of the scale, to something akin to a more traditional and restricted appellate process at the other. It has been argued that it is not possible to have an independent review conducted by a person employed by the administrative body which funds the scheme, or by an employee of a self-insurer. For example, the Communication Workers Union of Australia (Sub 60, p.2) argued that for self-insurers:

If the reconsideration stage is to remain, then this stage should be removed from the employer and the function placed with an independent body. ... [this] would eliminate the unacceptable delays in dealing with claims and ensure consistency of approach. It would also provide a stable environment conducive to good ongoing relationships between employers and employees.

This argument may be less persuasive where the review officer knows that their decisions are appealable at a higher level, and where their performance is judged on the number of their decisions successfully disputed.

There is a possibility that internal review may be treated as a “trial run” for judicial review and not taken seriously by the disputing parties.

However, internal review ensures sound primary administrative decision making before such decisions are open to external review. It complements expedient initial decision making by providing an opportunity for a second, more detailed examination of disputed determinations. It is also capable of more rapid, flexible responses than external review.

Administrative review processes are also regarded as much cheaper than traditional adversarial processes. The Boston Consulting Group found the overall cost per disputed claim was \$3800 in Victoria, and \$2400 in NSW. Transformation Management Services (1993 p.20) interpret Ombudsman statistics from the Commonwealth Ombudsman, NSW Ombudsman and the Australian Banking Industry Ombudsman to show that claims can be resolved administratively at around \$1000.

If a party is dissatisfied with the outcome of the internal review process, there must be provision for some type of external or independent review. It is at this stage that ADR techniques may be employed to minimise the escalation of disputes.

There should be eventual recourse to the general court system. However, appeals to the courts should be restricted to appeals on questions of law only. Unless there are good reasons to the contrary, the first level of external review should be accepted as the finder of fact in relation to a dispute.

D3.6 Role of medical panels

Many disputes involve questions of fact in relation to medical opinions. Often there are differences in opinion expressed by medical practitioners. The existence of an independent medical panel to advise on medical issues at the external review stage would remove the requirement to call expensive and time consuming adversarial experts.

The use of medical panels avoids the problem of 'duelling specialists'. Boden, (1992) found that workers' compensation adjudicators 'split the difference' between the parties' positions. This creates a clear incentive for workers to exaggerate medical conditions to maximise benefits, and for insurers to minimise medical conditions to minimise liability.

If parties perceive that adjudicators place excessive weight on the physician ratings relative to other facts, voluntary resolution is discouraged. When disagreement is encouraged among medical experts, the bargaining range between the parties is increased, thereby increasing the costs of reaching agreement. In addition, each party may discount the value of the other party's medical opinion and be less willing to 'give in' to the other side in a voluntary resolution.

There may be difficulties constituting a panel of recognised experts in specialised fields in some jurisdictions. A national register of experts willing to serve on medical panels might alleviate this problem. Medical panels should be restricted to advising on purely medical matters. They may advise on questions of fact relating to the nature of injury and the degree of impairment, but should not consider questions of capacity to work.

It is also important to distinguish questions of fact relating to medical issues and questions which turn on matters of probity, which are not within a medical panel's field of expertise.

An alternative to medical panels to avoid 'duelling specialists' is to require adjudicators to choose one or the other of the parties' final positions, with no compromise. This encourages the parties to supply reasonable medical opinions, as they face an 'all or nothing' situation. "Final offer adjudication" has been adopted in Wisconsin for workers' compensation cases. Judges must

choose between the claimant's and defendant's reports of impairment, with only a five percentage point discretion.

However, this approach merely narrows the scope of "ambit claims" and does not completely remove the need for duelling specialists. It also lacks the expertise of an independent medical panel.

D3.7 Legal representation

Organisational efficiency and cost minimisation call for the minimisation of legal involvement. Layton (1992, p.11) stated that:

There is no doubt that on the whole lawyers tend to extend the times for hearing rather than minimise them and tend to want to take technical points more in the adversarial mould than in the administrative equity justice and good conscience mould.

However, most jurisdictions currently permit a party to be legally represented at all stages of decision making by consent.

Many submissions argued for the restriction or abolition of legal representation in workers' compensation dispute resolution, at least in the early stages of a dispute. It has been suggested that neither party should be able to have legal representation except by consent and for special reason, at which time both should be able to be represented with adequate costs recompense.

However, if legal representation were barred, this would be likely to adversely affect the least powerful. In workers' compensation this is generally the claimant. Some workers' compensation cases raise difficult legal concepts unfamiliar to most workers, who generally rely on union or legal counsel. Lawyers generally improve workers bargaining power in their dealings with insurers and employers. Employers and the scheme are likely to have quasi-legal representatives who specialise in such work.

In addition, lawyers provide a valuable information resource for injured workers. For example, Ms Marilyn Hill, an injured worker, contacted a solicitor to find out her entitlements. She stated (Sub 10, p.2) that:

Even though they make a lot of money out of cases such as mine, I've found their help invaluable. I'm sure I would have walked away from it all long ago without her help and back up.

In any case, representation should not be restricted to lawyers. Claimants should be entitled to representation by advocates of their choice.

An established policy on fees may act to minimise the cost of representation by promoting effective competition and providing greater information to consumers so that they can make an informed choice of counsel.

In April 1993, the Attorney General's Department of NSW published a Statement of Government Policy on setting and reviewing legal fees. They identified four main options for setting fees:

- complete government control;
- an independent fee setting body;
- market forces; and
- competition, with safeguards.

Their preferred option was a system of effective competition, encouraged and protected by safeguards. This was to be achieved through the provision in advance of fee information sufficient to constitute a fee agreement or retainer. If there is no fee agreement, the lawyer will be entitled only to the "benchmark" fee. Fee agreements would be required to be clear and unambiguous, in writing, and signed by both parties. If fee agreement were not fair and reasonable, they may be disregarded in the event of a review of costs.

The need for representation can be reduced if responsibility for explaining workers and employers rights and entitlements is vigorously adopted by another party, possibly the scheme regulator or unions. If the quality of service provided to participants is sufficiently high, there should be little need for legal involvement.

The State of Oregon in the United States employs a Workers' Compensation Ombudsman and a Small Business Ombudsman who operate educational and outreach programs. The major concern of workers was reported to be frustration and a need to know in plain English what had happened in respect of their claim, rather than a lack of information about the operation of the scheme.

In Canada, Ontario has established two divisions within its workers compensation agency with the specific task of assisting workers and employers meet their workers compensation obligations. The Office of the Workers Advocate has three functions. It provides information to workers about the scheme, it assists workers in the preparation of appeals, and it concentrates on educational programs for workers. A separate office ensures that employers receive similar assistance.

D4 Medical costs

D4.1 Background

The estimated total cost of claims for the seriously injured are increasing at rates well above inflation. Medical costs are an important contributor to this trend. In part, this reflects ongoing advances in medical technology which increase treatment options and increase life expectancy. Table D5 shows that the health care costs component of the Consumer Price Index (CPI) grew by 54.7 per cent between 1987 and 1992, while the CPI itself grew by only 21.2 per cent.

However, Table D5 also shows workers' compensation medical costs in most jurisdictions have outstripped even the health care costs component of the CPI. Queensland performed best, its workers' compensation medical costs rising only 33.4 per cent compared to the CPI health costs increase of 54.7 per cent. WA was the only other State where medical costs rose by less than CPI health care costs (51.3 per cent). (The 42.4 per cent figure for the Northern Territory refers to the period 1989-1992, when CPI health costs rose by 22.8 per cent.) Figure D2 displays the relationship between medical costs and CPI health costs.

Table D5 Percentage change in medical costs: Workers' compensation scheme costs compared with health care costs component of the CPI, 1987 to 1992

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i> ^a	<i>NT</i> ^b	<i>Comm.</i>	<i>ACT</i>	<i>Health Costs</i> ^c	<i>CPI</i> ^d
1987-92	246.6	69.7	33.4	714.6	51.3	461.2	42.4	na	na	54.7	21.2

a 1988-92.

b 1989-92.

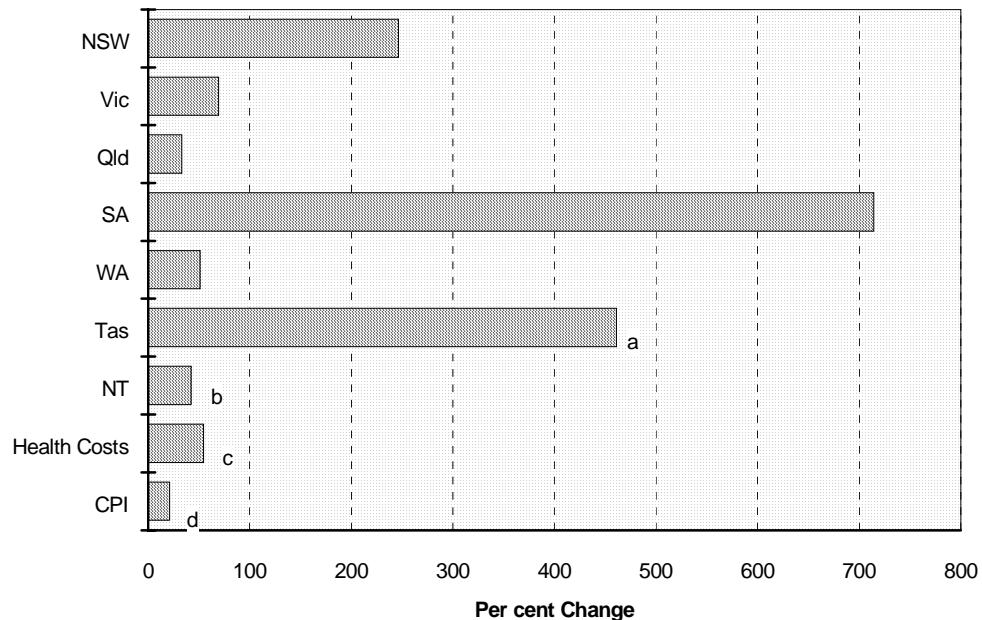
c Hospital & medical services expenditure class of the Consumer Price Index.

d Consumer Price Index Weighted Average of Eight Capital Cities.

Source: ABS Special data services Product Code CPI.07

It should be noted that the medical cost increase is a function of both price and quantity, and if the quantity of medical services consumed has increased over time this will inflate the total medical cost.

Figure D2 Percentage nominal change in medical costs
Workers' compensation scheme costs compared with
health care costs component of the CPI, 1987 to 1992



a 1988–92.

b 1989–92.

c Hospital & medical services expenditure class of the Consumer Price Index.

d Consumer Price Index Weighted Average of Eight Capital Cities.

Source: ABS Special data services Product Code CPI.07

Table D6 shows medical costs as a proportion of payments to or on behalf of workers. In most jurisdictions medical costs as a proportion of payments have fallen over the past few years. This could suggest that the increase in total medical costs identified in Table D5 reflects an increase in the number of claims, with medical cost per claim decreasing, or that payments to workers have increased faster than medical costs.

In 1991–92 medical costs ranged from 15.8 per cent of payments in Victoria, to 37.1 per cent in WA. This wide spread of costs as a proportion of benefits may reflect the different composition of benefits in different jurisdictions. In addition, those schemes which allowed common law claims may not separately count the medical costs component of common law lump sums. However, in all schemes medical costs are an important component of scheme expenditure and should be subject to strenuous cost control efforts.

Table D6 Medical costs as a proportion of payments to workers (per cent)*

	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tasa</i>	<i>NTb</i>
<i>1991-92</i>	29.8	15.8	17.1	29.1	37.1	26.1	27.8
<i>1990-91</i>	32.9	18.5	18.8	33.8	40.7	27.8	29.5
<i>1989-90</i>	35.5	19.3	18.0	37.8	39.0	29.6	28.1
<i>1988-89</i>	35.0	20.2	20.0	39.7	35.9	29.8	na
<i>1987-88</i>	31.9	19.6	18.5	46.6	32.0	na	na

*payments to workers includes weekly benefits, lump sums and medical costs

Source: Industry Commission 1993, Survey A

Important determinants of the cost of medical care for workers' compensation beneficiaries include:

- the costs for hospital and doctor services;
- the utilisation of hospital and doctor services;
- the frequency and severity of work place injuries;
- the availability of new technology which may be cost increasing or cost decreasing;
- the practice of defensive medicine requiring additional tests and procedures; and
- regulations affecting cost.

The level of medical costs is also a function of the broader health market. If the wider health market is not operating efficiently, workers' compensation medical and like costs will be correspondingly greater. There is considerable scope to examine the efficiency of the broader health market in greater detail, but such a study is beyond the terms of reference of the present inquiry.

D4.2 Role of medical and like service providers

Medical and like service providers may fill one or more of several roles within a workers' compensation scheme. They may act as providers of certificates, treatment providers, independent medical examiners, advisers or members of medical panels.

Certification

Medical service providers in one sense control initial and ongoing access to workers' compensation benefits, through their control over the certification process.

The Australasian Faculty of Occupational Medicine (Sub 28, p.28) distinguished the following situations:

- initial certification of a claim, which should include the history of the worker's injury or disease, on what basis it is considered to be work related, and the diagnosis;
- certification for the early period of a claim, which should include the diagnosis, a nominated period of incapacity, and any major anticipated treatment costs; and
- certification for the later period of a claim, which should include an assessment of the worker's abilities, expected recovery of abilities in the near future, and diagnosis, particularly any changes.

To fulfil these multiple roles, certification needs to shift from the traditional fit/unfit for work categorisation, toward a description of ability or disability. Assessment of capacity for work requires a knowledge of the worker's workplace and work activities which the issuer of a certificate may not have. They may be in a better position to make a statement referring to the worker's capacity to do certain tasks, for example the ability to lift certain weights, or to work for a certain period.

Another important issue the issuer of a certificate must initially decide is the work-relatedness of an injury or disease. It has been argued that most treating doctors are not well equipped to certify work-relatedness and capacity for work. Burry (1990) cites pecuniary interest, lack of training in the nuances of compensation acts, lack of knowledge of individual jobs and the labour market, and lack of emphasis in most medical curricula on disorders of the locomotor system as potential drawbacks of using treating doctors for this purpose.

Treatment providers

Treatment providers should supply sufficient information to the compensation authority to justify the expense of the treatment provided.

The role of treatment providers may be broken down into the initial treatment and certification of injured workers, and the ongoing treatment of injured workers as part of the medical rehabilitation process, and the provision of ongoing medical certificates.

There may be a potential for the patient's desire for treatment, or the provider's desire to treat, to outstrip the actual need for treatment. Compensation authorities should scrutinise and seek justification of expensive treatment. This is discussed in more detail under utilisation review.

Independent medical examiners

An opinion about an injured worker may be sought from an independent medical examiner, often within the context of a dispute resolution process.

The Australasian Faculty of Occupational Medicine (Sub 28, p.43) argued that a medical opinion should note what parts or systems of the worker's body do not function properly, and what pathological process occurs there. The contribution of employment to the abnormalities or pathological state or process should be spelt out. The severity of the abnormalities and their effect on the worker's daily activities should also be noted.

The opinion should state whether the abnormal parts are likely to become near-normal, stay much the same or gradually worsen, and provide a likely time scale of recovery or deterioration, and note what more, if anything, could be done to hasten the worker's return to work.

The worker's fitness for work should be spelt out, stating whether a worker is:

- fit for normal pre-injury duties;
- fit for normal duties with minor modification, nominating the modifications;
- fit for alternative duties, nominating abilities/disabilities; or
- unfit for any work.

Blackmoore (1993) rejected this approach, arguing that a medical examiner's opinion should not state whether a claimant is 'fit' or 'unfit' for work, but should list disabilities, which gives the employer greater opportunity to structure appropriate alternative duties.

Medical boards or panels

Some states employ statutory panels of doctors which sit in a manner akin to a medical tribunal. Two issues arise in relation to medical panels:

- should medical panels be limited to providing advice to dispute resolution decision makers, or should they be empowered to make binding decisions; and
- on what issues should medical panels decide or advise.

Depending on the jurisdiction, medical panels may provide independent advice to legal tribunals, and/or be given power to decide matters referred by parties in dispute.

Medical panels have been criticised for their lack of decision making expertise, particularly when they act in a quasi-legal role. The President of the NSW Court of Appeal, Justice Kirby, urged medical panels and doctors to take more care when making decisions. He said that in many cases assessments failed to address the precise criteria mentioned in the Act.⁵

Mrs Muriel Dekker of the Workers' Compensation Self-Help Group (Transcript p.1976) criticised the Queensland system of medical tribunals, for not allowing a right of appeal from decisions of a medical board. She argued that this denies a worker's basic right to a fair hearing.

The questions on which medical panels decide or advise are usually confined within perceived medical expertise, that is:

- which bodily structures or systems are abnormal;
- what pathological process is occurring; and
- the extent and likely duration of the abnormalities.

Medical panels may also decide or advise on some questions which, although they relate to medical issues, also involve 'legal' questions of causality or credibility of witnesses. These include questions as to work-relatedness of injury, and capacity for work. Medical panels have been criticised for lacking the expertise to make such decisions.

The Law Society of Tasmania (Transcript p.1916) argued that even on purely medical questions a medical panel may lack necessary expertise to decide between the opinions of two leading authorities in a particular field. Some questions do not allow a simple answer, which is why the traditional adversarial procedure has developed — to decide a conflict between two expert opinions.

Advisers to compensation authorities or insurers

Medical service providers may also act as advisers to schemes. They may assist claims staff to understand the information on files, and guide the obtaining of necessary facts that are missing.

They may also provide a link between an employer and the treating doctor, in order to assist the worker's early and appropriate return to work.

⁵ NSW Court of Appeal, CA40652/91, CC6442/90

Sometimes these doctors may also act as independent medical examiners, which may lead to a possible conflict of interest.

D4.3 Medical fee determination in workers' compensation

An important issue in restraining medical costs is the actual level of fees paid to treatment providers for services.

All schemes provide coverage of the costs of fee-for-service medical care. To assist in the administration of claims most schemes have adopted fee schedules linked to one of the two schedules in use in Australia, namely:

AMA: the structure and fees of the Australian Medical Association;

CMBS: the structure and fees which form the basis of the Commonwealth Medicare Benefit Schedule rebates.

While there is substantial agreement on categories of services between the two lists, they differ significantly in terms of fee levels. AMA recommended fees are on average 35 per cent above CMBS fees.

Table D8 indicates that in all jurisdictions fees for workers' compensation cases are higher than the CMBS for all services and are mostly linked to or based on the AMA schedule.

In some jurisdictions, including NT, ACT and Tasmania, the AMA schedule is applied directly. WA and SA schedules are based on the AMA schedule, and involve negotiations with the AMA. NSW also undertakes negotiations with the AMA and tends to apply AMA rates for most procedures. Queensland and Victoria on the other hand both tend to apply loadings to the CMBS. As a result the fees charged for workers' compensation patients can differ markedly both across jurisdictions and from the rest of the population under Medicare.

National consistency on fees is being addressed by the Heads of Workers' Compensation Authorities. A working party into the medical profession and service involvement in workers' compensation, The National Medical Services Group, was formed in October 1992, and acts as a forum reviewing cost containment and broader issues, and interacts with Medicare and the medical profession.

Brennan and Deeble (1993) queried why workers' compensation and Medicare should value medical services so differently. They noted that in the year ending 30 June 1992, 76.3 per cent of all services under Medicare were billed at or below the CMBS fee, whereas for compensation purposes fee schedules up to 50 per cent above the CMBS generally apply.

Richardson and Cook (1990) also examined the market for medical fee determination in workers' compensation and concluded that there was no good reason for workers' compensation fees to differ from general market fees.

They argued that workers' compensation medical fees should only differ from the fees applicable in the general medical services market if the desired objectives of the workers' compensation system cannot otherwise be achieved.

The desired objectives of a workers' compensation system, in relation to medical costs, should be to achieve:

- economic efficiency — that is, neutral incentives between workers' compensation and Medicare;
- provider equity — that is, the fee to reflect the opportunity cost of a medical practitioner's time; and
- worker equity — that is, claimants should receive an equivalent level of medical services to those available in the general market.

Under current arrangements the economic efficiency objective is not met while fees charged under the workers' compensation system exceed those charged in the general medical services market. With higher fees, incentives exist for doctors to certify patients as having a work related injury or disease.

Similarly it is doubtful whether provider equity is achieved. Traditionally, higher fees are justified for greater case complexity, different service content, delays in payment or bad debts.

In regard to case complexity, if any case is more complex, this is reflected by:

- payment of a higher fee for a long rather than a short consultation;
- payment for a large number of visits or services; or
- payment of procedural items.

These factors should be reflected in the general market rate.

Any obligations to provide additional services, such as special medical reports and so forth can be reimbursed separately, although the provision of standard medical certificates should be regarded as part of the doctor's general duties, as occurs in other areas such as superannuation.

Payment delays and bad debts have already been substantially reduced as compensation systems have been reformed. Any outstanding problems should not be compensated through higher fees. Rather, such problems should be addressed directly by placing appropriate incentives on the responsible body.

There is a case for the development of a uniform national medical fee schedule for workers' compensation cases, although there may be an argument for different fee schedules in different States if average fees charged differ significantly due to variable market conditions.

To achieve parity between the workers' compensation and the general market for medical services, this schedule should be based on general market rates applying in the Medicare market. (The single best estimate of the market rate is the average fees charged by doctors under the Medicare system.)

The Australian Medical Association (AMA) (Sub 202, p. 1) expressed concern that the general market rates applying in the Medicare market implied the use of CMBS fees. This is not necessarily the case. The actual billings by doctors may be above or below the CMBS rate.

Table D7 shows the distribution of doctors' charging as against the CMBS fee in the major specialty groups. This would suggest, for example, that general market rates for GPs are 92.2 per cent of the CMBS schedule, while general market rates for cardio-thoracic surgeons are 127 per cent of the CMBS schedule rate.

These rates would reflect the state of the labour market in individual specialities, as well as practice costs, and could form the basis of negotiation of uniform workers' compensation fees at a national level.

Table D7 Doctors' billing relative to CMBS schedule fee

<i>Specialty Group</i>	<i>% of CMBS rate</i>
Anaesthetists	119.9
Obs/Gyn	120.5
Other	101.7
Psychiatrists	95.6
GPs	92.2
<i>Surgeons</i>	
Cardio-Thoracic	127.0
Orthopaedic	120.3
Plastic	121.6
Neurosurgeons	119.3
Urological	117.0
Vascular	112.3
Ear Nose Throat	111.8
Ophthalmic	111.3
General	109.7
Paediatric	105.9
Other	109.0
<i>Total</i>	<i>113.7</i>

Source: Reform of Private Health Insurance Discussion Paper (1993) p.20

Table D8 Medical fee schedules

<i>Type of service</i>	<i>SA</i>	<i>ACT</i>	<i>NSW</i>	<i>QLD</i>	<i>COMCARE</i>	<i>TAS</i>	<i>NT</i>	<i>WA</i>	<i>VIC</i>
General Practitioner	AMA Schedule as guide	AMA Schedule	AMA Schedule most procedures	CMBS + loading	AMA Schedule as guide	AMA Schedule	AMA Schedule	AMA Schedule as guide	CMBS + loading
Private Hospital	PHA Schedule		Negotiated with PHA	Negotiated Hospital Rate	PHA Schedule where available or own schedule				Based on Medibank Private Intermediate Table
Public Hospital	SA Health Commission Charges	Negotiated rates		One off grant to Health Department for services	Dept of Health		Govt Fees		DRG payment structure (Fee for Service)
Specialist Surgeon	Negotiated with AMA, Associations		AMA Schedule		AMA Schedule		AMA Schedule		Negotiated
Occupational Therapy	Negotiation with Association			Administrative	Market related, Case estimates		Negotiation with individual providers		Motor Accident Board rates

Source: Drawn from National Medical Services Group Summary of Fee Schedules

D4.4 Cost containment measures

By establishing and applying effective cost control and medical management measures schemes can reduce costs and provide injured workers with the best, most appropriate care. However, medical cost containment measures have been applied neither broadly nor systematically in the workers' compensation arena.

Medical cost containment measures include:

- deductibles and co-payments;
- utilisation review; and
- output based payment systems (ie case-mix payment).

It is essential to apply both pricing and utilisation controls. Price limits alone tend to foster higher utilisation, while utilisation limits alone may permit higher fee treatment.

Deductibles and co-payments

Deductibles and co-payments aim to shift some of the cost of medical treatment onto employers or employees, thus giving them a stake in controlling expenses. For example, self-insurers pay the full cost of medical treatment for their employees, and in Victoria employers pay the first \$378 of an injured worker's medical costs. Workers tend not to pay direct co-payments under workers' compensation.

By taking initial financial responsibility, employers are encouraged to actively manage the treatment process. However, the existence of the easily accessed Medicare benefits system may encourage employers to shift the cost of a deductible onto Medicare.

Utilisation review

Utilisation review refers to the systematic screening of claims for hospital treatment to assess their necessity and appropriateness. It aims to cut down the cost of hospital treatment by identifying and reducing:

- costly emergency room treatment for relatively minor injuries when lower cost and equally effective alternatives are available;
- multiple unnecessary visits to treat minor medical conditions; and
- hospitalisation for surgery which could be routinely handled on an outpatient basis.

Comprehensive utilisation review of hospital services can involve:

- pre-admission screening and certification, to determine if hospitalisation is required;
- continued hospital stay reviews to ensure length of stay is not excessive;
- mandatory second opinions on certain procedures;
- retrospective reviews for emergency hospitalisation where pre-admission screening was not possible; and
- non-emergency surgical necessity reviews.

Utilisation review programs are not designed to deny necessary treatment. Both parties should be able to benefit, — the employer through cost containment and the employee through better, medically necessary treatment.

Output-based funding systems (case-mix payment)

Another approach to cost containment is to introduce appropriate financial incentives to improve the efficiency of service provision. This can be achieved through the introduction of case-mix payment systems. Currently in most jurisdictions, hospital payment is based on determinants such as inpatient days or medical services provided. Case-mix payment systems gear hospital payment to outputs.

The hospital receives a fixed payment for each workers' compensation patient, according to the patient's classification. The patient is classified according to injury type through the diagnostic related group (DRG) classification system.

The key features of case-mix payment are:

- payment to hospitals is geared to output, with the treated case or episode of care as the payment unit;
- hospitals which produce more output (in terms of case-mix adjusted cases) earn more revenue; and
- hospitals' financial results (in terms of net surplus or deficit per case) depend on their cost per case compared to the price paid.

A significant incentive is placed on hospitals to improve their efficiency.

Victoria trialed case-mix payment for workers' compensation patients in public hospitals from November 1991 to March 1993. Inpatient fees were determined on the basis of the condition for which the patient was admitted and received treatment, rather than the length of stay. The trial reduced the average length of stay for workers' compensation patients, and total workers' compensation public hospital payments fell by 31.3 per cent.

A consultancy report on the pilot (Health and Community Services, 1993, p. 22) recommended that Victoria continue using DRGs as the basis of its payments.

The adaptation of this approach to the provision of rehabilitation services could also be considered. This could involve establishing payment rates for agreed rehabilitation programs for different injury types.

E OVERSEAS EXPERIENCE

Internationally, there is a great variety of workers' compensation schemes. This variety can provide useful information for Australian schemes to develop more effective workers' compensation arrangements.

Australia's workers' compensation schemes differ from those in most other countries in the world. Comparisons with the performance of overseas schemes should therefore be made with considerable caution. However, some broad lessons may be drawn from the wealth of international experience.

Of the 136 countries who have workers' compensation schemes, only three organise their schemes on a sub-national level. These are Canada, the United States of America (US), and Australia (Williams 1991, p.2).

For countries which organise workers' compensation on a national level, there are several different approaches taken. Most systems of workers' compensation in Europe are heavily integrated with the general social security system — for example, being funded in the same way as general sickness benefits. Japan's system is separate from the social security system, and is organised more along the lines of an American state scheme, but at a national level. New Zealand's (NZ's) scheme is part of a national 'no-fault' accident scheme, which covers all accidents, not just work accidents.

This appendix examines the experience of some US states (whose experience may most closely be compared to Australia), Japan, NZ and some common features of European schemes of workers' compensation and accident prevention.

As noted by WorkCover Vic (Sub. 89, p.14):

The record of some nine decades ... is that there is no obvious difference in performance according to the particular structure involved.

The historical record and critical and empirical analysis ... shows that the crucial elements associated with effective system performance are not those connected with formal structure but rather a complex mosaic of features which affect system dynamics.

The Commission agrees with this conclusion. This appendix aims to identify and draw lessons for Australia from those features which are the keys to good scheme performance.

E1 United States of America

The United States (US) provides a useful model for Australia for a number of reasons:

- workers' compensation is formally separate from the social security system, as in Australia;
- their schemes are state based; and
- there is considerable academic literature on American schemes.

Workers' compensation is an exclusive remedy for workers in the US. There is no access to common law.

Benefits are usually around two-thirds of a worker's pre-injury earnings, often with upper and lower limits. Lump sums are usually given for specific impairments. Deciding on the extent of specific permanent impairment(s) is usually the largest cause of dispute in US schemes.

Various models are followed in different US states. The Victorian WorkCover Authority (Sub 89, pp.13–4) identified the broad types as:

- sole government fund, no provision for self-insurance;
- sole government fund together with ability for certain entities to self-insure;
- competitive insurance (embracing both private insurers and state-owned insurers) and self-insurance;
- competitive insurance (involving only private insurers with no competitive state owned insurer) and self-insurers; and
- competitive insurance (involving only private insurers with no competitive state-owned insurer) and no provision for self-insurance.

Selected US state schemes are compared and contrasted according to whether they are based on private competitive or government monopoly insurance.

E1.1 Competitive private insurance: Wisconsin and California

Wisconsin and California exemplify the differences in outcomes that may be achieved under essentially the same formal model of private insurers overseen by a state regulator. Wisconsin is generally regarded as a successful scheme, while California is beset by escalating medical and legal costs. Wisconsin is a low-cost, while California has a high-cost workers' compensation system. This is despite the fact that Wisconsin has higher than average benefits, while California has relatively low benefits. The key difference in costs is found in

dispute resolution practices and policies. Table E1 outlines basic features of the two schemes.

Table E1 Basic features of the Wisconsin and Californian schemes

<i>Feature</i>	<i>Wisconsin</i>	<i>California</i>
Insurance requirements	Compulsory, self-insurance permitted	Compulsory, self-insurance permitted
Income benefits for total disability	66 2/3% of wages, \$450 max, minimum \$20. Time limits: TTD ^a - disability. PTD ^a - life.	66 2/3% of wages, \$336 max, minimum \$126 50% increased compensation if injury due to employer's serious, wilful misconduct. Compensation increased by 10% if undue delay in payment. If injury caused by employee's intoxication by alcohol or other controlled substance, no compensation is payable. Time limits: TTD ^a - disability PTD ^a - life
Waiting period for benefits	3 days (compensation paid for waiting period if incapacity lasts > 1 week)	3 days (Compensation for waiting period paid if incapacity lasts > 14 days)
Scheduled injury	Wisconsin benefits considerably higher than California	Californian benefits considerably lower than Wisconsin
Medical benefits	Unlimited	Unlimited
Rehabilitation benefits	TTD ^a : travel and necessary maintenance if away from home.	Necessary living expenses plus either a maintenance allowance not exceeding \$246 per week, or may be supplemented up to temporary disability maximum, if medical condition has not become permanent and stationary. If employee fails to cooperate with the rehabilitation service's plan, he or she will not receive maintenance allowance for days of non-cooperation.
Administration	Workers' Compensation Division	Division of Workers' Compensation Judicial functions: Appeals Board
Appeal provisions	Time limits: 21 days. Court: Circuit Court, Appellate Court, Supreme Court.	Time limits: 45 days. Court: Supreme Court, or District Court of Appeals.

Attorneys' fees	Limited to 20% of amount in dispute. If liability admitted, not to exceed 10% or \$100.	Reasonable fee fixed by Appeals Board. If Court finds no reasonable basis for appeal, Appeals Board may award fees as supplementary award. (Typically 9–12% of contested benefits, which are usually permanent disability awards. Attorney's fee in rehabilitation cases is the lesser of approximately 12% of rehabilitation benefit or reasonable hourly fee for services to attain these benefits.
Medical boards	May appoint an independent medical expert in doubtful cases.	No medical boards
Second injury funds	Coverage: second injury with permanent disability for 200 weeks or more with a pre-existing disability of an equal degree or greater. Fund pays disability caused by lesser of 2 injuries. If the combined disabilities result in permanent total disability, fund pays the difference between compensation payable for second injury and permanent total disability.	Coverage: second permanent partial injury which when added to pre-existing permanent partial disability results in 70% or more permanent disability. Second injury must account for 35%. Fund pays for difference between compensation payable for second injury and permanent disability.

a TTD refers to temporary total disability; PTD refers to permanent total disability.

Source: US Chamber of Commerce 1993, *Analysis of Workers' Compensation Laws*, Washington DC

The Workers' Compensation Research Institute's (WCRI) *Workers' Compensation in Wisconsin: Administrative Inventory* (Ballantyne & Telles, 1992) attributed Wisconsin's success to certain features which may be contrasted with features in the Californian scheme. All of the features are related to dispute resolution procedures. It seems from the experiences of these states that cost-effective dispute-resolution is an important feature of successful schemes.

Wisconsin's ability to pay reasonable benefits while still running a low-cost scheme results from system features that promote return to work and prevent litigation and attorney involvement (Ballantyne & Telles 1992, p.89). The WCRI conclude that low costs are not a product of:

- low frequency of claims;

- low weekly temporary total disability (TTD) benefits;
- low permanent partial disability (PPD) benefits;
- low frequency of permanent total disability (PTD);
- low frequency of death benefits (although frequency is lower for these benefits, the cost effect is not large); nor
- lower medical costs (although these too are lower than many states).

The study concluded that cost savings are caused by a shorter average period of TTD benefits (partly attributable to early return to work), a low percentage of claims for PPD benefits, and low 'friction costs', such as legal fees and costs of medical evaluations.

The key system features, identified by the WCRI as working in combination to provide incentives for early return to work (and hence low total TTD payments) and fewer payments for PPD, were that:

- employers face much larger PPD liabilities if they do not offer the worker a job paying at least 85 per cent of pre-injury earnings;
- workers face a financial incentive to return to a well paying job rather than delay return to work in the hope of a greater payout;
- employers are fined for unreasonable refusal to hire injured workers;
- with evidence from a doctor that the worker is no longer injured, insurers and employers may unilaterally cut off benefits; and
- Wisconsin requires a greater degree of impairment to receive PPD payments than states who use the *AMA Guides for Evaluation of Permanent Impairment* (Ballantyne & Telles 1992, pp.93–4).

The cost of litigation is the factor which most clearly differentiates Wisconsin from California. While Wisconsin is known as a low litigation state, in California, litigation is endemic. Wisconsin has achieved low levels of litigation through a package of features carefully designed to avoid the need for lawyer involvement. California, however, has none of these features, and even has some which encourage litigation.

Four key features which helped reduce litigation over functional impairment were identified by Victor and Boden (1989).

The first of these is mandatory ratings for impairment. Back injuries, which account for large numbers of claims, are notoriously difficult to assess. To reduce scope for argument, an injury requiring back surgery is presumed to translate into a 5 to 10 per cent impairment rating, depending on circumstances.

Insurance companies know what their minimum payment will be, and can voluntarily pay the worker at least this much. If workers are paid voluntarily and promptly, they are less likely to feel the need to resort to lawyers.

A second feature is active supervision by the regulatory body. The agency tracks claims, and informs workers of their rights and insurers of their obligations. Treating physicians' reports are used to calculate benefits. This calculated figure is sent to the insurer, and if the amount is not paid or contested promptly, fines are imposed. Certainty of rights and obligations and speed of payment are enhanced.

The third feature identified is the heavy reliance placed on the treating physician. This lessens the confusion of dealing with conflicting reports of various doctors, which can often lead to litigation. Workers may choose their own doctor, which in other schemes may lead to finding a partisan physician who is likely to overstate impairment. This is discouraged in Wisconsin by the fourth factor identified by Victor and Boden.

The fourth feature is termed 'final offer adjudication'. In most schemes, when faced with different estimates of a worker's impairment, the adjudicator will split the difference. For example, if the insurer's doctor claims the worker is only 20 per cent impaired, but the worker's doctor says the patient is 50 per cent impaired, a judge might normally discount the possible biases of both doctors, and place the worker's impairment at something like 35 per cent. This encourages the use of doctors prone to gross over-estimation by workers and under-estimation by insurers. In Wisconsin, the adjudicator must choose within 5 percentage points of one or the other of the doctors' reports of impairment. The judge is not permitted to guess at somewhere in between. Under such a scheme, the credibility of the estimate is the most important factor in the decision, and partisan estimates are unlikely to be chosen. This encourages parties to choose credible doctors who do not have a reputation for bias.

California exhibits none of these features. According to another WCRI study (Barth & Telles, 1992), it is a system in which litigation is the norm, and where medical and legal expenses account for a large proportion of costs. Despite the fact that California has relatively low benefits, it is a high-cost state. Barth and Telles (1992, p.127) stated that:

With very low maximum weekly benefits by national standards for total and partial disability and death, California might be expected to rank toward the bottom of the distribution of states across the country in terms of costs. Yet the opposite is true. The average cost of adjusted (for discounts, constants, dividends, deviations, and retrospectively rated plans) manual rates for forty-four types of employers ranked California as between the second and the sixth highest-cost state among forty-seven states analysed. Since these manual rates are calculated as insurance rates per \$100 payroll, California's very high ranking is not a product of California's high average

wage rates. Because of the high wages in the state and the very high adjusted manual rate, the state's weekly insurance premiums were 52.5 percent higher than the U.S. average in 1989.

Litigation rates in California are high. According to Barth and Telles (1992, p.xviii):

Litigation is the *modus operandi* of the system. Half of all lost-time claims result in the filing of an application for adjudication and require some agency intervention to resolve. In one-quarter of all lost-time claims, the employer's first notice of injury is by an attorney's letter.

Not only is the rate of litigation high, but the costs of litigation are high. Doctors who specialise in giving medical advice at trials (medical/legal experts, which are quite distinct from treating physicians in California) are a particular source of costs.

Why is litigation such a problem in California?

Barth and Telles identified a particular design feature which seems to create incentives for litigation over medical issues in California. Employers may choose the employee's doctor for the first 30 days. However, the employee has the right to see another medical/legal specialist to prove the claim is compensable (at the employer's expense). The physician trying to prove compensability appears to be free to charge considerable fees for his or her own services, as well as for unfettered numbers of tests and assisting practitioners. As Barth and Telles (p.128) concluded:

The result is a system with incentives to generate questionable claims, high transaction costs, unnecessary disputes, and, usually, a compromise and release agreement.

Another area of litigation is over the provision of medical services. Although a schedule exists for the price of treatment, this does not regulate volume or appropriateness. The schedule only covers physicians' fees, and not hospital or pharmaceutical expenses. The only avenue for resolving disputes on these matters is through litigation.

The system for evaluating permanent partial disabilities is another cause for dispute. California uses an impairment-based system, like many other States, but has no uniform guidelines for its application. Thus there is greater scope for disputes regarding degrees of impairment.

While many jurisdictions experience difficulties with stress claims or cumulative injuries, California is thought to compensate such claims far more frequently than other states. Since many such injuries cannot be adequately objectively assessed, litigation often ensues. The costs of proving such claims

are high, and the WCRI study claims that some attorneys actively advertise to attract potential claimants.

Litigation in many jurisdictions is time consuming, but in California, the problem is acute. Barth and Telles (1992, p.xix) stated that from 1986 to 1990, the average period from application to resolution of claims was 29 months. The demand for hearings flooded the court time available and, due to funding difficulties, the regulatory body was unable to significantly increase the number of judges.

In 1989, the Californian legislature passed provisions designed to improve the dispute resolution process. One innovation was to appoint certain physicians as Qualified Medical Evaluators. One aim of this was to eliminate the use of physicians whose qualifications were inappropriate or substandard. Another initiative was to create an Industrial Medical Council. This independent body is to act as a specialist regulator over medical disputes.

Barth and Telles concluded that while it is too soon to judge the effectiveness of the reform measures, some problems have been perceived in both reform measures.

E2.2 Public insurance: Washington and Ohio

Washington and Ohio are examples of public monopoly schemes operating in the US. Only six states in that country have state monopolies: North Dakota, Nevada, Ohio, Washington, West Virginia and Wyoming. While the Washington scheme is generally thought to be working well, the Ohio scheme is experiencing difficulties. Table E2 below outlines some of the basic features of the two schemes.

Table E2 Basic features of the Washington and Ohio state schemes

<i>Feature</i>	<i>Washington</i>	<i>Ohio</i>
Insurance	Compulsory with state fund	Compulsory with state fund
Self-insurance	Group self-insurance permitted for school districts and hospitals	Permitted
Income benefits for total disability	60-75% of prior wages, depending on conjugal status Max. \$435.57 (100% SAWW ^a) Min \$46.25	72% first 12 weeks, then 66 2/3%. Max \$460 (100% SAWW ^a) Min TTD ^b ; \$147.67 (33 1/3% SAWW); PTD ^c - \$221.50 (50% SAWW)
Schedule of injuries	Generally, consistently lower than Ohio benefits	Generally, consistently higher than Washington benefits
Rehabilitation benefits	Compensation plus board, lodging, travel, books, equipment, child care allowance, for up to 52 weeks Max \$3000 Supervisor may extend period for another 52 weeks. Department operates a rehabilitation centre.	Maintenance allowance: same as for TTD ^b Minimum 50% of SAWW ^a , for 6 months (renewable) Rehabilitation Division (within the Bureau of Workers' Compensation) may make all necessary medical expenditures, including treatment of non-occupational conditions inhibiting return to work.
Waiting period	3 days (retroactive period, 2 weeks)	7 days (retroactive period, 2 weeks)
Administration	Department of Labour and Industries	Bureau of Workers' Compensation and Industrial Commission
Appeal provisions	Board of Insurance Appeals (administration) Time limits: 60 days (Superior Court), 30 days further appeal and Jury trials on demand.	Court of Common Pleas (within 60 days), or Supreme Court (no time limits)
Attorneys' fees	Determined by Appeals Board upon application, reviewable by Superior Court.	Fixed by judge based on effort expended, but shall not exceed \$2 500.
Medical boards	None	Medical specialists in specific cases, findings advisory.
Medical benefits	Unlimited	Unlimited

Choice of physician	Employee free choice (employees pay half of medical aid premiums)	Employee has free choice of physician
Second injury funds	Covers second injury or disease which added to pre-existing injury or disease and results in PTD ^c or death. Employer pays for disability caused by second injury, fund pays difference between charge assessed against the employer at the time of second injury and total pension reserve. Preferred workers (those who must change jobs on account of accident or disease) have all benefits for claims arising within 3 years of new employment, paid by the second injury fund. The fund also covers job modification costs resulting from on-the-job injuries.	Covers second injury which aggravates pre-existing disease or condition (25 types of handicaps as listed by statute), resulting in death, temporary or permanent total disability, and disability compensable under a special schedule. Employer pays disability attributable to injury or occupational disease sustained in employment. Fund pays amount of disability or proportion of cost of death award determined by Industrial Commission to be attributable to employee's pre-existing disability.

^a State Average Weekly Wage.

^b TTD refers to temporary total disability.

^c PTD refers to permanent total disability.

Source: US Chamber of Commerce 1993, *Analysis of Workers' Compensation Laws*, Washington DC

State monopolistic funds in the US have been criticised in recent years for their lack of financial viability. In a study published by the Alliance of American Insurers (the Alliance), Kenney (1991, p.i) wrote of Ohio:

The Ohio monopolistic state fund reported operating losses from 1985 to 1989 of more than \$1.3 billion. The operating losses would have been billions higher had claim reserves not been discounted. The fund reported that liabilities (mostly claim payment obligations to injured workers) exceeded assets by \$1.9 billion even after consideration of billions of dollars of investment income. If the fund were a private insurer, it would be considered financially insolvent and be the largest insurer insolvency ever.

The Washington fund was the only state monopolistic fund to have recorded an operating profit in the same period, and over time its financial position strengthened. However, the same study claims that despite the improvement, the surplus to reserve ratio was still very weak, at 6 per cent (Kenney 1991, p.33).

In a spirited defence of state funds, the American Association of State Compensation Insurance Funds (the Association) (1991) denied the grim picture painted by the Alliance. The Association argued that state funds work.

The Association argued that state funds were less expensive than private funds, for two reasons: they have lower administrative costs, and they run as non-profit organisations. While the funds may generate profits in their business, they are free to make full use of these funds to fund losses, reduce rates and pay dividends. They contrast this position with that of the private market, where there are conflicting incentives: the 'competitive insurance market' may force insurance firms to reduce rates and so on, but the 'competitive stock market' forces insurance firms to pay investment income to stockholders (1991, p.72).

Regarding claims of technical insolvency made by the Alliance, the Association (1991, p.73) argued that:

While these funds would be considered *technically* insolvent were they private carriers, to describe them as "insolvent" is disingenuous. No state fund has ever gone insolvent, no state fund has ever been taken over by a regulatory agency, and no guarantee funds have ever been tapped to pay state fund losses .

The Association (1991, p.89) went on to criticise the claim that employers end up paying for the lack of financial credibility of state funds. It argues that the situation is exactly the same when a private firm goes bankrupt: the insurance market as a whole absorbs the losses, and this inevitably gets passed on to employers. Against claims that rates were inadequate and must eventually be raised significantly, the Association argues that there may be "legitimate public policy reasons" to hold rates down in the short term. When rates must eventually rise, it argues that most of the employers who bear these higher rates were the ones who benefited from the low rates of the past, and that "there is an inherent equity in this approach".

The Association also claimed that the Alliance's use of indicators of financial performance was inappropriate.

Regarding the Ohio state fund, the Association maintained that the scheme's financial performance had been improving since legislative changes in 1990. These reforms included moderate rate increases and closer administrative scrutiny of claims review and court cases. The fund intended to address its unfunded liabilities over a period of time, rather than via sudden sharp rate increases.

The Washington fund's turnaround in its financial position was argued to be not simply the result of rate increases, but also improved claims management processes.

Experience rating in Washington

Of particular interest in the Washington scheme is its experience rating system. Usually in an experience rated scheme, premiums give small firms very little

financial incentive to improve their safety performance. The reason (discussed in Chapter 3 of this report) is that their credibility factor is too small, and so very little of their own experience feeds through to their rates.

In Washington, however, a formula is used which gives greater weight to the employer's individual recent experience. In addition, small firms are given further premium reductions if they have had no claims in the first three of the last four years. The sum of these features would give rise to *prima facie* expectations of better small employer prevention.

Chelius and Smith (1987) attempted to test whether such an incentive actually existed. Several attempts were made to find a relationship between this brand of experience rating and better safety performance. The paper concluded that no proof of such a relationship existed. In fact, injury rates were found to be higher almost across-the-board in Washington, and that the difference in safety performance between Washington and other states was greatest in small firms.

Several possible reasons were offered to explain these counter-intuitive findings. First, the lags between when a safety improvement was made and when it fed into the formula were at least two years, and five years before the full adjustment was made. Such lags tend to dull incentives. Second, the complexity of the formula used was thought to make it difficult for many employers to calculate the potential gains from reduced injuries. Third, since workers' compensation costs are a small proportion of payroll, and safety improvements may only decrease a proportion of these costs, some employers may think it simply not worth the effort. Fourth, the way experience rating was explained and 'sold' to employers may have been as a "procedure for bringing equity to rate-making rather than as a tool for providing firms with greater safety incentives" (Chelius & Smith, 1987, p.18).

E2 Japan

Japan's workers' compensation scheme bears many similarities to those in Australia. However, Japan is reputed to have low workers' compensation costs and low accident rates. This section describes Japan's workers' compensation system, and attempt to highlight differences with the Australian system.

E2.1 The scheme

Despite a much larger population than Australia, Japan has a single, national scheme to cover most of its workers, called the Workmen's Accident Compensation Insurance Scheme (WACI). WACI is administered by the Ministry of Labour, Division of Workmen's Compensation.

Compared to most OECD countries, Japan is a latecomer to the area of workers' compensation schemes, with WACI dating from *the Workmen's Accident Compensation Insurance Law* and the *Labour Standards Law of 1947*.

E2.2 Premiums

Employers finance the scheme, with some Government subsidy for administrative costs. There are 53 industrial categories, and examples of industry premium rates are given in Table E3 below.

Table E3: Premium rates in Japan by industry: 1993

<i>Industry</i>	<i>Sub-group</i>	<i>Premium rate %</i>
Forestry	Timber cutting	14.2
Fishery	Sea fishing	6.7
Mining	Metal	9.9
	Coal	11.1
	Oil/natural gas	0.1
	Water power plant/tunnel	14.9
Construction	Building	3.2
Manufacturing	Food	0.9
	Textile	0.7
	Wood/lumber	2.6
	Chemical	0.8
	Metal refining	0.9
	Mechanical machinery	1.1
	Transport machinery	0.8
	Ship building	2.3
	Passenger	0.7
	Freight transport	1.9
Transport	Stevedoring	5.3
	Electricity, gas, water supply	0.6
Power supply		
Agriculture		1.1

Source: Data provided by Australian Treasury Representative in Tokyo

Larger employers (with over 100 employees, or fewer in more dangerous industries) are experience rated. The experience rate can vary by 40 per cent above or below the industry rate.

E2.3 Common law

There are no restrictions on a worker's ability to sue in negligence (unlike many Australian jurisdictions, and all US states). As in Australia, provision exists for common law damages to be reduced by the amount of statutory compensation already paid.

E2.4 Coverage

Nearly all workers are covered by the one national scheme, except for most public servants and mariners who are covered under separate schemes (as in Australia). Some primary sector workers are not covered. The self-employed and very small employers (less than five employees) may elect for coverage.

Job-related injury and disease are covered. Intentionally self-inflicted injuries are not covered, and benefits may be reduced (or even cease altogether) if the worker committed a crime or acted with gross negligence. This is similar to Australian provisions for 'serious or wilful misconduct', except in the case of serious injury or death, where compensation will still be paid.

Journey claims are covered.

E2.5 The role of the private insurance market

Although WACI is a government monopoly scheme, the private insurance market meets demand for extra benefits and coverage. Many labour agreements specify higher benefits than those offered by WACI. These extra benefits may be covered by the private market. However, many employers prefer to self-insure for these obligations.

The private market may also insure employers against liabilities under the Civil code, such as for negligence damages greater than WACI covers, or compulsory automobile liability insurance.

E2.6 Benefits

Medical benefits are provided, with no time restrictions (unlike some Australian jurisdictions). Workers may be treated at specialised Workmen's Accident Hospitals, or other specially designated hospitals. Alternatively, the worker may choose to be treated outside this system, and have the costs reimbursed. Workers' compensation schemes in Australia do not have their own hospitals.

Temporary disability compensation benefits are paid from the fourth day of injury. (For the first three days, the employer is required to pay 60 per cent of the worker's wage.) Workers' compensation benefits are 60 per cent of the worker's prior average daily wage, plus a special benefit of 20 per cent of the wage. These benefits are tax free.

Eighteen months from the date of the first medical treatment, workers may receive an injury and disease compensation pension instead of temporary disability benefits. This applies to workers who are still medically recovering, and whose disability is assessed at a certain degree. Workers with disabilities

graded 1–3 (out of 14 possible grades) are eligible to receive these benefits, others continue to receive temporary disability benefits. The amount of the pension varies, from 86 per cent of their average annual wage for grade 1 injuries to 67 per cent for grade 3 injuries.

Those who have recovered medically but who remain permanently impaired receive a lump sum. Classes 1-7 receive a pension as well, which varies with the class of impairment.

Death benefits are a funeral service allowance, plus income-related lump sums or pensions. Only family members are eligible for benefits. This includes parents, grandparents, and brothers and sisters who were supported by the worker at the time of his or her death.

Benefits are indexed to changes in average national earnings (so long as the index moves by more than 6 per cent).

WACI also provides other labour services: rehabilitation, relief services (such as scholarships for injured workers' children, attendant allowances, and special supplements), and safety and health services (such as medical examination centres and financial aid to accident prevention organisations).

E2.7 Dispute resolution

Employee appeals are initially to WACI referees in each Prefectural Labour Standards Office. Further appeals are to the Labour Insurance Appeals Committee.

Employer appeals are to the Director of the Prefectural Labour Standards Office. The next stages of appeal are to the Minister of Labour, and then to the normal court system.

E2.8 Why does workers' compensation cost less in Japan?

Williams (1985) examined why Japanese workers' compensation premiums averaged 1.1 per cent in 1985, while those in the US averaged 1.7 per cent. Seven possible reasons were explored. These were:

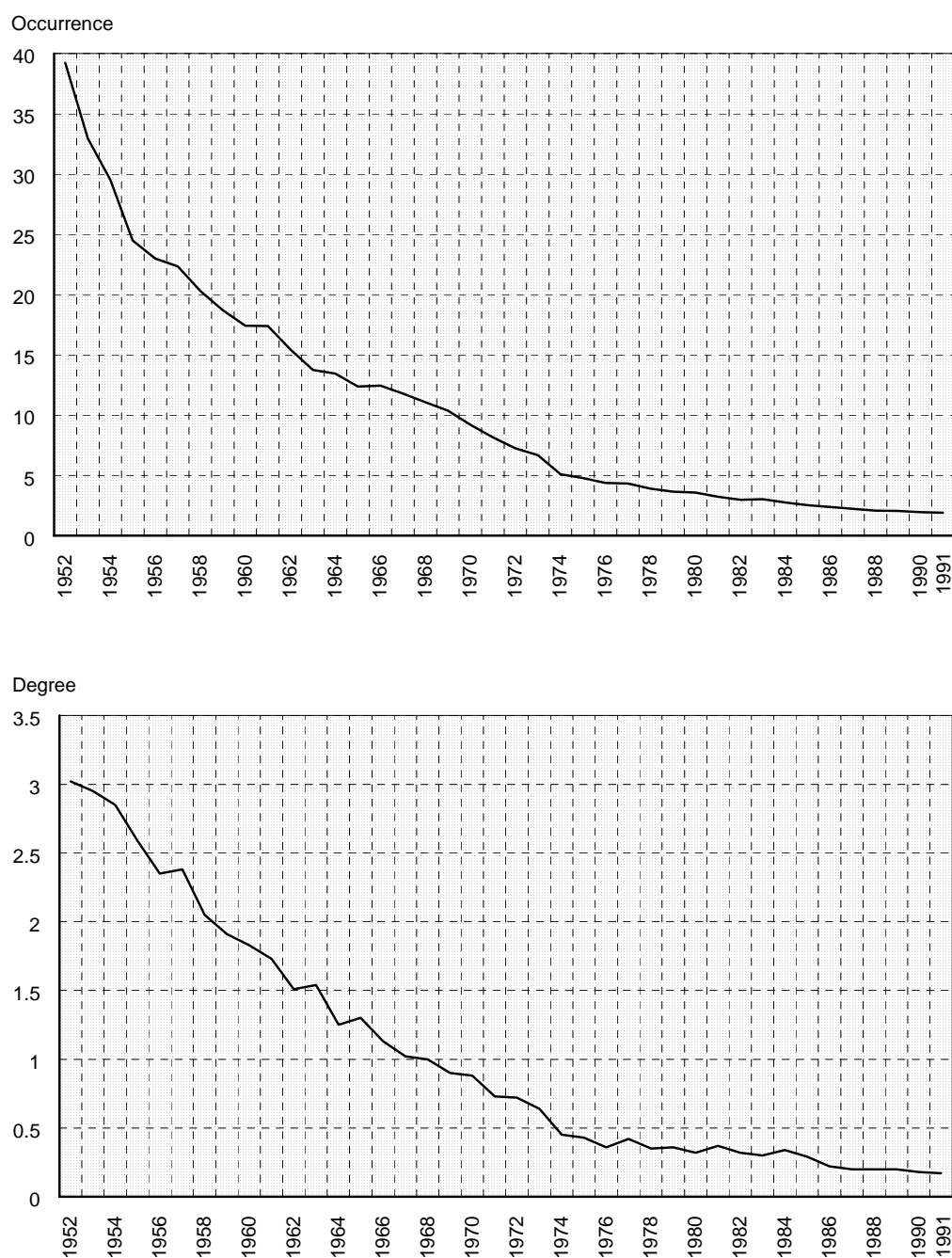
1. Lower statutory benefits — it was concluded, however, that benefits, on balance, were actually higher in Japan than in the US. This may lead to the conclusion that a low cost scheme does not necessarily have to have low benefits.

2. More restrictive administration — this is difficult to evaluate, but it was possible that Japanese interpretations of the law were stricter than those in the US.
3. Less hazardous industries — Williams found that Japan has a similar mix of hazardous industries as the US. Compared to Australia, Japan's industries may well be more technologically advanced. Dangerous work may be done by machines or robots, and the machinery with which humans do come in contact may be safer. Capital/labour ratios may be higher in Japan's dangerous industries than in Australia.
4. Lower accident frequency and severity rates — this was pointed to as a very important factor in Japan's lower costs. While the data were not always comparable, and some data from the US were not always reliable, it was clear that Japan's workplaces were likely to be safer than those in the US. Occupational health and safety in Japan is discussed below.
5. Work ethic, 'groupism' and employment practices — the famous Japanese work ethic and desire to be part of a group were identified as possible large factors in Japan's lower costs. Japanese workers were perhaps less likely to take time off from work, or to malingering. Also, positive employer attitudes regarding finding alternative employment for an injured worker were possibly important in lowering costs.
6. Lower insurance servicing costs — Japan's government monopoly might be able to achieve economies of scale in the workers' compensation insurance market, although it is not at all clear how large these economies are. Such economies are probably only likely to accrue in the form of administrative cost savings. Economies achieved in this area must be balanced against the possible lack of dynamic efficiency to which a monopoly structure may be prone. There is also no need for brokers. In the US, servicing costs account for about one third of costs, while in Japan, they account for only around 15 per cent of premiums.
7. Deferral of some current costs — Japan's scheme is not fully funded, and so some costs incurred in a particular year are deferred until later years.

E2.9 Occupational health and safety in Japan

As suggested above, Japan's record on occupational health and safety is often cited as exemplary. Figure E1 shows time series data from 1952 to 1991 on occurrence and degree (severity) of injury. Unfortunately, no direct comparisons with Australian injury statistics may be made since there are, to date, no reliable Australian national statistics for injury rates.

Figure E1 Japanese injury statistics: 1952–1991*



* Occurrence: (deaths + injuries) per 1 000 000 man-hours, degree: days lost per 1000 man hours.

Source: Data provided by Australian Treasury Representative in Tokyo

Some care should be used when examining Japanese accident data. Japan is often described as having a 'dual economy' (Kelley, Williamson & Cheetham 1972). This term illustrates the difference in conditions in the large, established firms, and the small suppliers. While large firms may have excellent standards in OHS, total quality management, job tenure, and wages, the small supplier firms lag well behind. There is doubt regarding injury reporting compliance among these small firms. It may be that the injury rates among these small firms is considerably higher than in the large-firm economy.

Legal framework

According to the Japan Institute of Labour, Japan's industrial injury rate increased steadily until about 1960, but has decreased constantly since then.

The Industrial Safety and Health Law 1927 (in its oft-revised form) and *the Industrial Safety and Health Law 1972* regulate health and safety in Japan. The Labour Standards Bureau of the Ministry of Labour (whose divisions and departments include the Industrial Safety and Health Department, the Inspection Division, the Wages and Welfare Department, and the Workers' Accident Administration Division, and the Compensation Division) is responsible for supervision and guidance.

The Laws mandate employer responsibility to meet minimum standards and to "endeavour to ensure the safety and health of workers" (Japan Institute of Labour 1988, p.14). Employers are required to appoint a general safety and health supervisor, a safety supervisor, a health supervisor, an industrial physician, and an operation chief. A safety and health committee (or separate committees for safety and health) must be established to investigate matters of occupational hazards. About half the members of such committees are elected by workers. Employers must also educate their workforce in industrial safety.

Japan's Minister of Labour is required to formulate Five-Year Programs for Industrial Injury Prevention. These programs started in 1958.

Organisations dedicated to industrial safety and health

Japan has several organisations devoted to accident prevention, which are partly subsidised by the Government. The functions of these bodies include research, education, public relations, and counselling and guidance through industrial safety and health supervisors.

The Japan Industrial Safety and Health Association (JISHA) is a national body which was established in 1964. It was created under the *Industrial Accident Prevention Organisation Law*, and its mission is to promote voluntary prevention activities by employer groups. It also provides facilities for

education and technical assistance. Its members are industry-level industrial accident prevention associations, employer organisations, prefectural safety and health promotion organisations, and other organisations engaged in industrial accident prevention activities. JISHA also operate the Japan Bioassay Laboratory which investigates the toxicity of chemical substances.

Industry level associations have the power to make regulations on industrial injury prevention, which all members must observe. They also provide technical assistance. Industry-level groups include the Construction Accident Prevention Association, the Land Transportation Industry Accident Prevention Association, the Port Cargo Handling Accident Prevention Association, the Forestry and Timber Manufacturing Labour Accident Prevention Association, and the Mining Labour Accident Prevention Association.

Several research organisations in Japan have been established to deal with the information problems in occupational health and safety. These include the Research Institute of Industrial Safety and the National Institute of Industrial Health. Industrial physicians are educated at the University of Occupational and Environmental Health. This body also promotes research in Industrial Medicine.

Government assistance

The Japan Institute Of Labour (1988, p.24) has stated that:

Basically speaking, the problem of industrial safety and health in the workplace is to be solved by the employer, and the role of the Government is to guide and supervise the employer to operate in compliance with the laws and regulations and to conduct research to develop new technologies, etc, which will be useful in promoting industrial safety and health. Small- and medium-size enterprises, however, lag behind technically and have fewer financial resources than large enterprises.

In view of these circumstances, the Government has set up various financial assistance programs primarily for small- and medium-size enterprises.

Assistance offered to small to medium size firms including low interest loans for improvements in the working environment or measurement equipment, and medical examination equipment. The government may also subsidise small to medium sized firms who are members of regional or industry organisations who engage in co-operatively improving safety and health.

E3 New Zealand

NZ's Accident Compensation Corporation (ACC) provides a case study of a national accident compensation scheme. It compensates all accidents in the same way regardless of their origin. The scheme has been criticised by many

parties, claiming that it has created perverse incentives which have increased the accident rate. It is likely that Australia can learn valuable lessons from the experience.

The 1974 Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia (co-chaired by Mr Justice Woodhouse who headed the equivalent NZ Royal Commission) made proposals similar to those across the Tasman. The demise of the Whitlam Government stopped the proposed introduction of a similar scheme in Australia.

E3.1 History

Before the introduction of the ACC scheme, NZ's accident compensation systems were fragmented in much the same way as Australia's are at present. Accidents arising 'out of and in the course of employment' were compensated by a workers' compensation scheme. Other accidents involving negligence were compensated by court-awarded damages. Money payments were made by the Crimes Compensation Tribunal for victims of criminal acts, a separate Motor Vehicle Insurance Act covered motor vehicle accidents, and for the remainder, there were social security payments.

The Woodhouse Report (1967) on personal injury compensation recommended a change to an integrated system of compensation, intended to protect all New Zealanders, 24 hours a day, from income loss in the event of an accident. It sought to treat accidents in the same manner, no matter where the accident occurred: work, motor vehicle, and accidents at home were all to receive income-related benefits.

The Report led to the *Accident Compensation Act 1972*, which was replaced by the 1982 version of the same Act. This Act was replaced by the *Accident Rehabilitation and Compensation Insurance Act* in 1992.

The Woodhouse Report's influence on the ACC

The Report of the Royal Commission of Inquiry, *Compensation for Personal Injury in NZ 1967* (the Woodhouse Report) was the blueprint for the ACC scheme. The report noted the large numbers of accidents, dealt with at great expense by "a fragmented and capricious response"; when accidents were a "social problem which cries out for coordinated and comprehensive treatment". Negligence action was described as a lottery; the Workers' Compensation Act was thought to provide inadequate benefits, and social security could only help if one passed the means test.

The Report recommended a new scheme which rested on the following five principles:

- community responsibility;
- comprehensive entitlement;
- complete rehabilitation, encouraged by an award not being revisable downward after an initial assessment;
- real compensation (adequate benefits); and
- administrative efficiency (McIntosh, in Chelius, J. (ed.) 1986)

Community responsibility

The principle of community responsibility rests on the premise that the whole community depends on its workforce for its prosperity. So, the whole community owes a moral duty to, and has a vested interest in, looking after workers. The self-employed also make a contribution to society, as do housewives.

Comprehensive entitlement

Comprehensive entitlement is based on equitable grounds. All injured people face the same needs, and society owes them the same duty (Woodhouse Report 1967, p.20).

Complete rehabilitation

The Report recommended that rehabilitation be streamlined into the general compensation system. It recognised that society is better off when people can get back to work as quickly as possible.

'Real' compensation

Compensation awards were designed to be adequate. They should be income based, since modern households faced considerable financial responsibilities, which were serviced by a regular inflow of income. These responsibilities did not disappear in the event of an accident, and so compensation at a flat rate was not 'real' compensation, since people on varying incomes would be affected in different ways.

Administrative efficiency

The description of administrative efficiency seems to be couched in terms of what Berkowitz and Burton (1987, p.28) term, 'myopic efficiency'. 'Myopic efficiency' is only concerned with lowering administrative costs, without

concern for the quality of the service provided. 'Panoramic efficiency', on the other hand, is concerned both with the service provided and with the administration costs associated with this service.

E3.2 Operation of the Accident Compensation Corporation

The Accident Compensation Corporation (ACC) acts as sole insurer for accident compensation in New Zealand. Insurance is compulsory. For work injury and disease, employers are required to pay levies to the ACC.

New legislation amending the scheme was passed in 1992, and made provision for a limited form of self-insurance. A pilot program for allowing employers to self-insure for 12 months was commenced.

Funding

The scheme consists of four funds:

- the Earner Account, which covers those employed or self-employed, for non-work accidents;
- the Employer's Account, funded by employers to cover workplace accidents;
- the Motor Vehicle Account, funded by motor vehicle owners to cover motor vehicle accidents; and
- the Non-earners' Account, funded by the Government to cover non-earners, including accidents involving visitors to the country.

This four-account structure is one of the most important reforms of the 1992 legislation. Previously, there were only three funds, and employers were required to pay for both their employees' work and non-work accidents.

The Employer's Account now covers all accidents that would be covered under Australian workers' compensation schemes.

The Employer's Account is funded by levies on employers. These levies are determined by industry classifications set by the NZ Standard Industrial Code (the NZ equivalent of the Australian Standard Industrial Code).

The Commission understands that the scheme is run on a pay-as-you-go basis, and has large unfunded liabilities. There is no political pressure at present to eliminate the unfunded liability.

Experience rating

Another of the key reforms of the 1992 Act was the introduction of experience rating. While the manager (Meeting, May 19, 1993) of the premium department

within the ACC stated that there is little unambiguous evidence that experience rating will improve safety performance, it was defended on the grounds of fairness.

Anecdotal evidence given by managers within the ACC and in the Division of Workplace Safety and Health of the Department of Labour has shown that the introduction of experience rating noticeably increased employers' awareness of occupational health and safety, and increased their preventive efforts.

Benefits

Generally, weekly benefits are 80 per cent of gross weekly earnings, with a maximum payment of \$NZ1179 per week. An extra weekly benefit, the Independence Allowance, is given in lieu of lump sums for permanent impairment, with a maximum of \$NZ40 per week. There is no compensation for pain and suffering. Medical and related expenses are paid, as are rehabilitation costs. Funeral expenses are covered, and earnings related compensation is paid to surviving dependents. Other incidental costs such as damage to clothing, costs of attendant care and damage to artificial limbs are covered (Nicholls 1991, pp.147–55).

Beyond 12 months, earnings related benefits cease if a person is assessed as having a capacity for work greater than 85 per cent. This serves to stop those who are unable to find work due to general economic conditions (rather than disability) using compensation as more lucrative form of unemployment benefits.

Rehabilitation

According to managers within the ACC (Meetings May 19-21 1993), rehabilitation had been largely ignored in the past as an ACC function. However, greater efforts are now being made.

The 1992 legislation changed the scheme from being just a compensation scheme to a compensation and rehabilitation scheme. The legislation states that everyone is entitled to rehabilitation, which covers physical, vocational, and social rehabilitation.

The scheme employs rehabilitation co-ordinators, who act as brokers. They establish individual rehabilitation plans and match providers and injured workers.

Rehabilitation co-ordinators generally have backgrounds in the social sciences, and are given no specific training. Training is on the job.

Employers may choose whether to employ a rehabilitation co-ordinator on staff. Small employers usually use a supervisor, while large firms use the company doctor or nurse.

Experience rating was thought to be a positive influence on firms to take people back to work, although there is no mandatory requirement to take workers back. Rehabilitation managers within the ACC claim that feedback from employer groups has shown that employers want to know bottom line issues, like how much they will save if they rehabilitate a worker, and are not interested in 'softer issues'.

Rehabilitation workers use a hierarchy to try to get the worker back to work. The options tried are:

1. same employer, same job
2. same employer, modified job
3. different employer, same job
4. different employer, different job.

REHABILITATION PLANS

Rehabilitation plans are mandatory under the new legislation. There is a focus on getting the employer and the physician to sign them as well as the worker.

The Act mentions personal responsibility for rehabilitation. Benefits may be cut off if a worker refuses to undertake rehabilitation.

There is a screening process at the claims level which tries to pick potential rehabilitation candidates. This screening process has its problems, since it is done by people who have no real expertise in the area.

There is a lag of about 45 days to enter a rehabilitation program, although the ACC is examining case management, to manage the case from day one. Case managers manage the whole process of treatment an injured person receives, and rehabilitation programs attended.

As at mid-1993, there were no rehabilitation centres, although one was planned for Auckland.

Payment to rehabilitation providers is on a fee for service basis, with maximums. If the maximum is exceeded, the ACC will re-examine the account. Open-ended reimbursement by the ACC has been regarded as a problem.

Some provision is made for retraining. However, vocational rehabilitation is only paid for one year, which operates against choosing drawn out-training. There is a lot of flexibility for workers to express a course preference, and so

conceivably, some people may choose inappropriate courses, unmatched by their abilities.

SOCIAL REHABILITATION

Social rehabilitation is regarded as an important element of the rehabilitation process. Its role is established in the 1992 Act, and is paid for by the ACC. The ACC scheme aims to rehabilitate the whole person, not just the productive capacity of that person. However, according to ACC staff working in the rehabilitation area, since it is largely subjective as to whether a person has been rehabilitated in this way, it is difficult to control its costs or measure its effectiveness.

E4 Europe

Workers' compensation schemes are a European invention, originating in Germany under Bismarck's rule (see Appendix F). Many European countries have since departed from the model of a separate workers' compensation insurance scheme, and have instead opted for a general social insurance system. This section will outline some of the main features of this 'European approach' (although this approach includes many variations on the theme) and its advantages and disadvantages, using examples from various European countries.

E4.1 Relationship to the social insurance system

Workers' compensation arrangements in many European countries are more closely related to their general social insurance (security) system than in Australia. However, the degree of integration varies considerably.

The main advantage of a link between the social insurance system and the workers' compensation scheme is that administrative costs will be lower if there is no need to prove work-relatedness. In addition, if there are economies of scale in administration, they may be achieved more easily in an integrated scheme, and coverage may be more equitable.

One disadvantage may be that costs are not borne where they are incurred, especially where contributions do not vary according to risk.

Germany maintains a separate workers' compensation insurance system, through the Industrial Injuries Insurance Institute. This is funded entirely from employer contributions. However, for the first 18 days, the social insurance sickness program pays medical costs (unless the injury is severe).

At the other end of the spectrum, the UK's work accidents and illnesses are compensated through the general social security system, without separate funding. The National Health Service administers medical services, also without special funding. Both employers and employees contribute to these social insurance schemes. People injured at work do receive some special treatment, however, as noted below in section E5.5.

France's workers' compensation system is also part of the general social insurance system. There are some separate systems for special industries such as agriculture, mining, public employees and the self-employed. Employers finance the work injuries section of the scheme, with contributions varying with risk. The National Sickness Insurance Fund administers the program at a national level, with the Primary Sickness Insurance Funds paying benefits. Contributions are raised by joint collection agencies. The Ministry of Social Affairs and Employment supervises the scheme generally.

Italy's social insurance system also covers work accidents. For most employed persons, general disability, sickness and medical benefits schemes apply. These schemes are funded by employees and employers. For manual workers, non-manual employees in dangerous work, and those self-employed in agriculture, a different program applies, for which only employers pay. All programs are administered generally by the Ministry of Labor and Social Welfare, and Treasury. The National Social Insurance Institute administers the programs through its branch offices.

The Netherlands and Switzerland are other examples of general accident schemes. In the Netherlands, both employers and employees contribute to the scheme (which consists of five programs: the *Compulsory Health Insurance Act*, the *Sickness Benefits Act*, the *General Disablement Benefits Act*, the *Disablement Insurance Act*, and the *General Widows and Orphans Act*). Contributions do vary by industry. In Switzerland, occupational injury and disease compensation is financed solely by employers at varying rates of contribution, but this is part of a general comprehensive accident insurance scheme.

E4.2 Access to common law

Among European countries, there is a range of positions on access to common law.

Some countries such as Germany, Austria, and Switzerland abolished common law rights for work injuries. Other countries, such as Sweden, the UK, and the Netherlands have maintained complete access to common law remedies. The Netherlands has even reversed the onus of proof for such cases, so that an

employee may assert negligence, and the employer must prove that this was not the case.

E4.3 Employees covered

Generally, all wage and salary workers in European countries are covered by the work injury program.

The self-employed are not covered in the UK, while in Germany and Switzerland, coverage for the self-employed is optional. In other countries, the self-employed are generally covered.

Students are covered in some countries, including Germany, Austria, Sweden, and France (vocational students).

E4.4 Coverage of injuries and diseases

Occupational injuries are all covered under the various schemes.

Many countries make special provision for occupational disease. For example, the work injuries scheme in the UK (as mentioned above, being a part of the general social insurance scheme) lists diseases covered by cause, physical agents, biological agents, and chemical agents. In Switzerland, Germany and Austria, only listed diseases are compensable, but provision exists for coverage of additional diseases with proof that it is work-related. Sweden generally compensates industrial diseases, but infectious diseases are only compensated if included in a schedule.

E4.5 Benefits

Weekly benefits

There are differing positions as to whether weekly benefits are paid as a proportion of pre-injury earnings, or as flat rates.

The UK pays flat rate compensation, after a period of employer-paid sick leave (usually 28 weeks). Those ineligible for sick leave may receive sickness benefits for this period. Normally, a certain amount of National Insurance contributions must have been paid before benefits may be paid, but work accidents are excused from this responsibility. Benefits then transfer to the permanent disability pension, which in 1991 was up to £76.60 if 100 per cent disabled (US Department of Health and Human Services 1992, p.298). A constant-attendance supplement of up to £30.70 per week is available in certain circumstances. For those partially disabled, benefits range from £15.32 for

those with a 14 per cent disability to £68.94 for a 90 per cent disability. A reduced earnings allowance of up to £30.64 is payable if the worker is unable to do his or her previous job, resulting in a loss of earnings. Compared to income replacement levels in other countries, these benefits may be seen as relatively low. Many employers have additional private insurance to cover their employees for higher benefits.

The norm in European countries is to provide benefits at some percentage rate of pre-injury earnings. For example, in Germany, after the first 18 days, which are covered by the general sickness benefits scheme, the relevant Insurance Institute pays 80 per cent of prior earnings until recovery, or until the worker is certified as permanently disabled. Once a worker is classified as permanently and totally disabled, 66.6 per cent of prior earnings are paid until the maximum amount is reached. If the worker has no other pension, then benefits increase to 72 per cent. Allowances for dependants and constant attendance care are also paid.

While benefits in Australia generally taper downward over time, in some European countries the opposite is true.

In Sweden, during the first 90 days — for which the general health insurance program pays — benefits are 90 per cent of the worker's expected income for the coming year, subject to a maximum amount. After this period, the occupational injury program continues benefits at a 100 per cent of expected earnings, with the same maximum. Workers who are permanently and totally disabled receive this benefit until retirement age.

In France, temporary benefits are 50 per cent of prior weekly earnings for the first 28 days. After that, benefits are 66.6 per cent. Both are subject to a maximum. Permanent benefits are 100 per cent of prior earnings, subject to a maximum and minimum. Partial disability payments vary according to the degree of incapacity. Partially incapacitated workers are given average earnings multiplied by half the percentage of incapacity for the portion of disability between 10 per cent and 50 per cent, and by one-and-a-half the percentage of incapacity for the portion above 50 per cent. Lump sums are paid for disabilities lower than 10 per cent.

Italy also offers higher benefits after a period of time. Benefits for temporary incapacity are 60 per cent of earnings for the first 90 days of disability, and 90 per cent thereafter. Totally and permanently disabled workers receive 100 per cent of previous earnings, plus a constant attendance allowance and dependants supplements. For the permanently and partially disabled, benefits are proportionate to the degree of incapacity for the range of 61 per cent to 79 per cent disability. If a worker is 11 to 60 per cent disabled, then benefits are 50 to 60 per cent of the degree of incapacity.

Medical benefits

In most European countries, medical benefits are paid, either through the work injury program or through a separate medical social insurance program.

F HISTORY OF WORKERS' COMPENSATION

Workers' compensation arrangements in Australia evolved from European systems of the turn of the century. Since their introduction in Australia, they have changed considerably. To better understand present arrangements, it is useful to consider the historical, institutional, and cultural context of their origin.

Workers' compensation in Australia evolved from a long process of institutional, cultural and technological change. This appendix seeks to give present arrangements some historical perspective. It gives a brief description of the forces which gave rise to the earliest workers' compensation systems in Europe, and how Australian jurisdictions gradually followed suit. Some of the major trends in Australian systems are described, and the factors which influenced these trends.

F1 The industrial revolution

Work injuries have been of significant social and legal concern since the industrial revolution in the 18th century. Then, work injuries were widespread and were seen as an inevitable part of the production process. Engels is reported to have likened the workforce of Manchester to an army lately returned from a campaign, so obvious was the toll of limbs (Luntz, Hambly & Hayes 1985, p.345).

Policy makers at the time subscribed to a *laissez-faire* philosophy. The courts appeared to share this view, as noted by Fleming (1987, p.480):

After the eclipse of the paternalistic economy by the industrial revolution, the courts created a pattern of industrial law in the first half of the 19th century which inevitably reflected the postulates of contemporary individualism. Its basis was the optimistic belief that a free interplay of economic forces would ensure the welfare of society, for the sake of which it was prepared to ignore both the inequality in bargaining between management and employee and the measure of economic compulsion which left the latter no realistic choice between acceptance of the conditions of work offered to him and starvation or equally hazardous employment elsewhere. With a view to encouraging and subsidising burgeoning capitalistic enterprise, the standard of protection conceded to employees was the minimum employers were regarded as capable of affording in the light of the unexacting standards of the time.

F1.1 Redress during the 18th century

Workers were forced to rely upon the common law for redress for injuries sustained at work. However, workers were reluctant to use the court system at all, so the vast majority of injuries were left uncompensated. There were many reasons for this reluctance. Going to court was expensive, workers did not want to jeopardise their positions, co-workers did not want to risk their own positions by acting as witnesses, and the largely uneducated workforce (including large numbers of children) was probably ignorant of any possible rights of action (Fleming 1987).

While an employment relationship is essentially contractual, workers usually brought an action in negligence. To prove negligence, a worker had to establish that the employer owed a duty of care, and that duty was to take reasonable care to protect employees from reasonably foreseeable risks. By today's standards, courts found the standard of care owed very low (Fleming 1987). When even this low standard of care was obviously breached, the courts nevertheless created new defences: which Fleming calls the 'unholy trinity' of voluntary assumption of risk, common employment, and contributory negligence (Fleming 1987, p.48).

Voluntary assumption of risk

Voluntary assumption of risk (or *volenti non fit injuria*) was used by the court to bar recovery where the worker was assumed to have known the risk implied in his or her job, and by continuing to work in the same place, to have implicitly accepted or 'assumed' the risk. This approach assumed that the worker had implicitly made a contractual agreement with the employer that the worker knew the work was dangerous but was prepared to take the risk, and had also agreed implicitly to waive all rights if injured.

Common employment

"The most common nefarious judicial ploy for reducing the charges on industry (Fleming 1987, p.491)" was the defence of common employment. This defence released employers from all liability resulting from the negligent action of the injured worker's workmates.

Today, employers are vicariously liable for the actions of their employees. This is largely because employees are engaged in activity at the behest of management, and so their mistakes are seen as mistakes of the firm. Also, the employer's duty to take reasonable care to provide a safe place of work includes employing reasonably competent and careful staff, thus if management fails in this matter, it is liable.

Contributory negligence

Contributory negligence (that is, the employee not taking reasonable care for his or her own safety) was once a complete defence to an action in negligence. This meant that even if the employer were mostly at fault, and the employee only slightly careless, the employer did not have to pay damages to the employee. This arose from a tradition of not apportioning damages, and also because it was thought to act as a good incentive mechanism to stop workers acting negligently.

The combined effect of these defences was that when workers were injured at work, they could rarely recover damages from their employers.

F2 The advent of workers' compensation schemes

Towards the end of the nineteenth century, society began to take a more humanitarian view of work accidents. It was thought that work injuries were such an inevitable part of work that it should be treated as another cost of business, and not left to the hapless individual worker to bear. There were calls for "the price of the product to bear the blood of the workers", so that the people who consumed the goods had to pay for all of the costs of their production (Luntz *et al*, 1985). It was thought that the common law had failed workers, and that legislative intervention was needed.

F2.1 The German initiative

Otto von Bismarck, Chancellor of the German Empire in the late 19th century after uniting the various autonomous Germanic states, faced serious opposition from the Socialist opposition. As Williams (1991, pp.123-4) notes:

Bismarck's first reaction was to have the Reichstag pass laws repressing the activities of radical newspapers and persons or organisations threatening to overthrow the government. These repressive measures slowed the trend toward socialism, but only temporarily. Bismarck then decided that the best way to halt socialism was to demonstrate that he could accomplish some of the practical aspirations of the Socialists better than the Socialists themselves. Specifically, he decided to remove a perennial source of unrest by establishing a paternalistic program that would provide workers with assistance they might need because of an accidental injury, sickness, or old age.

After number of false starts, the *Accident Insurance Law* was passed on July 6, 1884. This Act contained radical changes to the system of compensation. It introduced a 'no fault' principle.

As noted by Atiyah (1987), this Act was a major departure from common law principles in that the compensation it provided was not complete. Under the

Act, workers were compensated for loss of earning capacity, not for non-pecuniary loss — things like loss of enjoyment of life, loss of expectation of life, and pain and suffering. Common law damages, on the rare occasions they were awarded, at least made an attempt to put a money value on these things and compensate for their loss.

Following Bismarck's lead in Germany, the English *Workmen's Compensation Act* was passed in 1897, based on the same basic principles.

F3 Workers' compensation in Australia

Australian jurisdictions were swift to follow England's lead. States gradually introduced *Workmen's Compensation Acts*, offering limited cover. As Quinlan and Bohle (1991, p.246) note:

As in Britain, the introduction of the legislation entailed a long struggle between the labour movement and social reformers on one side, and employers and conservatives on the other. In most states it took several attempts and the impetus of a Labor government to achieve a law with a relatively comprehensive coverage of employees, one which made it compulsory for employers to take out insurance to meet workers' compensation claims.

SA was the first state to introduce workers' compensation legislation (1900), followed by WA (1902), Queensland (1905), Tasmania (1910), Victoria (1914), the NT (1920), NSW (1926), and the ACT (1951). The Commonwealth's first *Officers' Compensation Act* was passed in 1908, and the *Seamen's Compensation Act* was passed in 1911.

Over the years, coverage broadened, benefits were increased and more injuries and diseases became compensable. Coverage was broadened from injury 'arising out of *and* in the course of employment' to 'arising out of *or* in the course of employment'. Weekly benefits became more generous, and were offered for longer periods. These changes were a combination of legislative change, judicial interpretation, and administrative decisions.

F3.1 The Woodhouse proposal: 1974

In 1974, the Report of the National Committee of Inquiry into Compensation And Rehabilitation in Australia was completed. Justice Woodhouse chaired this Committee, after chairing a similar Committee in New Zealand in 1967 (see Appendix E). It recommended a general accident scheme which would provide for compensation for all accidents, regardless of cause. The Whitlam Government had intended to put the scheme into operation, but events of 1975

overtook such plans. The provision of a general compensation scheme is officially still part of the Labor Party platform.

F3.2 Problems and reforms: changes in the 1980s

While legislative change occurred in a haphazard fashion for most of this century, a major wave of reforming Acts were passed in the latter half of the 1980s. These Acts all gave greater power to workers' compensation authorities. The authorities' ambit was increased from just compensation to a greater emphasis on rehabilitation and prevention. In some states, the activities of the private insurance market were severely curtailed, in favour of government provided workers' compensation insurance.

Workers' compensation reform went against the deregulatory flow of the times because it was felt that the existing private insurance market arrangements failed to deliver adequate outcomes. In the late 1970s and early 1980s, costs were increasing at an alarming rate. These were often attributed to legal costs. There were concerns that unfettered discounting was generating insufficient reserves to cover long-term workers' compensation claims. Several well-publicised insurance company failures increased alarm. Queensland's government monopoly scheme, which had been in operation since 1916, seemed to be less susceptible to cost increases than other schemes, and it was thought that it must be enjoying considerable economies of scale, particularly in administrative costs.

There was also dissatisfaction with lump sums as a method of compensation. In the new Acts, these were usually curtailed. Commutations of weekly benefits were only granted in special cases, and common law remedies, which were another source of lump sums, were restricted or abolished altogether. By way of compensation for reduced common law, 'Table of Injuries' payments were also increased.

A series of major reports into workers' compensation was the catalyst for legislative change. The first of these was the Byrne Report, in SA. The Report recommended the creation of a central body which would co-ordinate prevention, rehabilitation, funding, and claims settlement. This central fund was to alleviate concerns regarding the solvency of private insurers. It also was concerned that lump sums (then a common feature of compensation) were a disincentive to rehabilitation. The Report wanted to divorce workers' compensation from the legal arena, and cited New Zealand as proof of the beneficial effects of abolishing tort claims.

The Cooney Report in Victoria (1984) also recommended a major overhaul of workers' compensation arrangements. It too recommended the incorporation of

rehabilitation in a workers' compensation scheme. It stressed the connection between workers' compensation and occupational health and safety (OHS). The quality of service to injured workers was severely criticised, especially the delays endemic in the system. Wild swings in premiums, which had more to do with the insurer's investment performance or market share ambitions than with underlying risk, also came under attack.

The first of the new wave of Acts was in WA. However, the more radical changes were heralded by the Victorian *Accident Compensation Act 1985*. This Act set up the WorkCare scheme, now defunct. It was based on promises of a fair deal for workers and lower costs for employers, especially those in Victoria's manufacturing sector. Premium rates were set in a manner which cross-subsidised riskier industries, on the basis of a 'community rating' principle. SA was soon to follow, with its WorkCover scheme in 1986. It too attempted to combine generous benefits with affordable premiums. The NT also enacted new legislation in 1986 which, in common with the NSW 1987 Act, abolished common law rights for injured workers. Tasmania's new Act was passed in 1988. The Commonwealth passed the *Commonwealth Employees Rehabilitation and Compensation Act* in 1988 (and belatedly the *Seafarers' Rehabilitation and Compensation Act* in 1992 and Queensland revamped its 1916 Act in 1990.

Different trends are discernible in these new Acts. Victoria, SA and NSW all followed a path from private competition to government centralism. The NSW Act, however, did not go as far as the other two states, and insurers hold much greater power in NSW as agents for the WorkCover Authority as they do under the Victorian scheme. Queensland's 1990 legislation seems to have concluded that the scheme's basics were sound, and involved no radical change. Other states left the private insurance market intact, but focused on greater changes in other areas.

There was a shift from judicial to administratively based dispute resolution mechanisms, in a bid to curb costs and waiting periods. Some states opened special court jurisdictions (such as the Workers' Compensation Appeals Tribunal under Victoria's WorkCare scheme) to deal exclusively with workers' compensation problems. Rehabilitation assumed a higher profile. Specific provisions regarding workers' rights to rehabilitation, attendance rules, and approval of providers were introduced.

The latest major change has been the introduction of a new scheme in Victoria (WorkCover) to replace WorkCare. The changes sought to replicate some aspects of the NSW scheme, with better return-to-work rates, greater restrictions on common law access, and better financial management. It is proposed that the underwriting function revert to private insurers when the new scheme stabilises.

The major perceived problem with the WorkCare scheme was its inability to control costs. Areas of cost increases were common law claims and long-term claims. Under WorkCare, claimants could sue at common law for non-pecuniary loss, and WorkCare would bear all costs, regardless of the outcome. This created an incentive for claimants to ignore the legal costs of an action, leading to an increase in claims, even for relatively small amounts. The relatively high number and cost of long-term claims was thought to result from having a separate organisation administering rehabilitation, employers not having an active role in rehabilitation, and poor return-to-work rates.

Another major change has been the passage of Commonwealth legislation giving Comcare the power to insure newly privatised government business enterprises, government trading enterprises, and their competitors. Action on this has been postponed pending the Commonwealth Government's consideration of this Report.

F3.3 Emphasis for the 1990s

The major emphasis at present is on financial viability. This explains many of the recent changes. Stress claim restrictions, stricter work-relatedness tests, reduced involvement of lawyers, medical panels, and the adoption of concepts like 'notional earnings'. It also explains some of the current emphasis on rehabilitation, now embraced as a cost-minimising tool. Schemes with unfunded liabilities are striving to eliminate them, and have nearly done so.

Another part of the new commercial rectitude of workers' compensation schemes is the emphasis on risk-rated premiums. Experience rated premiums or bonus-penalty schemes are the norm. These are justified in terms of either preventive incentives or fairness. Workers' compensation managers generally regard these premiums as superior to 'community rating' in reducing the incidence and costs of work-related injury and illness.

F4 How have things changed?

Many things have changed since workers' compensation systems were introduced.

First, other systems of accident compensation or income support have evolved. This creates anomalies: the same sort of accident will be compensated in different ways depending on how it happened.

Second, the harsh judicial attitude of the past, which left most plaintiffs with no compensation, has changed dramatically. The standard of care that is demanded

of employers has increased substantially, so an action in negligence can more likely be sustained.

The duty of care owed by employers has now come to include:

- employing reasonably competent staff;
- providing a safe place of work (although the employer does not have to guarantee safety, merely to take reasonable care to ensure safety);
- providing proper plant and appliances (which includes buying them from a reputable source, inspecting them, and maintaining them); and
- maintaining a safe system of work (which must allow for the fact that workers do become tired, careless, or even occasionally disobedient).

The defences that once barred recovery in so many cases have lost all or most of their sting. Voluntary assumption of the risk is almost never used today, possibly because its standing was never very clear. Also, it is recognised that realistically, workers rarely get a choice of whether to accept or reject a risk. At any rate, the employer generally has more information about that risk and is better placed to manage it than the worker. Common employment was abolished by statute: now employers are always vicariously liable for the actions of their employees. Contributory negligence can now lead to apportioned damages. This means that if the employer's negligence caused 90 per cent of the harm and the worker's 10 per cent, the worker's damages are only reduced by 10 per cent — not withheld altogether.

Common law still, however, has its problems as an accident compensation system. There are the well known problems of costs, delays, and the difficulty of proving fault. In most of the bodies established under the various workers' compensation Acts, there is at least an intention to deal with matters expeditiously, justly (with regard to the merits of each case) and with as few legal trappings as possible. For example, the Compensation Court of NSW is described in the following manner:

Decisions of the Court are to be based upon the real merits and justice of the case, and the Court is not bound by strict legal precedent. This was also the case in the former Commission, but nevertheless there was a tendency to follow principles established in previous decisions, particularly those laid down by appellate courts on the construction of various sections of the Act (CCH 1993, p.24502, para. 39-000).

Unfortunately, this aim has not always been achieved, since lawyers are often present at workers' compensation hearings, judges preside over them, and higher courts hear appeals.

Third, there have been cultural changes. Society is more safety-conscious, and the principle that employers should bear at least some of the employees' costs of work-related injury and illness is widely accepted. Judicial thinking at times

seems to take into account the capacity of the 'injurer' to pay rather than a moral question of liability. As Lord Denning MR said in a motor vehicle case, *Nettleship v Weston* ([1971] 2 QB 691, cited in Luntz, Hambly & Hayes, 1985, pp. 171-172):

Parliament requires every driver to be insured against third party risks. The reason is so that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured person is only able to recover if the driver is liable in law. So judges see to it that he is liable, unless he can prove care and skill of a high standard ... Thus we are, in this branch of the law, moving away from the concept of "No liability without fault". We are beginning to apply the test: "On whom should the risk fall?" Morally the learner driver is not at fault; but legally she is liable to be because she is insured and the risk should fall on her.

Fourth, and possibly most importantly, technology has changed and altered the nature of risks. Even in the riskiest industries of today, technology has increased safety enormously since the early days of workers' compensation. For example, fishermen still often work at night, boat decks are slippery, and the hours are long. However, boats are sturdier, safety equipment is more reliable, and communication systems have improved enormously. Technology has also brought with it new types of injury and disease, which workers' compensation systems often have difficulty incorporating. Diseases with long latency periods, for example those from chemical exposure, are particularly difficult to deal with under present workers' compensation arrangements.

Fifth, OHS safeguards against many risks, and if a breach of the statute occurs, workers may sue for breach of statutory duty.

The legal, cultural, and technological environment affecting workers' compensation has changed considerably since compensation schemes were introduced. Workers' compensation arrangements have to be sufficiently flexible to accommodate future change in these areas.

G WORKERS' COMPENSATION PREMIUMS

Employers, apart from self-insurers, generally do not pay directly for their compulsory workers' compensation liabilities. These liabilities are insured against, with employers paying premiums or levies to insurers. The basis on which premiums are set can significantly influence the incentives employers face to prevent work-related injury and illness (see Chapter 3). This appendix discusses the four main methods used to determine premiums — class rating; experience rating; bonus and penalty arrangements; and up-front discounts for safety — and how these methods are used in practice.

G1 Insurance theory

For premiums to work effectively as a prevention mechanism, they should be closely aligned to true risk. The so-called 'true risk premium' is the estimated average long-run annual cost of claims associated with each workplace. It is impossible to know in the short run what the long-run average annual cost will be. The actual pattern of workplace accidents is random, and in any one year will probably not equal the 'true risk premium'. The actual cost of claims generated in a particular year is called the 'experience premium'. Insurers make an estimate of a firm's 'true risk premium' by looking at industry averages and a firm's recent experience.

Cross-subsidisation

Cross-subsidisation occurs when a firm pays less in premiums than the costs that it brings to the scheme. The shortfall is then made up by other firms, who pay more in premiums than is actuarially necessary. This does not mean that in the short run (say one year) a firm should always pay premiums exactly equal to the costs of claims it generates. This would mean there would be no point in insuring at all, and violates the principle of risk pooling. However, no firm should consistently have the costs of its liabilities met by other firms over the longer term. This can happen when there are either too few premium bands, or the bands are not far enough apart. Too few bands mean that employers with dissimilar risk profiles are placed in the same category. Higher risk employers in the band are subsidised by lower risk employers. Bands which are too close together (ie not much variation in the lowest premium paid and the highest) mean that the industries in the lowest bands are probably paying too much in

premiums, and are in fact subsidising those in the higher bands, whose rate is capped too low.

Where cross-subsidies have existed for considerable periods of time, there may be transitional difficulties in their eradication. MTIA (Sub 71, p.7) argued against the abrupt removal of cross-subsidies in premium rates. It strongly opposes such a move, claiming:

There is merit in the argument that employers should pay for the costs of accidents and injuries incurred at their workplaces, but this should not and cannot occur through immediate and massive increases in base industry premiums. The effect of this on an industry already incurring high and increasing taxes and charges and to be exposed to lower tariff protection, will be disastrous; leaving fewer employers to carry a greater burden to pay for the accidents and injuries incurred.

A related issue is the variability of premiums. Employers may face a class rate which is being subsidised by other industries, but which is variable according to a bonus and penalty scheme, or experience rating. There may be incentives for employers to increase prevention efforts to reduce artificially low premiums even further. However, the nature of such schemes is to vary premiums by a percentage rate according to performance. Thus improving performance will lead to a smaller absolute saving for dangerous industries when class rates are cross-subsidised than if they are not. The financial incentive to improve prevention is proportionally weakened.

G1.1 Class rating

Class rating (otherwise known as manual rating or industry rating) involves setting premiums according to industry categories. The individual firm's experience does not affect the class premium rate, although in an experience rated scheme, class rates are used as a starting point for calculating premiums. According to Williams (in Chelius (ed.) 1986) insurers use three factors to determine class rates:

- expected loss allowance;
- expense allowance; and
- profit or profit and contingency allowance.

The expected loss allowance is the amount that the insurer expects an average firm in this group to claim. This is determined using past statistical data. It may be subjectively adjusted by extrapolating trends, or taking into account factors such as legislative change to benefits or coverage.

The expense allowance is the amount the insurer expends in administering claims.

The profit or profit and contingency component is the profit margin. In the event that class rates were proven inadequate to cover claims costs, extra claims would be paid out of this amount.

All schemes in Australia use some form of class rate as the basis for premium setting. In some jurisdictions (WA, NT, ACT, Tasmania), insurers may discount these rates at will. In others (NSW and Victoria), insurers are required to follow a formula when adjusting the base rate. In SA, base rates are in broad bands without much variation between bands, so much so that it leads to cross-subsidisation. These rates are then altered by a bonus and penalty system. In Queensland, more finely segregated class rates are adjusted by a bonus system.

G1.2 Experience rating

According to WorkCover NSW (Sub 92, p.7):

Any successful workers compensation premium system requires a mechanism which adjusts premium to reflect experience. This is the primary mechanism to ensure that employers have an incentive to improve safety performance and rehabilitate injured workers.

Experience rating takes the base rate (either the class rate or last year's premium) and adjusts it according to a firm's recent experience (usually 3 to 5 years). The period used for the firm's recent experience can vary.

Experience rating can be full or partial. Full experience rating means that the previous period's premium (which is assumed to already contain information about the firm's past periods experience) is adjusted by recent experience, weighted according to a 'credibility factor'.¹ Partial experience rating involves using the industry class rate rather than the previous year's premium as the base to be adjusted. NSW uses partial experience rating, while Victoria uses full experience rating (as of July 1 1993).

As a general principle, employers should be rated according to risk. The best estimate that insurers can probably use is an employer's recent experience. Therefore, experience rating is a sensible way to collect enough money from an employer to cover claims, and provide employers with an incentive to increase safety.

¹ How reliable a recent claims history is as an estimate of true underlying risk will depend partly on the size of the firm. Statistically, the experience of large firms with many employees will be more reliable than the experience of small firms. Thus, more weight should be given to the experience of large firms compared with small firms. The weight that should be given to the experience is called the 'credibility factor'. The larger the firm, the higher is the 'credibility factor'.

The prevention incentives involved in experience rating mean that employers will try to improve their safety performance in order to lower their premiums. This incentive will be greatest for large employers, for whom the largest weight is given to their recent experience.

The fact that small firms cannot be experience rated to any significant degree limits the effectiveness of experience-rated premiums as a prevention tool. Since any variation in a small firm's actual premium will correspond closely, or exactly to the industry rate, there will be no corresponding reward or penalty in its premium arising from a change in the firm's health and safety performance in any one year.

How well does experience rating work as a prevention tool?

Dr Andrew Hopkins (Sub 4, p.36) concluded that there is no unambiguous evidence that experience rating is effective as a prevention tool. He argued that:

Perhaps the best way to put the matter is that there is as yet no good evidence to rebut the presumption that premium incentives will reduce claims.

However, many employers believe that experience rating does offer incentives for prevention. Indeed, many Submissions to this inquiry suggested that premiums should be rated according to experience to increase incentives for prevention. This indicates that even though most employers would only receive small gains for improved prevention, these gains through experience rating encourage them to take occupational health and safety seriously.

However, the Commission recognises that there may be serious limitations to the extent that a firm's experience will influence its premiums. The most important of these is firm size, and the fact that small firms have very little of their own experience feeding into their premium.

What should be included in an experience-rating formula?

There are several areas of contention, such as:

- common law costs;
- journey claims; and
- second injuries;

Common law

The argument against including common law costs is that such costs are highly variable, and not easily predicted, although some schemes do include an estimate of expected common law costs when setting premiums. Using past

experience may not, however, be a good indication of future risk. The alternative is to include common law costs on an industry (or class) basis. This approach would distribute the vagaries of court decisions broadly across all firms in the industry.

The effect on prevention of including common law costs in the experience rating formula might be positive if a firm can see that negligent behaviour and breaching statutory obligations leads to more law suits and higher premiums.² However, the incentive effect is diluted if a firm feels that the cost of future common law claims is uncertain.

Including common law costs only on an average industry cost basis will have very little effect on incentives for prevention. Increasing prevention efforts will only pay off in this respect if everyone else in the group makes an equal increase in effort which will bring the average industry common law costs down.

On balance, it would seem to be more sensible (from the point of view of incentives for prevention) to include each firm's common law costs in its experience rated component of premiums.

If common law costs are included in experience rated premiums, then there are issues of timing and weighting to be resolved. Common law claims may take years to be finalised. There may be significant delays from when an accident occurred to when a worker files a claim, from when his or her medical condition stabilises, and when the claim is settled or goes to court. Even if the claim does go to court, years may elapse in appeals. Occupational diseases, which take a long time to manifest themselves, exacerbate these problems.

When should the cost of a common law claim be included in the premium? Should it be at the time the final judgment is awarded, or should an estimate of the final cost be made as soon as a worker files a claim? If the insurance company waits until the final payout is known, there may be little inducement for the employer to change his or her workplace to achieve improved health and safety performance. Immediacy of cause and effect is lost. The employer's workplace may have changed dramatically at over time. If some estimate is made at the time of claim, there are problems of deciding the probability a successful or unsuccessful claim, and any likely payout awarded.

Journey claims

From a prevention perspective, it is hard to justify the inclusion of journey claims should not be included in an experience rating formula, nor even in a

² Employers are liable for injuries to workers if a breach of a statutory obligation (say an OHS regulation) results in harm.

workers' compensation scheme. An employer has little control over such journeys. Making employers liable for such losses is unlikely to lead to greater preventive effort in avoiding journey accidents.

Second injuries

From the point of view of prevention, second injuries or aggravations of pre-existing conditions ought to be included in a premium calculations. Incentives for prevention are weakened if aggravations or recurrences of old injuries or diseases are not identified with the workplace in which they were originally incurred or contracted. The approach of the NZ Accident Compensation Corporation (ACC) is to reopen old claims when such incidents occur, even when the worker is employed by a new employer. This also releases the new employer from the obligation to prevent such recurrences or aggravations.

There are a number of alternative ways of incorporating second injuries or aggravation of pre-existing injuries into premium calculations. First, all the costs of compensation could feed back into the premiums of the original employer. The original employer would thus be forced to take into account the full consequences of an unsafe workplace. On the other hand, this method could be costly, and there may be difficulties if no original claim was made (especially in the case of disease). Furthermore, the second employer also has an obligation to provide a safe workplace. Second, all the costs could feed back into the premiums of the new employer. This method is administratively much simpler and provides good incentives for the new employer to ensure that old injuries are not aggravated. However, this method is not fair to the second employer, and creates the incentive to get rid of injured workers, moving them onto someone else's payroll. Third, the costs of second injuries or aggravations could be shared by the two employers according to the proportion of probable causality. This method is probably the fairest, but is likely to be the most administratively costly. It has been suggested that administrative problems could be lessened by establishing a rule of thumb (say 50 per cent each), with scope for appeal.

G1.3 Bonus and penalty schemes

WorkCover SA and the Queensland Workers' Compensation Board use a bonus and penalty scheme (although in Queensland, only bonuses are used). Victoria used a bonus and penalty scheme under WorkCare.

Bonus and penalty schemes are more effective than class rates alone in creating positive incentives for prevention. For example, the WorkCover SA Annual Report 1991 (p.4) stated:

Since the commencement of the bonus/penalty scheme in July 1990 there has been an almost-continuous improvement in the performance of the scheme. A similar improvement in the occupational health and safety performance of employers was also experienced in Victoria when that State introduced its bonus/penalty scheme.

Depending on how they are designed, there are several features which can make bonus and penalty schemes an inferior option to experience rating.

First, if bonuses or penalties are awarded on the basis of intra-pool comparisons, bonus and penalties may be highly volatile, and employers have little control over the factors which create the volatility. Since a firm can only try to control its own claims costs, it has very little control over the other determinants of the premium; the performance of the other firms in the class.

Second, a firm's experience may improve compared to previous years, but its premium may still rise. This might happen if the firm's experience was still inferior to that of the others in the class. Confidence in bonus and penalty schemes (and the motivation to undertake prevention) are lessened if, after making preventive efforts, firms are not rewarded for their efforts.

Third, the size of the bonus or penalty might not bear a direct relationship with the reduced/added costs the firm brings to the fund. Imbalances must therefore be corrected by other parts of the scheme.

A fourth problem may arise from excluding some types of claims from the bonus and penalty formula. Such exclusions may create incentives not to reduce claims, but to reclassify them. The WorkCare (Victoria) Annual Report 1990-91 complained of a steady increase in the number of claims for exempted categories such as second injuries, which was thought to be a substitute for actually improving safety performance.

While the majority of employers have improved workplace practices and encouraged workers to return to work as means of reducing claims costs and therefore levy [premium], some employers have sought to minimise levy [premiums] through provisions of the bonus and penalty regulations. An indicator of this approach has been the steady increase in the proportion of claims which are excluded from bonus and penalty calculations through exemptions from second injury costs provided in the regulations. The group of employers who have benefited most from claims exemptions from second injury costs have increased their percentage of exempted claims from 8.64 per cent in 1988 to 21.3 per cent in 1990. In terms of claims costs, this has allowed some employers to have in excess of 80 per cent of the costs excluded from bonus and penalty calculations. However, these costs which are excluded are paid for by other employers in the form of reduced bonuses or as a drain on the Fund (p.17).

WorkCover SA recently introduced some changes to their bonus and penalty scheme. Bonuses and penalties are now applied on the basis of size. In addition, bonuses and penalties will be applied to the industry levy rate in steps

of 1 per cent, instead of 10 per cent. The introduction of 1 per cent increments means that small improvements in claims costs can be reflected in the levy rate.

The Queensland system operates a merit bonus scheme. Annually, the surplus of Queensland's Workers' Compensation Fund is redistributed to employers as bonuses. Bonuses are awarded according to the claims-to-premium ratio of the employer. In the 1991–92 financial year, employers who achieved a claims experience of less than 5 per cent of the assessed premium for that year would have been entitled to the maximum discount (for that year) of 40 per cent. (In recent years, the maximum discount was 50 per cent of premium, but due to an unexpected increase in common law costs, the maximum was reduced to 40 per cent in 1991–92.) Firms with higher claims-to-premium ratios have their bonus reduced correspondingly (Sub 63, p.26).

Queensland's merit bonus scheme is not based on relative performance within pools. Rather, it is based on the performance of the firm in relation to the entire employer pool. While the actual bonus size cannot be known with certainty until the end of the premium year, it is generally a fairly stable ratio between claims performance and premium paid.

The Workers' Compensation Board of Queensland (Sub 63, p.26) stated that it is considering a penalty scheme to deal with consistently poor performers.

G1.4 Up-front discounts

Many submissions called for discounts to be given up-front for adopting safe work practices. Analogies may be drawn with fire insurance: cheaper premiums may be charged upon the installation of a sprinkler system, on the grounds that the insurer that such a system would reduce the risk of fire. Employers could be given a similar up-front discount on premiums after some evaluation of the worth, in terms of risk reduction, of new work practices.

An example of a variation of the up-front discount principle is the South Australian Safety Bonus Achiever Scheme, which offers premium discounts for achieving targeted reductions in claims.

The main advantage of an up-front discount is its immediacy. Employers know that if they implement certain changes, their premiums will be reduced now, rather than eventually when their better experience feeds through to the experience rating or bonus and penalty formula. Several submissions called for such immediate reductions in premiums to follow the introduction of safer work practices.

Up-front discounts may be particularly helpful in creating prevention incentives for small employers. These employers are largely unaffected by experience

rating techniques. This may be a way of rewarding small employers for introducing safe work practices which make them even more unlikely to make a claim than previously.

Problems might arise with up-front discounts if an insurer becomes too optimistic in its evaluation of risk reduction strategies and fails to charge premiums to cover liabilities. This problem is best dealt with by adequate prudential regulation.

A related problem may be that insurers, competing for market share, may use up-front discounts as a guise for premium competition. If regulations existed which prohibited premium reductions unwarranted by risk reductions, there may be a temptation for insurers to skirt the regulations by claiming that the reduction was a schedule rating assessment. All valuations of the worth of prevention strategies would become skewed towards the overly optimistic. There is also the potential for only 'paper compliance' with the requirements needed to obtain the discount. There may also be monitoring and compliance problems.

G2 Premium regulation

It may be argued that once mandatory benefit structures are set, market forces may be allowed to set appropriate premiums to fund those benefits. However, the majority of schemes regulate premiums to varying degrees.

In most jurisdictions there is a schedule of recommended rates of premiums to be charged in relation to workers' compensation insurance. The rates are generally in the form of recommended maximum rates, which it is possible to exceed with authorisation, or which may be discounted. Discounting may often be negotiated on the basis of the employer's good safety and claims record. The rates vary from jurisdiction to jurisdiction reflecting different claims experience, levels of benefits and costs of administration under the different systems.

The NT does not regulate premium rates, which are subject to market forces. However, the Premiums Monitoring Committee in the NT monitors standard premium rates and underwriting rates, and reports to the Minister on the performance of insurers.

G2.1 Premium setting

Regulations regarding premiums may help or hinder schemes' primary goals in relation to risk minimisation and full funding. As discussed in Chapter 3, insurance premiums should be based on risk to provide appropriate incentives to

prevent work-related injury and illness. Jurisdictions which regulate premiums generally aim to incorporate risk rating into their premium structures.

Premium caps

In a bid to control costs for employers, states may try to cap the maximum premium chargeable. WA uses capping regulation in its private insurer market. There, the Premium Rates Committee sets occupation categories, and gazettes rates for those categories. Insurers may discount this rate by any amount, but are limited to a maximum loading of 50 per cent.

Insurers who cannot charge as much as is actuarially necessary for a client will either try not to insure that firm or will have to meet claims in excess of premiums out of their own pocket (or engage in cross subsidisation). Capping thus affects the competitiveness of insurers and their willingness to participate in that market.

Most states (including WA without the Board's approval) have clauses which make refusal to insure an offence. This creates the possibility that in WA, for example, if a particular group of firms' long term safety performance is so poor that a loading of more than 50 per cent of the gazetted rate is warranted, these firms would not be forced to pay their full costs to the scheme. Their costs would be subsidised. Problems of cross-subsidisation and adverse selection would then arise. Perhaps the insurance company would try to recoup the loss through other lines of business sold to the firm, or to other firms; the insurance company might not offer discounts to other firms as large as it otherwise might; or the insurance company might have to meet the excess out of profits.

In evidence given to the Commission, the Workers' Compensation and Rehabilitation Commission (WCRC) of WA maintained that actual premiums are very close to the gazetted premiums. Insurers are closely monitored by the WCRC to ensure that premiums charged are actuarially viable, with provision for incurred but not reported claims and outstanding claims. The WCRC contended that no firm's performance warranted a premium loading of more than 50 per cent of the gazetted rate, and so the cap was not actually applied.

The potential dangers of capped premium rates are exemplified by the experience of Maine in the US, in the late 1980s. Scheme costs were rising due to other aspects of the scheme, but maximum premium rates were capped at a rate which was too low for insurers to write workers' compensation business profitably. The most dramatic evidence of this problem was the growth of the

residual market.³ Originally intended to be a market of last resort, the residual market in 1991 accounted for 90 per cent of the premium. For the US as a whole the residual market has grown from 5.5 per cent of premiums in 1985 to nearly 25 per cent in 1991 (Hager 1991, p.37).

While it is acknowledged that there is nothing so dramatic occurring in any Australian jurisdiction, this experience imparts a lesson regarding premium caps. If the insurance market is competitive and/or regulation sets the formula to be used for experience rated premiums, there should be no need for premium caps. Their only effect can be to shift costs onto other parties or lines of insurance business, or the premiums of firms with relatively better claims experience.

Levy categories

Under workers' compensation levy systems, employers pay levies into a fund to meet workers' compensation payments arising under the scheme.

The levy system may be based on classifying risk of liability for costs arising from work-related injury or illness at the industry level. Every employer will be classified to an industry based on its predominant economic activity, or alternatively, every establishment of an employer may be separately classified to an industry. Another alternative is to classify industry risk at the occupation level, and allocating the levy payable by each employer according to the occupations of their workforce. Australian schemes have adopted an industry-based approach to risk classification, although Queensland will allow employers to modify their industry rate for clerical and ancillary workers.

Classifying risk by occupation provides the best theoretical opportunity for creating a 'true risk premium'. The administrative costs (including monitoring compliance) involved in determining occupations at the firm level often makes this form of classification impractical. Also, the growing trend towards multi-skilling makes classification more difficult. Industry classifications are therefore used as a proxy.

³ The residual market is made up of the firms who have been refused voluntary coverage by insurance companies because they are too risky. Insurance companies are forced to pool the risks of these firms.

G2.2 Direct assessment of risk

Mr Barry Durham⁴ (Transcript, p.2439) suggested to the Commission a new way of setting premiums, which has not been tried on a system-wide basis anywhere in the world. The proposal is to set premiums on a direct assessment of risk. The perceived advantage of the approach is that it focuses the employer's attention on risks (and thus on prevention) rather than on claims.

Robert Buchanan (Sub 151, p.4) also recommended the use of direct risk rating, but in a more limited manner. The suggestion was to experience rate large firms, and to directly risk assess medium sized firms. It was thought that directly risk assessing the very large number of small firms would be impractical.

Mr Durham's suggested basis for premium setting aims to reduce the labour-intensity of direct risk rating through a first tier of 'self-assessment'. Since most categories of risk are already known (eg manual handling, noise, and chemicals), a simple questionnaire could be developed which would help employers to identify the risks which would account for the bulk of possible claims costs. A second tier of assessment could be carried out by insurers who believe that some self-assessments were inaccurate. Since the duration of claims is another key determinant of costs, the risk-rated assessment could be combined with a bonus for rehabilitation procedures.

The Insurance Council of Australia (Transcript, p.2860) stated that self-assessment was not a feasible option. It claimed that accurate assessments would not be forthcoming.

⁴ Mr Barry Durham; formerly Chairperson of the Victorian Accident Compensation Commission, the Victorian Occupational Health and Safety Commission, and the Victorian Accident Rehabilitation Council.

H CHANGED INCENTIVES AND LIKELY BEHAVIOURAL RESPONSES

This appendix reports the results of a simulation model of a workers' compensation scheme which highlight the potential for better outcomes for workers, employers and the Australian community — if the Commission's recommendations for changes in workers' compensation arrangements in Australia were adopted.

The model simulates the incidence of work-related injury and illness (and the resulting time injured/ill workers are off work) for a hypothetical firm with a variable number of employees over any time horizon. Results for small, medium and large firms (of 10, 100 and 1000 employees respectively) are reported, extending over a 20-year time horizon (because of the potential for workers' compensation schemes to have to discharge liabilities which extend over many years).

The model keeps track of the costs incurred by injured/ill workers (such as forgone earnings, necessary medical and rehabilitation expenses, the costs of dispute-resolution and pain and suffering). The model also tracks compensation paid by schemes (to the extent that any particular set of arrangements cover the costs incurred when an employee suffers a work-related injury or illness).

Key scheme performance measures are also calculated, for example the premium that would have to be charged annually to ensure 'full funding'.

A feature of the model is that it can incorporate assumed behavioural responses of the various parties to changed arrangements (which alter safety incentives). This allows exploration of the possible effects of jurisdictions implementing the Commission's recommendations for improved safety incentives — such as requiring firms to shoulder more of the costs of work-related injury and illness than they do at present.

Results from the model suggest that, in the longer term, improved safety incentives could see marked reductions in the incidence and severity of work-related injury and illness (and therefore workers' compensation premiums) — notwithstanding that some of the results

suggest that premiums would have to rise in the short run until expected behavioural changes worked their way through the system.

Model results also suggest that the current high level of cost-shifting (onto individuals and government programs such as Medicare and social security) would be significantly reduced under the Commission's proposals.

Most of the results reported in this appendix start with a firm of 100 fit workers. Their simulated experience of work-related injury or illness is tracked through time (in this case for 20 years). For those who suffer a work-related injury or illness, a typical cycle involves being injured/becoming ill, undergoing rehabilitation and returning to work (either fully fit or able to do restricted tasks). Periods off work vary, depending on the seriousness of the injury or illness — so that, for example, a serious accident could lead to years off work. In addition, the same worker could suffer more than one injury over the 20-year time horizon. An individual worker's experience from one week to the next is governed by the underlying risk of injury/illness, which is assumed to be known. As an example, miners might face risks of, say, one chance in six that they will be injured seriously enough to be off work for a week or more. But whether or not this happens in a particular simulation is akin to throwing a die and accepting that such an injury does in fact occur if the result of this random process is a one.

The model also tracks all costs incurred by injured or ill workers and all compensation payments made to them.¹ The former include forgone earnings, medical and related costs (eg rehabilitation expenses), legal costs and pain and suffering; while the latter include workers' compensation benefits paid to injured/ill workers while they are off work, and payments made for medical and legal costs incurred. While it is difficult to place a dollar value on pain and suffering, for the purposes of the simulations reported here, injured/ill workers are assumed to be only partly compensated for such costs.

Workers whose workers' compensation benefits cease may be eligible for social security payments if they are unable to find work. These payments are also tracked over time

All costs and payments are discounted back to the present. This enables calculation of workers' compensation premiums which ensures that the scheme can discharge all its liabilities (ie the scheme is 'fully funded').

¹ In the model, injured/ill workers are assumed to fall into three categories: temporarily disabled (denoted TD in this appendix); partially (but permanently) disabled (PD); or seriously (and permanently) disabled (SD).

The model has been specially constructed to illustrate many issues raised during the course of the inquiry. In particular, it can demonstrate the potential for increased safety incentives advocated by the Commission to lead to fewer work-related injuries and illnesses (particularly serious ones) over the longer term.

Model simulations have also been run to illustrate the possible effects of:

- holding employers liable to pay a significantly more of the cost of compensating employees suffering a work-related injury or illness for much longer periods than is typically the case under current schemes (see Chapter 4);
- operating an 'injury levy wedge' whereby the nexus is broken between firms liability for work-related injury and illness and what injured/ill workers actually receive by way of compensation (see Chapter 4);
- introducing 'front-end deductibles' (also known as 'excesses') as a device for signalling to firms the importance of workers' compensation costs (and as one way of cutting scheme payments) (see Chapter 3); and
- eliminating access to common law (so that pain and suffering payments are restricted to 'Table of Injuries' payments) (see Chapter 4).

Simulations can also shed light on the efficacy of basing premiums on firm's experience of work-related injury and illness.

Inputs to running a model simulation include:

- the number of employees — runs reported here are for a representative small firm (with 10 employees) and a representative medium-sized firm (100 employees) (with one reported run for a 1000-employee firm);
- the period (in weeks) over which the simulation is to be run — runs reported here extend over 20 years (because of the potential for schemes to have to meet liabilities extending over very long periods — the 'long-tail' problem);
- remuneration levels for three categories of employees (who could be regarded, for example as managers, administrative staff or 'process workers');²

² Three categories of employee are allowed for in the model who are assumed to have earnings of \$1200, \$700 and \$500 per week respectively. In the case of a 10 employee firm it is assumed that there is one employee earning \$1200 per week, 2 earning \$500 per week and 7 earning \$500 per week. The same ratios are preserved in the case of a 100-employee firm (ie there are assumed to be 10 managers, 20 administrative staff and 70 process workers). Social security payments are assumed to average \$125 per week (set at one-quarter of the weekly earnings of the third category of worker). (The composition of the hypothetical firm, in terms of the proportion falling into the three earnings categories, or the incomes in each category could be easily altered).

- the risk of injury/illness — driven by 'conditional probabilities'³ — that (in conjunction with a random number generator) determine, from one week to the next, how many employees are fit, or have become temporarily disabled (TD), partially (but permanently) disabled (PD), or seriously (and permanently) disabled (SD);⁴
- return-to-work probabilities⁵ which determine, at the start of each week, how many disabled employees will be able to return to work in some capacity (eg

³ Although the model is stochastic (in the sense that whether or not an event happens in a particular week — such as a previously fit employee becoming temporarily disabled — is determined by generating a random value lying between zero and one and testing whether it lies within the defined range for various events to occur), the underlying probabilities driving model results are pre-determined and take the form of various conditional probabilities (eg of the form of the probability that a worker who is fit this week will become partially (but permanently) disabled next week). The following transitional probabilities underlie all but two of the simulations reported in detail in this appendix (the exceptions are the two simulations involving decreased injury/illness rates consequent on increased safety incentives being put in place). They were chosen such that — with a benefit structure very roughly based on that currently prevailing in New South Wales — the premium necessary to fully fund the workers' compensation claims for a hypothetical 100-employee firm would be approximately 1.7 per cent of the payroll (referred to as the 'base case' simulation).

	Fit	TD	PD	SD
Fit	.998963	.001	.000025	.000012
TD	.3	.6978	.002	.0002
PD	0	.002	.996	.002
SD	0	0	.002	.998

Note: The above entries are to be interpreted as follows, taking three of the entries to illustrate: .998963 is the probability that a worker who was fit last week will remain fit this week; .002 (in line 2) is the probability that a worker who was temporarily disabled last week will be classified as partially (but permanently) disabled this week; and .002 (in line 3) is the probability that a worker who was classified as seriously (and permanently) disabled last week will be classified as partially (but permanently) disabled this week. Note further that assigning 0 to three of the probabilities has the effect of preventing a worker from moving from being either PD or SD one week to being Fit the next (ie the only route back to being fit for work is via the TD category from whence there is a 3 in 10 chance of becoming fit for work in the subsequent week).

- ⁴ These are the categories which were used as the basis for the Commission's illustrative benefits package in the Draft Report. The main distinction between the PD and SD categories for the purposes of the model are that injured/ill workers falling into the latter category are more likely to be off work for longer and less likely to be able to return to work in their former or (more likely) in a restricted capacity.
- ⁵ Apart from being eventually classified as Fit (for work) once a worker has suffered an injury or illness requiring at least a week off work via the above mechanism, the model also allows injured/ill workers to return to work either fully (ie fit to return to former

to undertake 'selected duties') — taking the form, for example, of the probability that a partially (but permanently) disabled employee can resume his/her former duties in spite of their disability;

- costs incurred of various kinds by those suffering a work-related injury or illness: categories included in the model are lost income (ie forgone earnings as a result of becoming incapacitated for work); medical and related costs (such as rehabilitation expenses); legal costs; and 'pain and suffering' costs;⁶

duties) or in a more limited capacity (fit for selected duties) while they are still classified as either TD, PD or SD. The probabilities governing these types of transitions are set out below.

	Fit for former duties	Able to undertake selected duties	Unable to work
PD	.0002	.001	.9988
SD	.0001	.0005	.9994

Note: The entries are to be interpreted as follows, taking two of the entries to illustrate: .0002 is the probability that a worker who is classified as partially (but permanently) disabled will nevertheless be able to resume his/her former duties; and .9994 is the probability that a worker who is classified as seriously (and permanently) disabled will remain unable to work. Note that it is assumed that a worker classified as temporarily disabled can only return to work by being declared fit via the transition probabilities described in the preceding table (ie a TD worker cannot either resume his/her former duties nor undertake selected duties while he/she remains so classified).

- ⁶ The final input necessary to run the model is the specifics of the particular workers' compensation scheme to be simulated. Three types of costs can be compensated for in the model: lost income, medical and related costs (eg rehabilitation expenses); dispute-resolution costs (eg legal expenses) and what is usually termed 'pain and suffering' costs (eg common law awards or statutory payments under a so called Table of Injuries).

Should a worker suffer an injury or illness, it is assumed that medical and related costs (eg rehabilitation expenses) are incurred at a weekly rate which varies according to the classification into which the worker falls, namely TD, PD, SD— with such costs assumed to be ongoing until the worker regains the status of being fit for work. The same applies in the case of legal and pain and suffering costs. The values assumed (to give proportions broadly in line with NSW) for the simulations reported in the appendix are as follows.

	Medical	Legal	Pain
TD	100	0	0
PD	200	20	100
SD	400	100	200

- payments made to those suffering work-related injury or illness: categories included in the model are weekly payments (to compensate for lost income) payments to cover medical and related expenses, payments to reimburse legal costs and payments to compensate for pain and suffering (these are usually of a 'on-off' nature, but have been represented as regular weekly payments in the model);
- social security payments made to those originally suffering a work-related injury or illness but who are no longer eligible for workers' compensation;
- an appropriate (real) discount rate to deflate (constant price) estimates of future costs and payments so that all dollar values relate to the base period (to facilitate comparisons);⁷ and
- the details of the particular workers' compensation scheme to be simulated — the rate at which lost income will be compensated for, for how long, and when any stepped reductions in the rate of support occur; and the extent to which the scheme will reimburse other costs incurred (ie medical, legal and pain and suffering).

The model produces a mountain of output, much of which has had to be summarised here — so that, for example, only 'snapshots' of what is occurring are reported in the tables.⁸ The full version produces the following outputs (all of which can be printed out if desired):⁹

- Incidence of work-related injury or illness, by worker and period (tracks simulated individual experiences of workers' compensation claims over time).
- Cumulative number of weeks off work, by worker and period (tracks the number of weeks individuals have off work as a result of work-related injury or illness).
- Workforce status (fit, fit to resume former duties, able to do selected duties, unable to work), by worker and period (tracks the weekly status of

⁷ Dollar-denominated results from the model — such as lost income, other costs and compensation payments — are all in constant-value terms (ie they are already adjusted for the effects of inflation). All dollar amounts are also discounted back to the base period to facilitate comparisons between simulations and to enable calculation of premiums which, if charged, would mean that the workers compensation scheme was fully funded. In the simulations reported in this appendix a (real) discount rate of 4 per cent has been used. (Again, this could be easily changed.)

⁸ All tables report results after 100 weeks (ie approximately 2 years), 200 weeks (around 4 years), 500 weeks (roughly 10 years) and 1000 weeks (about 20 years).

⁹ The detailed results are available from the Commission on request.

individuals in terms of their ability to undertake various duties as a result of their experiences of work-related injury or illnesses, if any).

- (Present value of) lost income, by worker and period (tracks lost income for individual workers — classified as managerial, administrative or process workers — as a result of their experiences of work-related injury or illness, if any).
- (Present value of) firm payments for liability for work-related injury or illness, by worker and period (tracks payments made by insurance companies on behalf of employers as a result of their liability to compensate for lost income in relation to employees who suffer work-related injury or illness — which may be different to actual workers' compensation payments due to the operation of an 'injury levy wedge').
- (Present value of) workers' compensation payments, by worker and period (tracks payments to individuals to compensate for lost income because of work-related injury or illness).
- (Present value of) medical and rehabilitation costs incurred, by worker and period.
- (Present value of) medical payments, by worker and period.
- (Present value of) legal costs incurred, by worker and period.
- (Present value of) legal payments, by worker and period.
- (Present value of) pain and suffering costs incurred, by worker and period.
- (Present value of) pain and suffering payments, by worker and period.
- Numbers in each category (fit, temporarily disabled, partially disabled, seriously disabled) and cumulative averages, by period. Number resuming former duties, number undertaking selected duties and number unable to work, by period.
- Number and proportion of lost weeks of work, by category (fit, temporarily disabled, partially disabled, seriously disabled) and period. Cumulative average number of lost weeks of work and ratio of lost to total weeks of work, by period.
- Transitions between categories (fit, temporarily disabled, partially disabled, seriously disabled), by period.
- The following information by category (ie TD, PD and SD):
 - (Present value of) lost income and as a proportion of total lost income, by period;

(Present value of) firm payments to cover liability to compensate workers for lost income and as a proportion of total firm payments for this purpose, by period;

(Present value of) workers' compensation payments and as a proportion of total payments to compensate workers for lost income, by period;

(Present value of) social security payments and as a proportion of total compensation payments, by period;

(Present value of) medical costs and as a proportion of total medical costs, by period;

(Present value of) medical payments and as a proportion of total medical payments, by period;

(Present value of) legal costs and as a proportion of total legal costs, by period;

(Present value of) legal payments and as a proportion of total legal payments, by period;

(Present value of) pain and suffering costs and as a proportion of total pain and suffering costs, by period; and

(Present value of) pain and suffering payments and as a proportion of total pain and suffering payments, by period;

- Summary statistics as follows:

(Present value of) firm's payroll, total lost income, total firm payments (to compensate for lost income), total workers' compensation payments, any 'injury levy wedge' (equal to the difference between total firm payments and total workers' compensation payments), and total social security payments, by period;

Lost income as a proportion of total incurred costs, workers' compensation payments as a proportion of total scheme payments (ie excluding social security payments), and social security payments expressed as a proportion of total incurred costs, by period;

(Present value of) total medical costs and as a proportion of total incurred costs, (present value of) total medical payments and as a proportion of total scheme payments, (present value of) total legal costs and as a proportion of total incurred costs, (present value of) total legal payments and as a proportion of total scheme payments, (present value of) total pain and suffering costs and as a proportion of total incurred costs, and (present

value of) total pain and suffering payments and as a proportion of total scheme payments, by period;

(Present value of) total costs incurred and total scheme payments, by category (TD, PD and SD) and as a proportion of total incurred costs/scheme payments, by period;

(Present value of) total incurred costs, total scheme payments, total firm payments (to cover liability to compensate workers for lost income), overall firm payments (equal to total firm payments plus medical, legal and pain and suffering payments); and

Workers' compensation payments as a proportion of the firm's payroll, total firm payments as a proportion of the firm's payroll and total scheme payments as a proportion of the firm's payroll.

H1 Setting up a basis for comparison

In order to serve as a basis for exploring the possible effects of varying key aspects of workers' compensation arrangements, the transition and return-to-work probabilities for a 100-employee firm were varied until a premium equal to 1.7 per cent of the payroll was achieved which would be sufficient to fully fund a workers' compensation scheme with a 20-year time horizon assuming the following scheme details:

- lost income is compensated for at a rate of 95 per cent of pre-injury levels for the first 26 weeks; thereafter reducing for up to two years in total elapsed time to 75 per cent in the case of temporarily disabled workers, 80 per cent in the case of those classified as partially (but permanently) disabled, and 85 per cent in the case of the seriously (and permanently) disabled¹⁰;
- medical and legal costs are fully compensated; and
- pain and suffering costs are only half compensated.

Details of this simulation are labelled *Base case* in Tables H1 through H9 which report the results of this and seven variants on the base case (although in some cases it is more interesting to compare the results to those of other simulations in addition to the base case).

¹⁰ Reclassifications during the course of periods off work do not result in changes to the rate at which lost income is compensated for in the series of simulations reported here (on grounds that such assessments would only be undertaken periodically, if at all, during the course of a workers forced absence from work).

In the *Base case* simulation (and the four others that do not assume any behavioural responses — see below), the following work-related injuries and illnesses occur:

- worker 16 (on \$700 per week) becomes TD in week 661, PD in week 663, TD in week 689 and becomes fit in week 699 (involving more than 7 months until fit);
- worker 72 (on \$500 per week) becomes PD in week 191, SD in week 195, PD in week 716 and becomes fit in week 937 (involving more than 14 years until fit);
- worker 60 (on \$500 per week) becomes PD in week 398, TD in week 425 and becomes fit in week 426 (involving almost 6 months until fit);
- worker 81 (also on \$500 per week) becomes TD in week 187, PD in week 188, SD in week 201, PD in week 307, SD in week 691, PD in week 954, TD in week 965 and returns to work in week 966 (involving almost 15 years until fit); while
- many workers (in all three earnings categories) become TD and take varying periods off work (between one and fifteen weeks).

Table H1 reports in respect of the base case plus the other seven variants (described below), the following selected summary statistics, at the 4 snapshot periods, which in the *base case* are:

- total workers' compensation payments as a proportion of total costs incurred by injured/ill workers (indicative of the extent of cost shifting to individuals): 100 per cent after 100 weeks; 97 per cent after 200 weeks; 66 per cent after 500 weeks and 58 per cent after 1000 weeks;
- worker' compensation benefits paid for forgone earnings (lost income) expressed as a proportion of the firm's payroll: 0.22 per cent after 100 weeks; 0.50 per cent after 200 weeks; 0.62 per cent after 500 weeks and 0.52 per cent after 1000 weeks;
- firm payments necessary to discharge its total liability to compensate workers for work-related injury or illness expressed as a proportion of the firm's payroll (in most cases this is equal to the workers' compensation premium that would need to be charged by a fully funded scheme operating over the relevant period): 0.24 per cent after 100 weeks; 0.67 per cent after 200 weeks; 1.64 per cent after 500 weeks and 1.70 per cent after 1000 weeks; and

- total scheme payments to individuals expressed as a proportion of the firm's payroll: equal to the corresponding figures for firm payments necessary to discharge its total liability in this case.

Cost-shifting

Perhaps the aspect to note in particular in the base case simulation is the high proportion of costs transferred to injured/ill workers, with payments trending downward over time (reaching 58 per cent after 20 years, see Table H1). Note also that, in this simulation, social security payments are equivalent to 9 per cent of total costs incurred by injured/ill workers after 20 years — so that taxpayers are being called upon to provide not inconsiderable support to those originally suffering a work-related injury or illness (but who are no longer in receipt of workers' compensation payments).

Other results

Table H2 reports, at the four snapshot periods, the number of employees (of the initial 100 workers) who remain fit, as well as the proportion of weeks lost due to work-related injury or illness. Thus all 100 are fit at week 100; while 98 are fit at weeks 200, 500 and 1000. The corresponding numbers of lost weeks of work expressed as a proportion of total weeks that all workers could have worked if they had all remained fit over the relevant period were: 0.2, 0.6, 1.6 and 1.9 per cent respectively.

Table H3 reports the proportions, at the 4 snapshot periods, of total lost income accounted for by workers classified as TD, PD and SD. In the case of the base case simulation the proportions are:

- in respect of TD workers: 100 per cent after 100 weeks; 65 per cent after 200 weeks; 21 per cent after 500 weeks and 19 per cent after 1000 weeks;
- in respect of PD workers: 0 per cent after 100 weeks; 30 per cent after 200 weeks; 30 per cent after 500 weeks and 35 per cent after 1000 weeks; and
- in respect of SD workers: 0 per cent after 100 weeks; 5 per cent after 200 weeks; 49 per cent after 500 weeks and 46 per cent after 1000 weeks.

Table H4 reports the proportions, at the 4 snapshot periods, of firm payments necessary to meet its liability to compensate TD, PD and SD workers for lost income as a result of a work-related injury or illness (with such payments having the potential to differ from the sums which would be sufficient to compensate workers at the specified rates at which periodic workers' compensation are payable under the scheme because of the possible existence of an injury levy wedge — see section H3 below). In the base case these proportions are:

- in respect of TD workers: 100 per cent after 100 weeks; 66 per cent after 200 weeks; 44 per cent after 500 weeks and 56 per cent after 1000 weeks;
- in respect of PD workers: 0 per cent after 100 weeks; 31 per cent after 200 weeks; 17 per cent after 500 weeks and 17 per cent after 1000 weeks; and
- in respect of SD workers: 0 per cent after 100 weeks; 4 per cent after 200 weeks; 38 per cent after 500 weeks and 27 per cent after 1000 weeks.

Table H5 reports the proportions, at the 4 snapshot periods, of workers' compensation payments going to TD, PD and SD workers respectively as recompense for lost income as a result of a work-related injury or illness. In the base case these proportions are identical to those reported in Table H4, as no injury levy wedge applies in the base case.

Table H6 reports the proportions, at the 4 snapshot periods, of social security payments made to TD, PD and SD workers owing to their eventual ineligibility for continuing workers' compensation payments. In the base case these proportions are:

- in respect of TD workers: 0 per cent after 100 weeks; 0 per cent after 200 weeks; 0 per cent after 500 weeks and 0 per cent after 1000 weeks;
- in respect of PD workers: 0 per cent after 100 weeks; 0 per cent after 200 weeks; 44 per cent after 500 weeks and 46 per cent after 1000 weeks; and
- in respect of SD workers: 0 per cent after 100 weeks; 0 per cent after 200 weeks; 56 per cent after 500 weeks and 54 per cent after 1000 weeks.

Table H7 reports the components of total costs incurred by individual workers expressed as a proportion of overall costs incurred. In the base case these proportions are:

- in respect of lost income: 89 per cent after 100 weeks; 73 per cent after 200 weeks; 52 per cent after 500 weeks and 53 per cent after 1000 weeks;
- in respect of medical and related costs: 11 per cent after 100 weeks; 20 per cent after 200 weeks; 29 per cent after 500 weeks and 28 per cent after 1000 weeks; and
- in respect of legal and other dispute-resolution costs: 0 per cent after 100 weeks; 2 per cent after 200 weeks; 6 per cent after 500 weeks and 6 per cent after 1000 weeks.
- in respect of pain and suffering costs: 0 per cent after 100 weeks; 6 per cent after 200 weeks; 13 per cent after 500 weeks and 13 per cent after 1000 weeks.

Table H8 reports the components of total payments to individual workers expressed as a proportion of overall workers' compensation payments (including social security payments which are unrelated to scheme payments and which have been expressed as a proportion of total incurred costs). Inclusion of social security payments in the table means that the various percentages do not add up to 100 per cent (but they are supposed to if social security payments are ignored — the fact that this is not always the case in the various tables is due to the effects of rounding). In the base case these proportions are:

- in respect of workers' compensation payments: 89 per cent after 100 weeks; 75 per cent after 200 weeks; 38 per cent after 500 weeks and 31 per cent after 1000 weeks;
- in respect of workers' social security payments: 0 per cent after 100 weeks; 0 per cent after 200 weeks; 7 per cent after 500 weeks and 9 per cent after 1000 weeks;
- in respect of payments for medical and related costs: 11 per cent after 100 weeks; 20 per cent after 200 weeks; 43 per cent after 500 weeks and 49 per cent after 1000 weeks;
- in respect of payments for legal and other dispute-resolution costs: 0 per cent after 100 weeks; 2 per cent after 200 weeks; 9 per cent after 500 weeks and 10 per cent after 1000 weeks; and
- in respect of payments for pain and suffering costs: 0 per cent after 100 weeks; 3 per cent after 200 weeks; 10 per cent after 500 weeks and 11 per cent after 1000 weeks.

Table H9 reports the proportions, at the 4 snapshot periods, of total costs incurred by individual categories (ie TD, PD and SD). In the base case these proportions are:

- in respect of TD workers: 100 per cent after 100 weeks; 56 per cent after 200 weeks; 13 per cent after 500 weeks and 12 per cent after 1000 weeks;
- in respect of PD workers: 0 per cent after 100 weeks; 37 per cent after 200 weeks; 26 per cent after 500 weeks and 31 per cent after 1000 weeks; and
- in respect of SD workers: 0 per cent after 100 weeks; 8 per cent after 200 weeks; 61 per cent after 500 weeks and 58 per cent after 1000 weeks.

H2 Sensitivity of model results to holding firms liable to pay workers compensation for long periods (assuming no behavioural changes)

A central thrust of the Commission's proposals is that firms should be held liable for the costs of work-related injury and illness for much longer periods than is typically the case at present. This would create much greater incentives for employers to take more active steps to achieve healthier and safer workplaces than is currently the case. However, if no efforts are made to increase safety on the job (or such initiatives as are taken do not succeed in reducing the probability that workers will suffer a work-related injury or illness) workers' compensation premiums would have to increase to ensure that the scheme remains fully funded.

This second simulation (labelled *Longer firm liability (unchanged behaviour)* in the tables) illustrates the estimated outcome of increasing the maximum period of firm liability from 2 (in the base case) to 5 years (while maintaining the same step down at 26 weeks and the same rates of replacement for lost income as in the base case), assuming no behavioural responses on the part of firms in reducing the underlying probabilities of accidents/exposure to hazards. The three simulations following the next one are logical extensions of this (and the next one) — as they explore possible implications of likely behavioural responses on the part of employers and employees to changed incentives.

Salient features of the results for this simulation (as compared with the base case) are that:

- premiums have to increase by 14 per cent (from 1.70 to 1.93 per cent of the payroll) to ensure the scheme remains fully funded (Table H1);
- costs transferred to individuals decrease by 19 per cent (as a result of the ratio of payments to incurred costs rising from 58 per cent to 66 per cent at the end of the simulation period) (Table H1); and
- cost shifting to taxpayers has fallen by 33 per cent (as a result of social security payments as a proportion of total costs falling from 9 per cent in the base case to 6 per cent in this case at the end of the simulation period) (Table H8).

H3 Sensitivity of model results to longer-term liability, plus imposition of an 'injury levy wedge' (assuming no behavioural changes)

An option discussed in the report designed to both provide a strong incentive for employers to put safety first, while at the same time encouraging injured/ill workers to undergo rehabilitation and return to work as soon as practicable is to break the nexus between what firms pay to compensate workers for lost income and the amount workers actually receive. This can be done by requiring firms to pay as if workers were to be recompensed at near pre-injury levels (in this case 95 per cent) for long periods (in this case up to 5 years), but to actually compensate workers as described in the previous simulation. The relevant simulation is labelled *Longer liability plus injury levy wedge (unchanged behaviour)* in the tables.

Salient features of the results for this simulation (as compared with the preceding one) are that:

- premiums have to increase by a further 4 per cent (from 1.93 to 2.00 per cent of the payroll) for the scheme to remain fully funded (Table H1);
- costs transferred to individuals remain unchanged from the previous simulation (ie still down 19 per cent on the base case); and
- cost shifting to taxpayers also remains unchanged from the previous simulation (ie still down 33 per cent on the base case).

H4 Sensitivity of model results to longer-term liability, plus imposition of an 'injury levy wedge' (with increased return-to-work rates)

An important likely consequence of holding firms liable for work-related injury or illness for long periods is that employers will have a much bigger incentive to offer their former employees a job (or arrange for a job offer from someone else) as soon as that becomes a practical possibility for the employee — since that is one way for the firm to discharge its liability to those suffering a work-related injury or illness. Compensating injured/ill employees on a tapering scale (common to all simulations and most schemes) also provides employees with an incentive to get back to work as soon as possible.

To capture this type of likely behavioural response, this simulation (labelled *Longer liability plus injury levy wedge (with increased return-to-work rates)* in the tables) doubled the probabilities that both partially (but permanently) and seriously (and permanently) disabled former employees would return to work (if

only on a selected-duties basis) — admittedly from the very low levels that currently seem to prevail. This meant that the probability that a partially (but permanently) disabled worker could return to his or her former duties in a given week increased from a 1 in 5000 chance to a 1 in 2500 chance, while the probability that he/she could undertake selected duties increased from 1 in a 1000 to 1 in 500. The corresponding probabilities in the case of a seriously (and permanently) disabled worker doubled to 1 in 5000 and 1 in 2000 respectively.

In this simulation the following work-related injuries and illnesses occur:

- worker 63 (on \$500 per week) becomes PD in week 398, TD in week 490 and fit in week 491 (involving over one and a half years until fit);
- worker 66 (on \$500 per week) becomes TD in week 572, PD in week 574, SD in week 665, PD in week 822, TD in week 888 and becomes fit in week 889 (involving about 6 years until fit);
- worker 72 (on \$500 per week) becomes PD in week 168, SD in week 195 and becomes fit in week 393 (involving just over 4 years until fit);
- worker 81 (also on \$500 per week) becomes TD in week 187, PD in week 188, SD in week 201, PD in week 307, TD in week 405, and returns to work in week 407 (involving about 4 years until fit); while
- many workers (in all three earnings categories) become TD and take varying periods off work.

The results are fairly dramatic. Salient features of the results for this simulation (as compared with the preceding one) are that:

- premiums fall by 20 per cent (from 2.00 to 1.61 per cent of the payroll) (Table H1);
- costs transferred to individuals decrease by 59 per cent (as a result of the ratio of payments to incurred costs rising from 66 per cent to 86 per cent at the end of the simulation period) (Table H1); and
- cost shifting to taxpayers (at least via the social security system) falls to zero.

H5 Sensitivity of model results to longer-term liability, plus imposition of an 'injury levy wedge' (with decreased injury/illness rates)

Another likely response to the changed incentives for both employers and employees entailed in the Commission's recommendations is that increased

safety consciousness will mean fewer accidents in the first place — that is the incentives will have powerful preventive effects.

To capture this type of behavioural response, this simulation (labelled *Longer liability plus injury levy wedge (with decreased injury/illness rates)*) halved the probabilities that employees who were fit one week would become temporarily, partially (but permanently) or seriously (and permanently) disabled the next. This meant that the relevant transition probabilities changed from 1 in a 1000, 1 in 40 000 and 1 in 1 in 80 000; to 1 in 2000, 1 in 80 000 and 1 in 160 000 respectively.

In this simulation (and the next) the following work-related injuries and illnesses occur:

- worker 93 (on \$500 per week) becomes TD in week 577, PD in week 579, SD in week 670, PD in week 827, TD in week 890 and fit in week 893 (involving about 6 years until fit);
- other workers (in all three earnings categories) become TD and take varying periods off work.

This has an even more dramatic outcome than the effects of increased return-to-work rates reported in the previous simulation. Salient features of the results for this simulation (as compared with the one reported in Section H3) are that:

- premiums fall by 74 per cent (from 2.00 to 0.53 per cent of the payroll) (Table H1);
- costs transferred to individuals decrease by 56 per cent (as a result of the ratio of payments to incurred costs rising from 66 per cent to 85 per cent at the end of the simulation period) (Table H1);
- cost shifting to taxpayers falls to negligible levels.

H6 Sensitivity of model results to longer-term liability, plus imposition of an 'injury levy wedge' (with increased return-to-work rates and decreased injury/illness rates)

This simulation (labelled *Longer liability plus injury levy wedge (with increased return-to-work rates and decreased injury/illness rates)*) combines the increased return-to-work rates of the simulation described in Section H4 with the decreased injury/illness rates described in the preceding simulation. The results turn out to be very similar to the decreased injury/illness rates simulation, mostly because hardly anyone gets injured/ill — so that increased return-to-work rates do not have much of an opportunity to operate to cut the costs of

work-related injury or illness much beyond the effects reported in the previous simulation.

H7 Sensitivity of model results to allowing some 'front-end deductibles (assuming no behavioural changes)

Alternative incentives on employers to increase their emphasis on maintaining healthy and safe workplaces is for insurers not insure employers against the costs of work-related injury or illness for an initial period.

To capture the flavour of the likely consequences of such a 'front-end-deductibles' approach, this simulation (labelled *Front end deductibles (unchanged behaviour)* in the tables) held employers uninsurably liable to recompense injured/ill employees (at the rate of 95 per cent of pre-injury earnings) for the first week off work, irrespective of the seriousness of any disability sustained.

Salient features of the results for this simulation (as compared with the base case) are that:

- premiums fall by 5 per cent (from 1.70 to 1.61 per cent of the payroll — in this simulation it is the ratio of total scheme payments to the payroll (rather than total firm payments over the payroll) which indicates the premium necessary to fully fund the scheme, because no injury levy wedge is operating and the scheme does not reimburse injured/ill employees for their first week off work) (Table H1);
- costs transferred to individuals in fact remain the same as in the base case — in spite of total payments as a proportion of total costs falling from 58 per cent in the base case to 55 per cent in this one — since lost income in the first week is made good by the firm (which does not show up in the calculated ratio);
- there is a negligible effect on cost shifting to taxpayers.

H8 Sensitivity of model results to eliminating access to common law (assuming no behavioural changes)

One of the Commission's recommendations is to remove access to remedies at common law, substituting instead statutory payments according to an agreed 'Table of Injuries'. This is difficult to simulate because the overall effect on costs is uncertain. However, the Commission is confident that overall costs will fall, and has proxied this possible effect by decreasing pain and suffering

compensation payments to the partially (but permanently) disabled from the equivalent of \$100 for every week off work down to \$70, with the corresponding figures for the seriously (and permanently) disabled down from \$200 to \$140 per week. The results of this simulation are labelled *No access to common law (unchanged behaviour)* in the tables.

Salient features of the results for this simulation (as compared with the base case) are that:

- premiums fall by 4 per cent (from 1.70 to 1.64 per cent of the payroll) (Table H1);
- costs transferred to individuals increases slightly (Table H1);
- cost shifting to taxpayers also remains unchanged.

H9 Experience as a guide to setting premiums

An issue for insurance companies is how to set workers' compensation premiums for a defined benefit structure. The basic problem is that the underlying risk that the employees of a firm will suffer a work-related injury or illness is unknowable. One obvious basis for setting such premiums is the experience of the firm (if any). But how good a guide to the underlying risks is a firm's experience with work-related injury and illness? For example the firm's experience may be unrepresentative of the underlying risks due to 'bad luck' (and it is to guard against this possibility that there is a demand for insurance services, particularly 'catastrophe insurance').

In the context of this simulation model, this issue can be explored empirically by repeatedly running the model (keeping the risks the same) using a different starting number for the random number generator each time. Such a series of experiments can be run for different sized firms choosing an appropriate time horizon. For the purposes of shedding some light on the issue one simulation was run over 20 years for a firm with 1000 employees, and 8 each for firms of 10 and 100 employees respectively again over a 20 year time horizon (and including calculating the average premium over the 8 runs). Each simulation used the benefit structure underlying the base case simulation.

Results (in terms of the premium necessary to fully fund the scheme using a 20 year time horizon — expressed as a percentage of the payroll) were as follows. These results exemplify the statistical law of large numbers in operation, with greater variability being exhibited by small firms as compared with larger ones, and with the average for larger firms better approximating the underlying risks (taken to be best approximated by the result for the 1000 employee firm) than

does the average for smaller firms. It is, for these statistical reasons that actuaries devise formulae for calculating workers compensation premiums which give increasing weight to experience as the number of employees in the firm increases. It may also partly explain why larger firms opt to self-insure, perhaps guarding against down-side risks by only insuring themselves against events of a catastrophic nature.

The relationship between firm size and premiums

Number of employees		Premium necessary to fully fund scheme	Average
1000		1.5	1.5
100	Base	1.7	
	Run 2	1.9	
	Run 3	1.2	
	Run 4	2.2	
	Run 5	1.1	
	Run 6	0.4	
	Run 7	0.5	
	Run 8	0.7	1.2
10	Run 1	4.5	
	Run 2	0.3	
	Run 3	0.3	
	Run 4	0.7	
	Run 5	0.1	
	Run 6	0.2	
	Run 7	0.7	
	Run 8	0.3	0.9

Source: Model simulations.

**Table H1 Summary statistics
(Per cent)**

Simulation	Category	Situation after week:			
		100	200	500	1000
<i>Base case</i>	Pay/cost	100	97	66	58
	WC/proll	.22	.50	.62	.52
	FP/proll	.24	.67	1.64	1.70
	TP/proll	.24	.67	1.64	1.70
<i>Longer firm liability (unchanged behaviour)</i>	Pay/cost	100	97	81	66
	WC/proll	.22	.50	1.01	.75
	FP/proll	.24	.67	2.10	1.93
	TP/proll	.24	.67	2.10	1.93
<i>Longer liability plus injury levy wedge (unchanged behaviour)</i>	Pay/cost	100	97	81	66
	WC/proll	.22	.50	1.01	.75
	FP/proll	.24	.67	2.11	2.00
	TP/proll	.24	.67	2.02	1.93
<i>Longer liability plus injury levy wedge (with increased return-to-work rates)</i>	Pay/cost	100	97	88	86
	WC/proll	.22	.50	1.02	.89
	FP/proll	.24	.67	1.93	1.61
	TP/proll	.24	.67	1.84	1.55
<i>Longer liability plus injury levy wedge (with decreased injury/illness rates)</i>	Pay/cost	100	100	100	85
	WC/proll	.16	.15	.19	.31
	FP/proll	.18	.17	.21	.53
	TP/proll	.18	.17	.21	.51
<i>Longer liability plus injury levy wedge (with increased return-to-work rates and decreased injury/illness rates)</i>	Pay/cost	100	100	100	85
	WC/proll	.16	.15	.19	.31
	FP/proll	.18	.17	.21	.53
	TP/proll	.18	.17	.21	.51
<i>Front end deductibles (unchanged behaviour)</i>	Pay/cost	68	82	62	55
	WC/proll	.14	.40	.53	.43
	FP/proll	.24	.67	1.64	1.70
	TP/proll	.16	.56	1.55	1.61
<i>No access to common law (unchanged behaviour)</i>	Pay/cost	100	97	67	59
	WC/proll	.22	.50	.62	.52
	FP/proll	.24	.66	1.59	1.64
	TP/proll	.24	.66	1.59	1.64

Note: **Pay/cost** stands for total payments as a proportion of total costs
WC/proll stands for workers' compensation payments as a proportion of the payroll; **FP/proll** stands for total firm liabilities as a proportion of the payroll; and **TP/proll** stands for total payments as a proportion of the payroll.

Source: Model simulations.

Table H2 Number of fit workers and proportion of weeks lost due to

work-related injury or illness (100 worker firm)					
Simulation	Units	Situation after week:			
		100	200	500	1000
<i>Base case</i>	<i>No.</i>	100	98	98	98
	<i>Propn (%)</i>	0.2	0.6	1.6	1.9
<i>Longer firm liability (unchanged behaviour)</i>	<i>No.</i>	100	98	98	98
	<i>Propn (%)</i>	0.2	0.6	1.6	1.9
<i>Longer liability plus injury levy wedge (unchanged behaviour)</i>	<i>No.</i>	100	98	98	98
	<i>Propn (%)</i>	0.2	0.6	1.6	1.9
<i>Longer liability plus injury levy wedge (with increased return-to-work rates)</i>	<i>No.</i>	100	98	100	99
	<i>Propn (%)</i>	0.2	0.6	1.4	1.1
<i>Longer liability plus injury levy wedge (with decreased injury/illness rates)</i>	<i>No.</i>	100	100	100	99
	<i>Propn (%)</i>	0.1	0.1	0.2	0.5
<i>Longer liability plus injury levy wedge (with increased return-to-work rates and decreased injury/illness rates)</i>	<i>No.</i>	100	100	100	99
	<i>Propn (%)</i>	0.1	0.1	0.2	0.5
<i>Front end deductibles (unchanged behaviour)</i>	<i>No.</i>	100	98	98	98
	<i>Propn (%)</i>	0.2	0.6	1.6	1.9
<i>No access to common law (unchanged behaviour)</i>	<i>No.</i>	100	98	98	98
	<i>Propn (%)</i>	0.2	0.6	1.6	1.9

Source: Model simulations.

Table H3 Proportion of total lost income accounted for by workers suffering various types of disablement (100 worker firm) (Per cent)

Simulation	Category	Situation after week:			
		100	200	500	1000
<i>Base case</i>	TD	100	65	21	19
	PD	0	30	30	35
	SD	0	5	49	46
<i>Longer firm liability (unchanged behaviour)</i>	TD	100	65	21	19
	PD	0	30	30	35
	SD	0	5	49	46
<i>Longer liability plus injury levy wedge (unchanged behaviour)</i>	TD	100	65	21	19
	PD	0	30	30	35
	SD	0	5	49	46
<i>Longer liability plus injury levy wedge (with increased return-to-work rates)</i>	TD	100	65	28	29
	PD	0	31	30	31
	SD	0	5	43	40
<i>Longer liability plus injury levy wedge (with decreased injury/illness rates)</i>	TD	100	100	100	44
	PD	0	0	0	28
	SD	0	0	0	28
<i>Longer liability plus injury levy wedge (with increased return-to-work rates and decreased injury/illness rates)</i>	TD	100	100	100	44
	PD	0	0	0	28
	SD	0	0	0	28
<i>Front end deductibles (unchanged behaviour)</i>	TD	100	65	21	19
	PD	0	30	30	35
	SD	0	5	49	46
<i>No access to common law (unchanged behaviour)</i>	TD	100	65	21	19
	PD	0	30	30	35
	SD	0	5	49	46

Note: **TD** denotes a worker who is temporarily disabled, **PD** partially (but permanently) disabled, and **SD** seriously (and permanently) disabled.

Source: Model simulations.

Table H4 Proportion of firm payments for workers' compensation liability, by category of disability (100 worker firm) (Per cent)

Simulation	Category	Situation after week:			
		100	200	500	1000
<i>Base case</i>	TD	100	66	44	56
	PD	0	31	17	17
	SD	0	4	38	27
<i>Longer firm liability (unchanged behaviour)</i>	TD	100	66	27	39
	PD	0	31	27	25
	SD	0	4	46	36
<i>Longer liability plus injury levy wedge (unchanged behaviour)</i>	TD	100	65	25	36
	PD	0	30	28	26
	SD	0	4	47	38
<i>Longer liability plus injury levy wedge (with increased return-to-work rates)</i>	TD	100	65	28	31
	PD	0	30	30	29
	SD	0	4	42	40
<i>Longer liability plus injury levy wedge (with decreased injury/illness rates)</i>	TD	100	100	100	48
	PD	0	0	0	21
	SD	0	0	0	30
<i>Longer liability plus injury levy wedge (with increased return-to-work rates and decreased injury/illness rates)</i>	TD	100	100	100	48
	PD	0	0	0	21
	SD	0	0	0	30
<i>Front end deductibles (unchanged behaviour)</i>	TD	100	66	44	56
	PD	0	31	17	17
	SD	0	4	38	27
<i>No access to common law (unchanged behaviour)</i>	TD	100	66	44	56
	PD	0	31	17	17
	SD	0	4	38	27

Note: **TD** denotes a worker who is temporarily disabled, **PD** partially (but permanently) disabled, and **SD** seriously (and permanently) disabled.

Source: Model simulations.

Table H5 Proportion of workers' compensation payments to individuals, by category of disability (100 worker firm) (Per cent)

Simulation	Category	Situation after week:			
		100	200	500	1000
<i>Base case</i>	TD	100	66	44	56
	PD	0	31	17	17
	SD	0	4	38	27
<i>Longer firm liability (unchanged behaviour)</i>	TD	100	66	27	39
	PD	0	31	27	25
	SD	0	4	46	36
<i>Longer liability plus injury levy wedge (unchanged behaviour)</i>	TD	100	66	27	39
	PD	0	31	27	25
	SD	0	4	46	36
<i>Longer liability plus injury levy wedge (with increased return-to-work rates)</i>	TD	100	66	30	33
	PD	0	31	29	28
	SD	0	4	41	39
<i>Longer liability plus injury levy wedge (with decreased injury/illness rates)</i>	TD	100	100	100	51
	PD	0	0	0	20
	SD	0	0	0	29
<i>Longer liability plus injury levy wedge (with increased return-to-work rates and decreased injury/illness rates)</i>	TD	100	100	100	51
	PD	0	0	0	20
	SD	0	0	0	29
<i>Front end deductibles (unchanged behaviour)</i>	TD	100	58	35	48
	PD	0	37	20	20
	SD	0	5	45	33
<i>No access to common law (unchanged behaviour)</i>	TD	100	66	44	56
	PD	0	31	17	17
	SD	0	4	38	27

Note: **TD** denotes a worker who is temporarily disabled, **PD** partially (but permanently) disabled, and **SD** seriously (and permanently) disabled.

Source: Model simulations.

Table H6 Proportion of social security payments to individuals, by category of disability (100 worker firm) (Per cent)

Simulation	Category	Situation after week:			
		100	200	500	1000
<i>Base case</i>	TD	0	0	0	0
	PD	0	0	44	46
	SD	0	0	56	54
<i>Longer firm liability (unchanged behaviour)</i>	TD	0	0	0	0
	PD	0	0	42	46
	SD	0	0	58	53
<i>Longer liability plus injury levy wedge (unchanged behaviour)</i>	TD	0	0	0	0
	PD	0	0	42	46
	SD	0	0	58	53
<i>Longer liability plus injury levy wedge (with increased return-to-work rates)</i>	TD	0	0	0	7
	PD	0	0	0	93
	SD	0	0	0	0
<i>Longer liability plus injury levy wedge (with decreased injury/illness rates)</i>	TD	0	0	0	7
	PD	0	0	0	93
	SD	0	0	0	0
<i>Longer liability plus injury levy wedge (with increased return-to-work rates and decreased injury/illness rates)</i>	TD	0	0	0	7
	PD	0	0	0	93
	SD	0	0	0	0
<i>Front end deductibles (unchanged behaviour)</i>	TD	0	0	0	0
	PD	0	0	44	46
	SD	0	0	56	54
<i>No access to common law (unchanged behaviour)</i>	TD	0	0	0	0
	PD	0	0	44	46
	SD	0	0	56	54

Note: **TD** denotes a worker who is temporarily disabled, **PD** partially (but permanently) disabled, and **SD** seriously (and permanently) disabled.

Source: Model simulations.

Table H7 **Components of total costs incurred by individuals**
(Per cent)

Simulation	Category	Situation after week:			
		100	200	500	1000
<i>Base case</i>	Income	89	73	52	53
	Medical	11	20	29	28
	Legal	0	2	6	6
	Pain	0	6	13	13
<i>Longer firm liability (unchanged behaviour)</i>	Income	89	73	52	53
	Medical	11	20	29	28
	Legal	0	2	6	6
	Pain	0	6	13	13
<i>Longer liability plus injury levy wedge (unchanged behaviour)</i>	Income	89	73	52	53
	Medical	11	20	29	28
	Legal	0	2	6	6
	Pain	0	6	13	13
<i>Longer liability plus injury levy wedge (with increased return-to-work rates)</i>	Income	89	73	54	55
	Medical	11	20	28	27
	Legal	0	2	5	5
	Pain	0	6	13	12
<i>Longer liability plus injury levy wedge (with decreased injury/illness rates)</i>	Income	90	87	87	61
	Medical	10	13	13	25
	Legal	0	0	0	4
	Pain	0	0	0	10
<i>Longer liability plus injury levy wedge (with increased return-to-work rates and decreased injury/illness rates)</i>	Income	90	87	87	61
	Medical	10	13	13	25
	Legal	0	0	0	4
	Pain	0	0	0	10
<i>Front end deductibles (unchanged behaviour)</i>	Income	89	73	52	53
	Medical	11	20	29	28
	Legal	0	2	6	6
	Pain	0	6	13	13
<i>No access to common law (unchanged behaviour)</i>	Income	89	74	54	55
	Medical	11	20	30	30
	Legal	0	2	6	6
	Pain	0	4	10	10

Note: **Income** is shorthand for lost income (ie income forgone because of a work-related injury or illness; **Medical** stands for medical and related expenses (eg rehabilitation expenses); and **Pain** includes suffering.

Source: Model simulations.

**Table H8 Components of total payments to individuals
(Per cent)**

Simulation	Category	Situation after week:			
		100	200	500	1000
<i>Base case</i>	WC	89	75	38	31
	Soc Sec*	0	0	7	9
	Medical	11	20	43	49
	Legal	0	2	9	10
	Pain	0	3	10	11
<i>Longer firm liability (unchanged behaviour)</i>	WC	89	75	50	39
	Soc Sec*	0	0	2	6
	Medical	11	20	35	43
	Legal	0	2	7	8
	Pain	0	3	8	10
<i>Longer liability plus injury levy wedge (unchanged behaviour)</i>	WC	89	75	50	39
	Soc Sec*	0	0	2	6
	Medical	11	20	35	43
	Legal	0	2	7	8
	Pain	0	3	8	10
<i>Longer liability plus injury levy wedge (with increased return-to-work rates)</i>	WC	89	75	55	56
	Soc Sec*	0	0	0	0
	Medical	11	20	31	32
	Legal	0	2	6	6
	Pain	0	3	7	7
<i>Longer liability plus injury levy wedge (with decreased injury/illness rates)</i>	WC	90	87	87	60
	Soc Sec*	0	0	0	1
	Medical	10	13	13	29
	Legal	0	0	0	5
	Pain	0	0	0	6
<i>Longer liability plus injury levy wedge (with increased return-to-work rates and decreased injury/illness rates)</i>	WC	90	87	87	60
	Soc Sec*	0	0	0	1
	Medical	10	13	13	29
	Legal	0	0	0	5
	Pain	0	0	0	6
<i>Front end deductibles (unchanged behaviour)</i>	WC	84	71	34	27
	Soc Sec*	0	0	6	9
	Medical	16	24	46	51
	Legal	0	2	9	10
	Pain	0	4	11	12
<i>No access to common law (unchanged behaviour)</i>	WC	89	76	39	32
	Soc Sec*	0	0	7	9
	Medical	11	21	45	50
	Legal	0	2	9	10
	Pain	0	2	7	8

Notes: **WC** is shorthand for workers' compensation weekly payments
Soc Sec stand for social security; **Medical** stands for medical and related
 expenses (eg rehabilitation expenses); and **Pain** includes suffering.
 * Components add to more than 100 per cent because social security
 payments are not part of workers' compensation payment systems.

Source: Model simulations.

Table H9 **Proportion of total costs incurred by individuals, by category of disability (100 worker firm) (Per cent)**

Simulation	Category	Situation after week:			
		100	200	500	1000
<i>Base case</i>	TD	100	56	13	12
	PD	0	37	26	31
	SD	0	8	61	58
<i>Longer firm liability (unchanged behaviour)</i>	TD	100	56	13	12
	PD	0	36	26	30
	SD	0	8	61	58
<i>Longer liability plus injury levy wedge (unchanged behaviour)</i>	TD	100	56	13	12
	PD	0	36	26	30
	SD	0	8	61	58
<i>Longer liability plus injury levy wedge (with increased return-to-work rates)</i>	TD	100	56	17	19
	PD	0	36	27	28
	SD	0	8	56	53
<i>Longer liability plus injury levy wedge (with decreased injury/illness rates)</i>	TD	100	100	100	31
	PD	0	0	0	28
	SD	0	0	0	41
<i>Longer liability plus injury levy wedge (with increased return-to-work rates and decreased injury/illness rates)</i>	TD	100	100	100	31
	PD	0	0	0	28
	SD	0	0	0	41
<i>Front end deductibles (unchanged behaviour)</i>	TD	100	56	13	12
	PD	0	36	26	30
	SD	0	8	61	58
<i>No access to common law (unchanged behaviour)</i>	TD	100	57	13	12
	PD	0	36	26	31
	SD	0	8	61	57

Note: **TD** denotes a worker who is temporarily disabled, **PD** partially (but permanently) disabled, and **SD** seriously (and permanently) disabled.

Source: Model simulations.

I BENCHMARKING WORKERS' COMPENSATION AND OHS PERFORMANCE

In the absence of direct competition, 'yardstick' competition — from setting benchmarks and comparing performance — can provide a valuable substitute. Effective benchmarking is valuable too, for invigorating the pursuit of best practice in workers compensation and OHS in Australia.

I1 Why is benchmarking important?

Performance benchmarking can be formally defined as:

... the continuous process of measuring products, services, and practices against the toughest competitors or those companies recognized as industry leaders. (Camp 1989, p.10)

The objective of benchmarking:

... is to identify best practice and to measure the gap between actual performance and best practice performance. (Whiteman & Pearson 1993)

In the absence of direct competition between schemes — apart from competition to attract marginal changes in employment and production — 'yardstick' competition can provide a valuable substitute. The Victorian Department of Premier and Cabinet (DP&C, Sub 208, p.19) stated that:

A harmonised rather than uniform national system of workers' compensation could provide improved outcomes without limiting the scope for positive competitive differentiation between schemes. Outcomes shall be determined on the basis of national and international benchmarks.

Comprehensive, nationally consistent benchmarks would provide increased transparency and comparability of workers' compensation and OHS performance, with system participants, especially governments, scheme administrators, employers and service providers being able to compare the relative efficiency and effectiveness of schemes in order to identify and emulate best practice. DP&C (Sub 208, p.19) also stated that:

Achievement of Best Practice will require the development of a comprehensive and flexible national data base. Such a facility would allow the monitoring of trends on a national level and the development of national performance indices. It would also provide a planning tool for individual State schemes to improve their performance in particular areas.

In a broader context, benchmarking can also be applied on an international level, to place Australian performance in a global perspective.

I2 Impediments to benchmarking

The disparate and interrelated nature of existing workers' compensation arrangements, and to some extent OHS regulation, frustrates the task of effective benchmarking on a national level. Notable among the problems and impediments associated with national and international benchmarking are:

- diverse scheme structures — differences in the degree of cost shifting obscure the true measure of performance;
- inconsistent definitions — different definitions, for example for 'eligibility' and 'injury', dilute the usefulness of benchmarking to the extent that performance indicators fail to reflect comparable costs and/or occurrences;
- non-standardised classifications — different classifications, for example, by 'industry' and 'occupation', impede comparability on a disaggregated level;
- non-integrated data collection — dissimilar methods of data collection limit the usefulness of benchmarking inasmuch as performance indicators are not generated in the same way;
- international exclusion — for Australia to be included in valid international comparisons requires a degree of harmonisation with overseas data collection standards; and
- reliability of data — data involved in generating performance measures may be subject to both sampling error and non-sampling errors¹.

I3 A national approach to benchmarking

I3.1 Present efforts towards benchmarking

Present workers' compensation and OHS arrangements in Australia do not include a comprehensive national approach to performance benchmarking.

Worksafe Australia, through its National Data Set (NDS) program and Rehabilitation Task Group (RTG), are working towards benchmarking compensation based statistics and identifying best practice in occupational

¹ Sampling errors are the result of the variability that occurs by chance, because the sample rather than the population, is surveyed. Non-sampling errors may occur because of errors in reporting, recording and processing of data.

rehabilitation, respectively. In addition, some workers' compensation and OHS authorities apply benchmarking principles as a part of their own data collection and performance monitoring responsibilities.

A number of benchmarking studies have been conducted by various separate organisations. These studies have focused on a limited number of schemes or parts of schemes — the most notable examples being a series of benchmarking studies conducted by the Boston Consulting Group for the Victorian WorkCover Authority (formerly WorkCare).

The HWAC, at their September 1993 meeting supported the development of comprehensive and integrated data base and its effective use to achieve prevention, rehabilitation and return to work objectives.

13.2 The requirements of a national approach

A national approach to benchmarking requires the development of a framework for performance monitoring and identification of best practice for all workers' compensation and OHS schemes periodically. An example of such an approach is the system maintained by the National Association of Insurance Commissioners in the US which allows benchmarking of State schemes there (Sub 208, p.19).

Worksafe's NDS program plans to supplement compensation based statistics with OHS based data, providing a substantial start to implementing a national approach to benchmarking. Implied in this is a nationally consistent code of practice for notification of accidents, similar to that being pursued by the ILO and the European Community, as a part of the move toward harmonisation of occupational injury statistics.

Performance measures need to be consistent and comparable across schemes/jurisdictions, and segregated on the basis of the various parts of workers' compensation and OHS regulatory structures.

The Commission envisages a single body (such as the proposed National Workers' Compensation Authority or Worksafe, which already possess substantial expertise in the area) which would administer and review a national benchmarking program on an ongoing basis.

Such an approach would be consistent in principle, and similar in practise, to that been conducted by the Steering Committee on National Performance Monitoring of Government Trading Enterprises (Steering Committee, 1993). That is, all relevant State, Territory and Commonwealth Governments must be in agreement with, and participate in the evolution of such a program.

14 Possible performance indicators

The type of benchmarking envisaged by the Commission requires a set of indicators which inform system participants of:

- the degree to which schemes are achieving their objectives over time (or relative dynamic effectiveness); and
- the cost at which schemes are achieving their objectives over time (or relative dynamic efficiency).

A broad range of indicators is required to achieve this. Some of these indicators are already published on a national basis, but effective benchmarking requires disaggregation at the scheme/jurisdictional level.

The following tables display a range of possible performance indicators which could be applicable to benchmarking workers' compensation and OHS performance.

Table I1 shows some indicators of administrative efficiency and effectiveness, designed to reflect scheme benefits, common law, dispute resolution, administration, rehabilitation and OHS.

Table I1 **Benchmarks of scheme efficiency and effectiveness for workers' compensation and OHS***

<i>Benchmark/ Indicator</i>	<i>Numerator data</i>	<i>Denominator data</i>
Benefits per premium dollar	benefits paid	premiums paid
Average benefits	benefits paid	number of non-common law claims
Average claims duration	total days / weeks lost	number of claims
Settlements per premium dollar	common law settlements paid	premiums paid
Average settlements	common law settlements paid	number of common law claims
Legal costs per dollar of settlement	common legal costs	common law settlements paid
Dispute resolution costs per premium dollar	dispute resolution costs	premiums paid
Average dispute resolution cost	dispute resolution costs	number of disputes
Disputes as a proportion of claims	number of disputes	number of claims

Dispute resolution costs per dollar of benefits	dispute resolution costs	benefits paid
Dispute reversed/upheld as a proportion of total disputes	number of disputes reversed/upheld	number of disputes
Average dispute duration by dispute type	total days/weeks	number of disputes
Administration costs per premium dollar	administration costs	premiums paid
Average administration cost (per claim)	administration costs	number of claims
Administration costs per dollar of benefits	administration costs	benefits paid
Medical and rehabilitation costs per premium dollar	medical and rehabilitation costs	premiums paid
Medical and rehabilitation costs as a proportion of benefits	medical and rehabilitation costs	benefits paid
Average medical cost	medical costs	number of claims
Average rehabilitation cost	rehabilitation costs	number of rehabilitation cases
Ratio of workers compensation medical fee schedule to Medicare schedule	workers' compensation fee schedule	Medicare fee schedule
Ratio of rehabilitation costs to cost savings	rehabilitation costs	claims cost saved
Return to work rate	number of rehabilitation cases returned to work	number of rehabilitation cases
Correlation ^a between OHS spending and accident rates	OHS expenditure	number of accidents
Number of work place committees as a proportion of employers/employees ^b	number of workplace committees	number of employers/employees
Number of trained OHS representatives as a proportion of employers/ employees ^b	number of trained OHS representatives	number of employers/employees
Number of OHS personnel as a proportion of employers/ employees ^b	number of OHS personnel	number of employers/employees

Number of workplaces where OHS is a key management issue as a proportion of workplaces ^b	number of workplaces where OHS is a key management issue	number of workplaces
Number of satisfied claimants as a proportion of the total	number of satisfied claimants	number of claimants
Number of satisfied employers as a proportion of those involved with a claim	number of satisfied employers	number of employers involved in a claim

* Some schemes already generate some of the above indicators.

a A model is required to ascertain the correlation between changes in OHS spending and accidents rates.

b Worksafe Australia (Sub 176, p.3).

Source: Various annual reports and data publications

Table I2 shows indicators of efficiency exposing the costs of workers compensation as a proportion of other costs. These are currently generated by Worksafe on a national basis (see Worksafe 1993a).

Table I2 Benchmarks of efficiency in workers compensation and occupational health and safety *

<i>Benchmark/ Indicator</i>	<i>Numerator data</i>	<i>Denominator data</i>
Ratio of direct costs to indirect costs	claims costs	indirect costs
Claims costs as a proportion of output	claims costs	gross domestic product
Claims costs as a proportion of labour costs by industry and occupation	claims costs	labour costs
Average claims costs per employee by industry and occupation	claims cost	number of employees
Average premium rate by industry and occupation	premiums paid	payroll / wages and salaries

* Worksafe, as a part of the NDS program, currently publish indicators of this type on a national basis only, and plan to disaggregate on a State basis in the future.

Source: Adapted from various Worksafe data publications

Table I3 shows a range of indicators of effectiveness in accident prevention and compensation. These are currently published by Worksafe on a national basis (Worksafe 1993a).

Table I3 **Benchmarks of effectiveness in occupational health and safety***

<i>Benchmark/ Indicator</i>	<i>Numerator data</i>	<i>Denominator data</i>
Occupational fatality rate by industry and occupation	number of fatalities by industry and occupation	per (x) hours worked / per (x) wage & salary earners
Occupational fatality rate by agent ^a , nature ^b , type ^c , and demographics ^d	number of fatalities by agent, nature, type, and demographics	per (x) hours worked / per (x) wage & salary earners
Occupational injury rate by industry and occupation	number of injuries by industry and occupation	per (x) hours worked / per (x) wage & salary earners
Occupational injury rate by agent ^a , nature ^b , type ^c , and demographics ^d	number of injuries by agent, nature, type, and demographics	per (x) hours worked / per (x) wage & salary earners
Occupational disease rate by industry and occupation	number of disease by industry and occupation	per (x) hours worked / per (x) wage & salary earners
Occupational disease rate by agent ^a , nature ^b , type ^c , and demographics ^d	number of disease by agent, nature, type, and demographics	per (x) hours worked / per (x) wage & salary earners
Time lost by industry and occupation	days / weeks lost by industry and occupation	proportion of days / weeks worked
Time lost by agent ^a , nature ^b , type ^c , and demographics ^d	days / weeks lost by agent, nature, type, and demographics	proportion of days / weeks worked

* Worksafe, as apart of the NDS program, currently publish indicators of this type on a national basis only, and plan to disaggregate on a State basis in the future.

a *Agent* refers to the object, substance or circumstance most closely associated with the injury or disease.

b *Nature* refers to the nature of injury and diseases classification.

c *Type* refers to the type of accident or the manner of contact of the injured person with the object or substance or exposure or the movement of the injured person which resulted in the injury or disease.

d *Demographics* refers to age and gender.

Source: Adapted from various Worksafe data publications

J OCCUPATIONAL HEALTH AND SAFETY SURVEY DATA

The Commission sought information on occupational health and safety performance in each jurisdiction. To this end, a survey questionnaire was sent to the occupational health and safety authority in each jurisdiction and to Worksafe. This appendix contains the responses to that survey.

J1 Worksafe Questionnaire

Table J1 Total occupational injuries and diseases 1986-87 – 1991-92 (national)

	1986-87 ^a	1987-88	1988-89	1989-90	1990-91	1991-92 ^d
Injuries						
fatalities	*	306 ^b	*	*	343	170
other	169 792	*	*	*	159 665	75 988
total	169 792	*	*	*	160 009	76 158
Disease						
fatalities	*	196	*	*	215	54
other	*	*	*	*	19 480	15 686
total	*	*	*	*	19 695	15 740
Total	*	*	*	*	182 973 ^c	93 388

* Not available.

a Excludes NT, injuries to Commonwealth employees and to most of the self employed.

b Excludes Comcare.

c Total does not equal total of injuries and diseases due to the inclusion of uncoded claim forms and commuting accidents.

d NSW, WA, SA, NT and Comcare only. Total includes cases where injury or disease status not known.

Source: Industry Commission 1993, Survey B

Table J2 Nature of injury 1986-97 – 1991-92 (national)*

<i>Nature of injury</i>	<i>1986-87^a</i>	<i>1991-92^b</i>		<i>1986-87^a</i>	<i>1991-92^b</i>
Fracture	16 286	9 086	Burns	4 288	1 905
Dislocation	1 407	632	Poisonings	281	273
Sprains and strains of joints and adjacent muscles	93 258	41 771	Effects of weather, exposure and related conditions	98	127
Concussion and other intracranial injury	604	423	Asphyxia ^c	35	*
Internal injury of chest, abdomen and pelvis	3 130	104	Effects of electric current ^d	92	*
Open wound	23 823	10 232	Multiple injuries	1 599	994
Superficial injury	3 453	1 190	Other	2 914	994
Contusion with intact skin surface and crushing injury	18 524	273	Total	169 792	6 158

* Data for 1987-88 – 1990-91 is not available.

a Excludes the NT, injuries to Commonwealth employees and to most of the self employed.

b NSW, WA, SA, NT, and Comcare only. Total includes cases where nature of injury not known and excludes 15740 disease cases and 1490 cases where injury or disease status not known

c Asphyxia not separately coded in type of occurrence classification.

d Effects of electric current separately coded in type of occurrence classification.

Source: Industry Commission 1993, Survey B

Table J3 Type of accident 1986-87 – 1991-92 (national)*

<i>Type of accident</i>	<i>1986-87^a</i>	<i>1991-92^b</i>
Fall of a person	37 138	17 857
Falling object or substance	8 705	4 110
Stepping on, striking against or struck by object	34 321	15 273
Caught in or between objects	10 896	4192
Overexertion or physical stress movement	66 808	31 425
Other types of accident	13 227	20 531
Total	171 095	93 388

* Data for 1987-88 – 1991-92 not available.

a Includes NT data for the period 1 January 1987 to 30 June 1987. Excludes injuries to Commonwealth employees to most of the self employed.

b NSW, WA, SA, NT and Comcare only.

Source: Industry Commission 1993, Survey B

Table J4 Accident by industry 1986-87 – 1991-92 (national)

<i>Type of industry</i>	<i>1986-87 ^a</i>	<i>1991-92 ^b</i>
Agriculture, forestry, fishing and hunting	6 239	796
Mining	8 437	4 412
Manufacturing	53 920	20 771
Electricity, gas and water	5 101	2 004
Construction	19 582	8 448
Wholesale and retail trade	21 331	11 204
Transport and storage	13 179	7 613
Communication	^c	29
Finance, property and business services	5 406	5 132
Public administration	5 650	8 856
Community services	23 644	11 905
Recreation, personal and other services	7 818	4 737
Total	171 095 ^d	93 388 ^e

* Not available.

a Includes NT data for the period 1 January 1987 to 30 June 1987. Excludes injuries to Commonwealth employees and to most of the self employed.

b NSW, WA, SA , NT and Comcare only.

c Included in total.

d Also includes 'Communication and Non Classifiable Economic Units' and cases where industry not known.

e Total includes 'Non Classifiable Economic Units' and cases where industry not known.

Source: Industry Commission 1993, Survey B

The survey also asked Worksafe to provide information on jurisdictional basis for inspections, fines on employers, fines on employees and court processes and prosecutions. This information was unavailable.

J2 Questionnaire to jurisdictions

2.1 Total occupational injury and disease

Table J5 Total occupational injuries 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales						
fatalities	*	*	*	*	164 ^a	131
other	*	*	*	*	44 676 ^a	40 984
total	*	*	*	*	44 840^a	41 115
Victoria ⁱ						
fatalities	133	181	174	142	92	104
other	82 941	79 041	75 495	68 364	60 830	52 608
total	83 074	79 222	75 669	68 506	60 922	52 712
Queensland ^c						
fatalities	212	189	171	107	104	93
other	n.a.	n.a.	n.a.	78 905	73 294	72 844
total	n.a.	n.a.	n.a.	79 012	73 398	72 937
South Australia ^d						
fatalities	*	19 ^e	36	28	35	18
other	*	6 112	11 970	14 735	13 221	11 297
total	*	6 131	12 006	14 763	13 256	11 315
Western Australia						
fatalities	*	*	*	*	*	*
other	*	*	*	*	*	*
total	*	*	*	*	*	*
Tasmania ^f						
fatalities	*	*	8 ^g	10	9	5
other	*	*	*	20 596	18 750	17 830
total	*	*	*	20 606	18 759	17 835
Northern Territory						
fatalities	*	6	12	17	9	3
other	*	3 175	3 512	3 579	3 811	3 410
total	*	3 181	5 324	3 593	3 820	3 413
Australian Capital Territory ^j						
fatalities	3	1	1	2	3	*
other	1 740	1 794	1 702	1 621	1 750	*
total	1 743	1 795	1 703	1 623	1 753	*
Comcare ^e						
fatalities	*	*	*	8	12	*
other	*	*	*	*	*	*
total	33 032	*	*	*	*	*
Seafarers ^h						
fatalities	1	2	1	1	2	1
other	937	937	705	347	440	545

total	938	939	706	348	442	546
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- * Not available.
- a Excludes coal mining cases.
- b Figures do not allow for claims which have been incurred but not reported. Self insurers, the self employed and commonwealth employees excluded.
- c Figures exclude injuries and especially disease for which compensation is not claimed. Also excluded are injuries sustained by self-employed persons (one-fifth of the workforce).
- d Up to 5 day claims only.
- e 9 month data only.
- f prior to the commencement of the Workers' Compensation Act 1998 only ABS kept statistics which are not comparable to the Workers' Compensation Board's collection.
- g 7.5 months only.
- h Over the period 1986-1992 there was a significant decrease in the number of seafarers employed in the industry because of multi skilling and reduced crew sizes.
- i Excludes self insurers, self employed and commonwealth employees.
- j Figures are based on workers' compensation payouts and as such do not represent the years in which the injury/illness occurred.

Source: Industry Commission 1993, Survey B

Table J6 Occupational disease 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales						
fatalities	*	*	*	*	57	44
other	*	*	*	*	8 406	9 792
total	*	*	*	*	8 463	9 792
Victoria ^e						
fatalities	162	152	144	117	98	84
other	10 618	9 373	9 634	8 451	9 870	10 664
total	10 780	9 525	9 778	8 568	9 968	10 748
Queensland ^a						
fatalities	n.a.	n.a.	n.a.	58	57	38
other	n.a.	n.a.	n.a.	5 305	4 526	6 108
total	n.a.	n.a.	n.a.	5 363	4 583	6 146
South Australia ^c						
fatalities	*	2 ^b	10	10	7	1
other	*	636 ^b	1 654	2 207	2 019	2 429
total	*	638^b	1 664	2 217	2 026	2 430
Western Australia						
fatalities	*	*	*	*	*	*
other	*	*	*	*	*	*
total	*	*	*	*	*	*
Tasmania						
fatalities	*	*	*	0	3	0
other	*	*	*	1 511	1 444	1 646
total	*	*	*	1 511	1 447	1 646
Northern Territory						
fatalities	*	1	4	2	2	1
other	*	313	305	396	514	418
total	*	314	309	398	516	419
Australian Capital Territory ^f						
fatalities	1	1	1	0	0	*
other	52	51	58	80	71	*
total	53	52	59	80	71	*
Comcare						
fatalities	*	*	*	20	18	*
other	*	*	*	*	*	*
total	4 934	*	*	*	*	*
Seafarers ^d						
fatalities	5	7	4	1	2	1
other	435	429	440	513	355	263
total	440	436	444	514	357	264

* Not available.

- a Figures exclude injuries and disease for which compensation is not claimed. Also excluded are injuries sustained by self-employed persons (one fifth of the workforce).
- b 9 months data only.
- c Up to five day claims only.
- d Over the period 1986 – 1992 there was a significant decrease in the number of seafarers employed in the industry because of multiskilling and reduced crew sizes.
- e Excludes self insurers, the self employed and Commonwealth employees.
- f Figures are based on workers' compensation payouts and as such do not represent the years in which the injury occurred.

Source: Industry Commission 1993, Survey B

Table J7 Total injury and disease 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales		61 000 ^c	609 00 ^c	58 000 ^c	^a 53 402 ^b	1 077 ^c
Victoria ^d	93 854	88 747	85 447	77 074	70 890	63 460
Queensland ^e	79 400	83 304	83 304	84 375	77 981	79 083
South Australia	*	7 437 ^f	13 968	17 278	16 015	13 995
Western Australia						
Tasmania	*	*	13 363 ^g	22 117	20 206	19 481
Northern Territory	*	3 495	3 833	3991	4 336	3 832
Australian Capital Territory ^h	1 796	1 847	1 762	1 703	1 824	*
Comcare ⁱ	38 155	31 461	18 548	18 311	18 794	18 863
Seafarers ^j	1 378	13 475	1 150	862	799	810
Australia	212 787	227 919	219 613	224 008	209 021	199 524

* Not available.

a Includes cases which were not stated as injury or disease (1990-91— 99 cases of which 2 are fatalities, 1991-92 — 170 cases of which 2 are fatalities).

b Excludes coal mining cases.

c Estimates.

d Excludes self insurers, the self employed and Commonwealth employees.

e Excludes injury and disease for which compensation is not claimed and injuries sustained by self-employed persons (one fifth of workforce).

f 9 months data only.

g 7.5 months only.

h Figures are based on workers' compensation payouts and as such do not represent the years in which the injury occurred.

i Includes Australia Post, Telecom Australia and Defence Military.

j Over the period 1986 – 1992 there was a significant decrease in the number of seafarers employed in the industry because of multiskilling and reduced crew sizes.

Source: Industry Commission, 1993

J2.2 Inspections

Table J8 Numbers of inspections and ratio of inspection to workplaces 1986-87 – 1991-92

		1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales	No. of Inspections	n.a.	n.a.	n.a.	n.a.	46 943	556 558
	No. of workplaces in jurisdiction ^a	300 000	300 000	300 000	300 000	300 000	300 000
	Ratio of inspections to workplaces	-	-	-	-	0.1565	1.8552
Victoria	No. of Inspections	*	20 307	22 388	38 345	36 868	45 363
	No. of workplaces in jurisdiction ^b	276 464	286 179	293 036	299 010	295 857	297 201
	Ratio of inspections to workplaces	-	0.0710	0.0764	0.1282	0.1246	0.1526
QLD	No. of Inspections	36 657	42 743	19 744	10 474 ^c	27 965	48 370
	No. of workplaces in jurisdiction	*	*	*	69 585 ^c	82 626	94 189
	Ratio of inspections to workplaces	-	-	-	0.1505	0.3385	0.5135
South Australia	No. of Inspections	7 474	8 615	*	*	*	11 400
	No. of workplaces in jurisdiction	16 045	29 756	33 000	42 000	50 000	55 000
	Ratio of inspections to workplaces	0.4658	0.2895	-	-	-	0.2073
Western Australia	No. of Inspections	53 865	57 461	38 829	24 821	18 143	15 806
	No. of workplaces in jurisdiction ^d	-	-	-	-	-	-
	Ratio of inspections to workplaces	-	-	-	-	-	-
Tasmania	No. of Inspections	*	*	*	*	6 002	14 458
	No of workplaces in jurisdiction	*	*	*	*	*	*

	Ratio of inspections to workplaces	-	-	-	-	-	-
Northern Territory	No. of Inspections	*	*	*	*	1 952 ^f	2 885
	No. of workplaces	*	*	*	*	8 000 ^e	8 225
	Ratio of inspections to workplaces	-	-	-	-	0.2440	0.3508
Australian Capital Territory	No. of Inspections	*	*	*	*	6 089	3 188
	No of workplaces in jurisdiction	*	*	*	*	9 000 ^g	9 000 ^g
	Ratio of inspections to workplaces	-	-	-	-	-	-
Comcare ^e	No. of Inspections	n.a.	n.a.	n.a.	n.a.	n.a.	89
	No. of workplaces	n.a.	n.a.	n.a.	n.a.	n.a.	* ^h
	Ratio of inspections to workplaces	-	-	-	-	-	-
Seafarers	No. of Inspections ⁱ	119	116	124	124	118	120
	No. of workplaces	119	116	124	124	118	120
	Ratio of inspections to workplaces	1	1	1	1	1	1

* Not available

n.a. Not applicable

* Not available

n.a. Not applicable

a Estimate.

b Exact number of workplaces in inspectorate unknown.

c Workplace Health and Safety Act came into effect 1/7/89.

d Unable to be ascertained.

e Estimate.

f Not complete year, full recording commenced 11/90.

g Private sector workforces only.

h Virtually impossible to answer, see definition of 'workplace' s.5 of the OHS Act.

i Pursuant to the International Health and Safety of Life at Sea Convention and the Navigation Act 1912, each trading ship and offshore industry vessel is required to have its safety equipment surveyed/inspected annually. As part of that survey/inspection there is an inspection made of the ship for general health and safety purposes.

Source: Industry Commission 1993, Survey B

Table J9 Number of inspectors 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales	n.a.	n.a.	n.a.	n.a.	248	273 ^a
Victoria ^b	140-160	140-160	140-160	140-160	140-160	140-160
Queensland ^c	n.a.	77	123	132	146	149
South Australia	*	28	35	34	40	36
Western Australia	*	*	*	*	*	*
Tasmania	*	*	*	*	30	30
Northern Territory	*	*	*	*	20	20
Australian Capital Territory	10	10	10	10	10	10
Comcare ^d	n.a.	n.a.	n.a.	n.a.	n.a.	75
Seafarers ^e	36	36	36	36	36	38

n.a. Not applicable.

a The figure for 1991-92 is actually the number of officers with inspectors authorities.

b The number of inspectors does not accurately reflect the number conducting workplace inspections. The figures are estimates of persons appointed as inspectors.

c The Workplace Health and Safety Act came into effect 01.07.89.

d OHS (CE) Act came did not come into effect until 6/9/91. Therefore no OHS activities before 1991-92.

e The number of regional marine surveyors employed by the Australian Maritime Safety Authority. Equipment surveys/inspections form only a small part of each surveyor's workload.

Source: Industry Commission 1993, Survey B

Table J10 The cost of conducting inspections 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales ^a	n.a.	n.a.	n.a.	25022000	29362000	29629000
Victoria ^b	*	*	*	*	*	*
Queensland ^c	n.a.	n.a.	n.a.	n.a.	8126000	9309000
South Australia	*	*	*	*	*	*
Western Australia	n.a.	n.a.	n.a.	n.a.	5969000	7388000 ^d
Tasmania	*	*	*	*	*	*
Northern Territory	*	*	*	*	*	*
Act ^g	*	*	*	*	550000	600000
Comcare ^e	n.a.	n.a.	n.a.	n.a.	n.a.	* ^f
Seafarers ^h	250000	300000	360000	390000	430000	450000

* Not available.

n.a. Not applicable.

a Comprises the total operating costs of two divisions engaged in inspection and prevention activities.

b The cost of conducting inspections is not known, however a calculation for 1991-92 estimating cost is as follows: 43701 visits divided by overall cost of the operations component i.e. \$9934019 = \$230.64 per visit. This includes all field staff inspectors, risk management, information and support staff).

c The costs relate to the operating costs of the inspection and advisory services branch, Division of Workplace Health and Safety.

d This reflects the total budgetary allocation for the regulatory services program. Cost was calculated by totalling salaries (wages and allowances included) and contingencies for regulatory services. Comparison with previous years is not applicable due to the introduction of programme budgeting in 1990-91.

e OHS (CE) Act came into effect until 6/9/91. Therefore no OHS activities before 1991-92.

f Costings are not compiled.

g Includes all costs of administration plus training etc.

h Figures represent the survey/inspection fees charged.

Source: Industry Commission 1993, Survey B

Table J11 Number of improvement notices 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales ^a	n.a.	n.a.	n.a.	n.a.	4 050	6 120
Victoria	*	1 358	1 597	2 191	3 343	3012
Queensland ^b	n.a.	n.a.	n.a.	181	558	417
South Australia	*	99	359	885	670	711
Western Australia	10 752 ^c	10 427 ^c	4 718	4 515	3753	6 450
Tasmania	*	*	*	*	348	1 028
Northern Territory	n.a.	n.a.	n.a.	n.a.	43	103
Australian Capital Territory	n.a.	n.a.	n.a.	n.a.	58	307
Comcare ^d	n.a.	n.a.	n.a.	n.a.	n.a.	11 ^e
Seafarers ^f	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available

n.a. Not applicable

a Improvement notices have only been issued since March 1990.

b The Workplace Health and Safety Act came into effect 01.07.89.

c Prior to September 1988, notification to employers was in the form of written directives and instructions to stop work until the satisfactory rectification of identified hazard. The introduction of improvement and prohibition notices with the new legislation means that data for 1986-87 and 1987-88 is not comparable with later data.

d OHS (CE) Act came into effect until 6/9/91. Therefore no OHS activities before 1991-92.

e Includes prohibitions notices, as these two are not recorded separately.

f OHS legislation is not yet in place for ships under Commonwealth jurisdiction.

Source: Industry Commission 1993, Survey B

Table J12 Number of prohibition notices 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales ^a	n.a.	n.a.	n.a.	n.a.	1 212	2 073
Victoria	n.a.	350	454	1 653	16 487	1 655
Queensland ^b	n.a.	n.a.	n.a.	52	116	76
South Australia	*	64	59	134	104	88
Western Australia	1 347 ^c	1 531 ^c	1 063	1 311	602	682
Tasmania	*	*	*	*	64	163
Northern Territory	n.a.	n.a.	n.a.	n.a.	0	10
Australian Capital Territory	n.a.	n.a.	n.a.	n.a.	24	42
Comcare ^d	n.a.	n.a.	n.a.	n.a.	n.a.	11 ^e
Seafarers ^f	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

a Prohibition notices have only been issued since March 1990.

b The Workplace Health and Safety Act came into effect 01.07.89

c Prior to September 1988, notification to employers was in the form of written directives and instructions to stop work until the satisfactory rectification of identified hazard. The introduction of improvement and prohibition notices with the new legislation means that data for 1986-87 and 1987-88 is not comparable with later data.

d OHS (CE) Act came did not come into effect until 6/9/91. Therefore no OHS activities before 1991-92.

e Includes improvement notices, as these two are not recorded separately.

f OHS legislation is not yet in place for ships under Commonwealth jurisdiction.

Source: Industry Commission 1993, Survey B

J2.3 Fines

J2.3.1 Employers

Table J13 Number of Offences 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales ^a	n.a.	n.a.	n.a.	n.a.	n.a.	475
Victoria ^b	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Queensland ^c	n.a.		n.a.	n.a.	n.a.	92
South Australia ^e	*	11 ^f	24	17	26	26
Western Australia	*	*	62	69	31	31
Tasmania	9	16	5	3	5	4
Northern Territory	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Australian Capital Territory	nil	nil	nil	nil	nil	1
Comcare ^d	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^g	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

a The OHS Regulation 1988, under which employers and employees are fined, only came into force in August 1991.

b Victorian OHS legislation does not provide for fines to be imposed on employers and employees by the department. Enforcement activity is through the issuing of improvement and Prohibition Notices under the OHS 1988 Act, other notices and directions under associated legislation and prosecutions deliberated by the courts.

c Convictions by courts.

d OHS (CE) Act came did not come into effect until 6/9/91. Therefore no OHS activities before 1991-92

e All fines are imposed by industrial court and Commission in SA

f 7 month data only (i.e from Dec 87 to June 88).

g OHS legislation not yet in place for ships under Commonwealth jurisdiction.

Source: Industry Commission 1993, Survey B

Table J14 Number of Times Maximum Fine Imposed 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales	n.a.	n.a.	n.a.	n.a.	n.a.	475
Victoria ^a	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Queensland	n.a.	n.a.	n.a.	n.a.	n.a.	nil
South Australia ^c	*	nil ^d	nil	nil	nil	nil
Western Australia	*	*	*	*	*	*
Tasmania	nil	nil	nil	nil	nil	nil
Northern Territory	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Australian Capital Territory	nil	nil	nil	nil	nil	nil
Comcare ^b	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^e	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

a Victorian OHS legislation does not provide for fines to be imposed on employers and employees by the 1988 Act, other notices and directions under associated legislation and prosecutions deliberated by the courts.

b OHS (CE) Act came did not come into effect until 6/9/91. Therefore no OHS activities before 1991-92.

c All fines imposed by the industrial court and Commission in SA.

d 7 months data only (i.e from Dec 87 to June 88).

e OHS legislation not yet in place for ships under Commonwealth legislation.

Source: Industry Commission 1993, Survey B

Table J15 Average fine imposed 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales ^a	n.a.	n.a.	n.a.	n.a.	n.a.	500
Victoria ^b	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Queensland	n.a.	n.a.	n.a.	n.a.	n.a.	1 531
South Australia ^c	*	216 ^f	1 943	3 371	6 172	5 065
Western Australia	*	*	2 485	3 350	3 413	2 864
Tasmania	600	170	217	917	370	1 223
Northern Territory	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Australian Capital Territory	*	*	*	*	*	d
Comcare ^c	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^g	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

a The fine is fixed for all offences committed by employers, at \$500.

b Victorian OHS legislation does not provide for fines to be imposed on employers and employees by the department. Enforcement activity is through the issuing of improvement and Prohibition Notices under the OHS 1988 Act, other notices and directions under associated legislation and prosecutions deliberated by the courts.

c OHS (CE) Act came into effect until 6/9/91. Therefore no OHS activities before 1991-92.

d Good behaviour bond.

e All fines are imposed by Industrial Court and Commission in South Australia.

f 7 month data only (i.e from Dec 87 to June 88).

g OHS legislation not yet in place for ships under Commonwealth jurisdiction.

Source: Industry Commission 1993, Survey B

J2.2.1 Employees

Table J16 Number of offences 1986-87 – 1991-92

	<i>1986-87</i>	<i>1987-88</i>	<i>1988-89</i>	<i>1989-90</i>	<i>1990-91</i>	<i>1991-92</i>
New South Wales	n.a.	n.a.	n.a.	n.a.	n.a.	215
Victoria ^a	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Queensland	n.a.	n.a.	n.a.	n.a.	n.a.	8
South Australia	*	0	0	0	5	6
Western Australia	*	*	*	2	2	5
Tasmania	nil	8	6	7	13	5
Northern Territory	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Australian Capital Territory	*	*	*	*	*	*
Comcare ^b	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^c	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* not available.

n.a. not applicable

a Victorian OHS legislation does not provide for fines to be imposed on employers and employees by the department. Enforcement activity is through the issuing of improvement and Prohibition Notices under the OHS 1988 Act, other notices and directions under associated legislation and prosecutions deliberated by the courts.

b OHS (CE) Act came into effect until 6/9/91. Therefore no OHS activities before 1991-92.

c OHS legislation not yet in place ships under Commonwealth jurisdiction.

Source: Industry Commission 1993, Survey B

Table J17 Number of on-the-spot fines 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales	n.a.	n.a.	n.a.	n.a.	n.a.	215
Victoria ^a	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Queensland	n.a.	n.a.	n.a.	n.a.	n.a.	nil
South Australia	*	nil	nil	nil	nil	nil
Western Australia	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Tasmania ^b	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Northern Territory	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Australian Capital Territory	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Comcare ^c	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^d	na.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

a Victorian OHS legislation does not provide for fines to be imposed on employers and employees by the department. Enforcement activity is through the issuing of improvement and Prohibition Notices under the OHS 1988 Act, other notices and directions under associated legislation and prosecutions deliberated by the courts.

b No provision for on the spot fines.

c OHS (CE) Act came into effect until 6/9/91. Therefore no OHS activities before 1991-92.

d OHS legislation not yet in place for ships under Commonwealth jurisdiction.

Source: Industry Commission 1993, Survey B

Table J18 Maximum fine imposed 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales ^a	n.a.	n.a.	n.a.	n.a.	n.a.	50
Victoria ^b	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Queensland	n.a.	n.a.	n.a.	n.a.	n.a.	300
South Australia	*	0	0	0	500	500
Western Australia	*	*	1 500	200	2 000	1 800
Tasmania	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Northern Territory	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Australian Capital Territory	*	*	*	*	*	*
Comcare ^c	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^d	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

a All fines imposed on employees are \$50.

b Victorian OHS legislation does not provide for fines to be imposed on employers and employees by the department. Enforcement activity is through the issuing of improvement and Prohibition Notices under the OHS 1988 Act, other notices and directions under associated legislation and prosecutions deliberated by the courts.

c OHS (CE) Act came into effect until 6/9/91. Therefore no OHS activities before 1991-92.

d OHS legislation not yet in place for ships under Commonwealth jurisdiction.

Source: Industry Commission 1993, Survey B

Table J19 Average fine imposed 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales	n.a.	n.a.	n.a.	n.a.	n.a.	50
Victoria ^a	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Queensland	n.a.	n.a.	n.a.	n.a.	n.a.	200
South Australia	*	0	0	0	215	458
Western Australia	*	*	513	200	100	670
Tasmania	nil	75	30	86	96	70
Northern Territory	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Australian Capital Territory	*	*	*	*	*	*
Comcare ^b	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^c	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

a Victorian OHS legislation does not provide for fines to be imposed on employers and employees by the department. Enforcement activity is through the issuing of improvement and Prohibition Notices under the OHS 1988 Act, other notices and directions under associated legislation and prosecutions deliberated by the courts.

b OHS (CE) Act came did not come into effect until 6/9/91. Therefore no OHS activities before 1991-92.

c OHS legislation not yet in place for ships under Commonwealth jurisdiction.

Source: Industry Commission 1993, Survey B

J2.3 Court Processes

Table J20 Number of prosecutions 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales	370	250	175	229	461	431
Victoria ^b	^a	45	42	45	76	119
Queensland	15	38	64	110	132	238
South Australia ^d						
Western Australia	*	*	64	71	33	36
Tasmania	4	13	9	12	29	14
Northern Territory	*	*	*	*	*	*
Australian Capital Territory	nil	nil	nil	nil	nil	1
Commonwealth Employees ^c	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^e	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

^a Figures in 1986-87 not recorded in a way to enable appropriate amounts to be determined.

^b Maximum fines are expressed as total fines per prosecution (aggregated) regardless of the number of separate charges with separate fines within the case.

^c OHS (CE) Act came into effect until 6/9/91. Therefore no OHS activities before 1991-92.

^d Refer to table on fines.

^e OHS legislation not yet in place for ships under Commonwealth legislation.

Source: Industry Commission 1993, Survey B

Table J21 Number of jail sentences 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales	nil	nil	nil	nil	nil	nil
Victoria ^a	nil	nil	nil	nil	nil	nil
Queensland				nil	nil	n.a.
South Australia ^c						
Western Australia						
Tasmania	nil	nil	nil	nil	nil	nil
Northern Territory	*	*	*	*	*	*
Australian Capital Territory	nil	nil	nil	nil	nil	nil
Comcare ^b	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^c	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

^a The use of criminal charges for breaches of OHS legislation with the potential for imposition of jail sentences was not possible prior to 1992.

^b OHS (CE) Act came into effect until 6/9/91. Therefore no OHS activities before 1991-92.

^c OHS legislation not yet in place for ships under Commonwealth legislation.

Source: Industry Commission 1993, Survey B

Table J22 Maximum jail sentence imposed 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales	nil	nil	nil	nil	nil	nil
Victoria ^a	nil	nil	nil	nil	nil	nil
Queensland	nil	nil	nil	nil	nil	nil
South Australia	*	*	*	*	*	*
Western Australia	*	*	nil	nil	nil	nil
Tasmania	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Northern Territory	*	*	*	*	*	*
Australian Capital Territory	nil	nil	nil	nil	nil	nil
Comcare ^b	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^c	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

a The use of criminal charges for breaches of OHS legislation with the potential for imposition of jail sentences was not possible prior to 1992.

b OHS (CE) Act came into effect until 6/9/91. Therefore no OHS activities before 1991-92.

c OHS legislation not yet in place for ships under Commonwealth jurisdiction.

Source: Workers' Compensation Inquiry Survey B

Table J23 Average jail sentence imposed 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales	nil	nil	nil	nil	nil	nil
Victoria ^a	nil	nil	nil	nil	nil	nil
Queensland	nil	nil	nil	nil	nil	nil
South Australia	*	*	*	*	*	*
Western Australia	n.a.	n.a.	nil	nil	nil	nil
Tasmania	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Northern Territory	*	*	*	*	*	*
Australian Capital Territory	nil	nil	nil	nil	nil	nil
Comcare ^b	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^c	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

a The use of criminal charges for breaches of OHS legislation with the potential for imposition of jail sentences was not possible prior to 1992.

b OHS (CE) Act came into effect until 6/9/91. Therefore no OHS activities before 1991-92.

c OHS legislation not yet in place for ships under Commonwealth jurisdiction.

Source: Industry Commission 1993, Survey B

Table J24 Maximum fine imposed by courts 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales ^a	n.a.	n.a.	n.a.	5 380	80 000	40 000
^b	n.a.	n.a.	n.a.	8 000	7 000	8 000
Victoria ^c	^d	10 000	10 000	16 000	30 000	51 000
Queensland	n.a.	n.a.	3250	70 000	n.a.	25 000
South Australia	*	*	*	*	*	*
Western Australia	n.a.	n.a.	15 000	30 000	20 000	10 000
Tasmania	nil	nil	nil	nil	nil	nil
Northern Territory	n.a.	n.a.	n.a.	1 250	1 500	1 520
Australian Capital Territory	nil	nil	nil	nil	nil	nil
Comcare ^e	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^f	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

a Industrial court.

b Magistrate's/local courts.

c Maximum fines are expressed as total fines per prosecution (aggregated) regardless of the number of separate charges with separate fines within the case.

d Figures in 1986-87 not recorded in a way to enable appropriate amounts to be determined.

e OHS (CE) Act did not come into effect until 6/9/91. Therefore no OHS activities before 1991-92.

f OHS legislation not yet in place for ships under Commonwealth jurisdiction.

Source: Industry Commission 1993, Survey B

Table J25 Average fine imposed by courts 1986-87 – 1991-92

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
New South Wales ^a	n.a.	n.a.	n.a.	5 000	15 000	20 000
Victoria ^b	n.a.	n.a.	n.a.	2 000	2 500	3 000
Queensland ^d	c	1 731	2 393	4 260	6 449	5 374
South Australia	*	*	592	*	*	1 783
Western Australia	*	*	*	*	*	*
Tasmania	600	112	92	363	244	743
Northern Territory	n.a.	n.a.	n.a.	1 410	680	750
Australian Capital Territory	nil	nil	nil	nil	nil	nil
Comcare ^e	n.a.	n.a.	n.a.	n.a.	n.a.	nil
Seafarers ^f	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.

* Not available.

n.a. Not applicable.

a Industrial court.

b Magistrate's/local courts.

c Statistics in 1986-87 not recorded in a way to enable appropriate amounts to be determined.

d Average fine is total fines divided by total number of defendants, irrespective of whether all defendants were actually fined.

e OHS (CE) Act came into effect until 6/9/91. Therefore no OHS activities before 1991-92.

f OHS legislation not yet in place for ships under Commonwealth jurisdiction.

Source: Industry Commission 1993, Survey B

Question 5.1: What major changes in legislation have been introduced over the period of 1986-87 to 1991-92 which could influence the performance of occupational health and safety measures, both nationally and in individual jurisdictions?

New South Wales

The *Workers Compensation Act 1987* made substantial changes to the workers' compensation system in NSW including abolition of common law actions (later partly restored for seriously injured workers).

The *WorkCover Administration Act 1989* provided for centralised administration of occupational health and safety, compensation and rehabilitation in one statutory body.

Subordinate Legislation Act 1989 imposes a sunset clause in all NSW regulations and provides for procedures to be followed in the making of regulations including a cost benefit analysis of the proposal and the seeking of comments on the proposal from affected parties.

Occupational Health and Safety (Workers' Compensation) Amendment Act 1987 provided for industry codes of practice to be approved by the Minister and to be prima facie evidence in prosecutions for breaches of the *Occupational Health and Safety Act 1983*. The Act also provided substantial amendments to the regulation making power to provide that regulations can be made on a wide range of occupational health and safety matters including the issuing of prohibition and improvement notices by inspectors.

The *Occupational Health and Safety Legislation (Amendment) Act 1990* increased penalties for corporations (maximum \$250 000) and individuals (maximum \$25 000) for various offences under the Occupational Health and Safety Act 1983. It also enabled on the spot fines to be imposed for certain OHS offences.

The *Industrial Relations Act 1991* provided for enterprise agreements which can include OHS issues, and provided civil remedies for victimisation in s482.

The *Mutual Recognition Act 1991* provided for mutual recognition of goods and services from other states.

Victoria

Acts

In 1992 the Victorian Government introduced significant increases in penalties under the Occupational Health and Safety Act 1985 and Dangerous Goods Act 1985, to encourage greater compliance in workplaces. These include four-fold increases in penalties under the OHS Act, special penalties for repeat offenders and the introduction of Provisional Improvement Notices under the Dangerous Goods Act.

Regulations

Since the introduction of the OHS Act, the Department has focussed its legislative efforts on rationalising the regulatory framework. The objective has been to produce a streamlined set of regulations which define legal duties in a performance based manner. This allows greater flexibility in determining the means of compliance while maintaining health and safety standards in Victorian workplaces. This is a move away from the previous prescriptive style of regulations, which was the predominant legislative style prior to the proclamation of the OHS Act.

In addition, the Department has sought to develop a regulatory framework which focuses on the hazard rather than the industry or process based approach to regulations. Modern OHS regulations are uniformly structured, requiring

employers to identify, assess and control the risk arising from exposure to a specific hazard in the workplace. Further, legal duties are placed on designers, manufacturers and suppliers.

Between 1988 and 1992, the Department introduced several major hazard-based regulations. For example:

OHS (Manual Handling) Regulations 1988 were introduced to reduce the number and severity of injuries resulting from manual handling activities in the workplace. These account for about one third of total accident compensation costs.

OHS (Asbestos) Regulations 1992 has the objective to prevent asbestos related diseases among employees working in processes which use asbestos where employees are likely to be exposed to airborne asbestos in workplaces. The Regulations will reduce the expected number of deaths through cancer by approximately 2 230 per year.

OHS (Noise) Regulations 1992 has the broad objective of seeking to reduce the incidence and severity of hearing loss resulting from excessive exposure of employees to noise in the workplace. The average number of cases of occupational deafness reported by Victorian employees between September 1985 and March 1991 was 2 175 per year. Over this period \$57 million was paid as compensation for permanent hearing impairment in Victoria.

Queensland

Development of a nationally consistent framework

Since the establishment of the National Occupational Health and Safety Commission in 1985, there has been a recognised need amongst the states to contribute significantly toward the development of nationally consistent occupational health and safety standards. This desire for national consistency has been accentuated over the last several years by the views expressed at the more recent Heads of Government Conferences and the Labour Minister Conferences.

The various standing committees which are put in place via the Worksafe Australia administrative framework go toward ensuring that national consistency in legislation and standards is achievable through the marshalling of national expertise.

Introduction of industry self-regulation and enhanced role of OHS agency

Coupled with this has been the introduction in Queensland of a 'Robens' based legislative model, which returns the duties of workplace health and safety responsibility to the employer and employee, through a regulatory arrangement that fosters greater industry self-regulation.

The primary role that government then takes is one of an educator and adviser to industry, rather than a 'policing' agency, attempting to check every possible hazard in every workplace on a daily basis (although sanctions are retained and applied where evidence supports attempts by operators to exploit the flexibility provided by new regulatory arrangements by seeking to gain competitive advantage by exposing workers and other persons to unacceptable risks).

And, by establishing the legal health and safety minima required of the industrial parties through the development of regulations and Codes of Practice, thereby enables the Division to spend greater time in the conduct of more comprehensive auditing of workplace health and safety systems. It is the enhancement of these systems that we believe contribute toward the economic performance of Queensland workplaces.

Western Australia

The *Occupational Health, Safety and Welfare Act 1984* and the *Occupational Health, Safety and Welfare Act 1988* were proclaimed on 16 September 1988 with the objective of promoting and improving standards for occupational health, safety and welfare in Western Australian workplaces. The Act imposes a general duty of care on employers to provide and maintain a working environment in which employees are not exposed to hazards, and requires an employee to ensure his or her own health and safety at work and to avoid adversely affecting the health and safety of others while at work. The Act also puts in place a system of consultative measures intended to assist with the resolution of workplace health and safety issues allowing for the appointment of health and safety representatives and committees.

The *Mines Regulation Amendment Act* was proclaimed in December 1992 and revised the existing *Mines Regulation Act 1946* by amending certain sections of the legislation and adding occupational health and safety provisions similar to those contained in the *Occupational Health, Safety and Welfare Act 1984*. The *Mines Regulation Amendment Act* and the *Coal Mines Regulation Act 1946* are currently being further revised and consolidated into a single mining safety enactment.

These pieces of legislation represent the implementation of a new system and outlook on the improvement of workplace health and safety and have noticeable impact upon health and safety outcomes in WA. For example, between 1988-89 and 1992-3 there was a decrease in the rate of lost time injuries in Western Australia of 14 per cent.

South Australia

- Occupational Health, Safety and Welfare Act, 1986.
- Construction Safety Regulations, 1987
- Industrial Safety Regulations, 1987
- Commercial Safety Regulations, 1987
- Rural industry-Machine Safety, 1987
- Power Driven Machinery Regulations, 1987
- Logging Regulations, 1991
- Safe Handling of Pesticides Regulations, 1987
- Manual Handling Regulations, 1991.
- Asbestos Regulations, 1991
- Synthetic Mineral Fibres Regulations, 1991
- Health and First Aid Regulations, 1991
- Registration of Workplaces, 1990
- Election of Health and Safety Representatives, 1987
- General Regulations, 1987 (health and safety committees, training of representatives)
- Proceedings Regulations, 1987 (Industrial Court and Commission)
- Notification of Work-Related Injuries, Accidents and Dangerous Occurrences, 1987
- Confidentiality of Health Records, 1991.

Tasmania

The penalties for a breach of the Industrial Safety, Health and Welfare Act 1977 were, in 1991, increased from a maximum fine of \$5,000 for an employer or an employee to a maximum fine for an employer of \$20,000 with a fine for a

continuing offence of \$2,000 Per day for an employee to \$10,000 with a fine for a continuing offence of \$500 per day. At the same time the definition (and hence duty) of owner/occupiers were clarified together with provisions to provide for the issue of licences for certain processes eg. asbestos removal.

Regulations relating to forest industries were revised in 1990 with specific requirements for training, equipment, practice and a requirement for all chainsaws to meet the SAA standard.

Worksafe Australia's manual Handling Standard was adopted by regulation in early 1992.

Regulations drawing together certificate of competency requirements from under the Scaffolding Act, Inspections of Machinery Act and Industrial safety, Health and Welfare Acts commenced in 1988.

The Workers Compensation Act 1988 provided for the establishment of the Workers Compensation Board with the specific function to inquire into and keep under review the incidence and cost of occupational injuries and diseases.

Northern Territory

Introduction of the Work Health Act on 1/1/87 - 'Robens' style legislation - consistent with other jurisdictions. Work Health (OH&S) Regulations commenced 24/12/92 - performance based consolidated OH&S regulations - consistent nationally where possible.

Australian Capital Territory

1990 – introduction of the OHS Act 1989 into the ACT.

1989 – Self-government in the ACT allowed greater response to needs via legislation.

Comcare

The Occupational Health and Safety (Commonwealth Employment) Act 1991 came into effect on 6 September 1991.

Question 5.2 What measures and techniques (eg cost benefit analysis, regulation impact statements) does your organisation use to evaluate the effectiveness of:

- **the introduction or continuation of regulations**

- **the introduction, prioritisation and continuation of safety programs**
- **inspection and targeting of inspection efforts**
- **existing OHS policy initiatives**

New South Wales

The introduction of regulations is determined either by Government policy or in response to a specific need to introduce controls or guidance on a particular activity or service or to prescribe provisions to meet the expressed intentions of Acts of Parliament.

The Subordinate Legislation Act 1989 requires Regulatory Impact Statements to be prepared with respect to new Regulations prior to their introduction. This Act also requires all regulations introduced after 1 September 1990 to be repealed on the 5th anniversary following their date of publication. All such Regulations may be repealed, remade or revised.

Regulations made prior to 1990 are subject to repeal in accordance with a time frame included in a schedule to the Act and these may also be repealed, remade or revised.

The introduction, prioritisation and continuation of safety programs and OHS policy initiatives are determined by Government policy, the use of data and other research material and in response to incidents, requests from industry and identified trends.

WorkCover cooperates with and assists the National Occupational Health and Safety Commission (Worksafe) in the development of national model regulations, standards, codes of practice and guidance notes designed to achieve national uniformity or address occupational health and safety issues identified by the Commission following discussion and input from peak employer and union bodies together with State and Territory jurisdictions.

The Occupational Health, Safety and Rehabilitation Council of NSW also assists the WorkCover Authority with the provision of advice and comment on occupational health and safety issues.

The evaluation of Regulations, programs and policies is an ongoing process which includes data analysis, research, consultation with relevant industry bodies together with information from professional and technical staff.

WorkCover has a Data Analysis and Research Unit which uses data gained from accident and occupational illness notification received under the provisions of the OHS (Notification of Accidents) Regulation together with information gained from workers' compensation statistics and other sources to assist the

Inspectorate in determining occupations, industries or processes which require targeting.

Inspection efforts are concentrated on major areas of accidents and illness such as manual handling, noise, rural safety, construction work and chemicals and other hazardous substances.

Victoria

Regulatory Impact Statements must be prepared wherever a proposed regulation is likely to impose an appreciable burden on any section of the community. Its purpose is to explain the need for the regulation and to set out the costs and benefits which would follow its adoption. Regulatory proposals are assessed by technical areas within the Department and initial cost benefit analysis is undertaken.

Under the Subordinate Legislation Act 1962, regulations automatically sunset 10 years after commencement of operation. If they are able to be remade, an impact statement must be prepared. The Act sets out the processes by which regulations are scrutinised in Victoria. Regulations can be reviewed by the Scrutiny of Acts and Regulations Committee.

Periodic review of Sections of the Act, Regulations and Codes of Practice are also conducted by the Department.

The introduction, prioritisation and continuation of some safety programs is based on a range of approaches including claims analysis of industries and hazards; survey of workplaces; national programs; workplace and community concerns; local inspectorate knowledge; fatalities and market research.

OHS Management Systems Audits are conducted in workplaces to determine the degree of implementation of OHS in workplaces to complement the various approaches above.

Assessments are conducted on the outcomes of projects and client's perspective including legal aspects on investigation reports of evidence for prosecution activities. Project reports are reviewed by a Steering Committee.

Queensland

The introduction or continuation of regulations

Legislative mechanisms to achieve industry feedback

The Workplace Health and Safety Act 1989 establishes extensive industry consultative structures which support the Government in determining the priorities for workplace health and safety in Queensland.

The Minister for Employment, Training and Industrial Relations is advised by the Workplace Health and Safety Council (a tripartite peak body) and through the Council by the twelve industry workplace health and safety committees which have as one of their functions:

to review the workplace health and safety legislation in force in respect of the industry or industries which the committee is constituted and to make suitable recommendations to the Minister for the necessary amendments to existing legislation or the introduction of new legislation in respect of any workplace health and safety matter.

The introduction, prioritisation and continuation of safety programs

In a similar manner the workplace health and safety committees structures provide the Division with the necessary input required to determine the specific introduction, prioritisation and continuation of workplace health and safety programs.

Much of the information which is used in the assessment of program needs, is taken from the nearly 20 000 workplace audits which are conducted yearly by the Division. In addition, a statistical base, which is being developed in conjunction with the Government Statistician's Office (GSO), will link the existing information made available through the claims experience of workers' compensation claimants with industry/occupational and incident specific information. As there are major gaps in compensation data, other data sources are also used.

The improved utilisation of GSO information will also prove invaluable in the analysis of these issues and the continuous improvement of program delivery.

Existing OHS policy initiatives

The effectiveness of specific policy initiatives which are conducted by this Division are also assessed by commissioned market research which is conducted periodically by the Division.

Western Australia

As a general rule cost benefit analysis, regulatory statements or similar techniques have not been required in Western Australia prior to the introduction of new legislation or regulation.

The Department of Occupational Health, Safety and Welfare utilises a number of measures to evaluate the effectiveness of legislation, policies, and inspection efforts. The Department constantly measures and reviews the occupational health and safety experience of the Western Australian workforce using lost time injury data provided by the workers' compensation insurance system. This allows the Department to evaluate whether specific safety programmes, newly introduced regulatory measures and inspection efforts are achieving desired results. The Department's inspection efforts are now largely based upon selective performance assessment of enterprises to ensure that efforts are focused upon those enterprises where health and safety is most at risk.

The Department also continuously reviews its efforts in enforcing the legislation through issuing improvement and prohibition notices or through prosecutions. This provides useful information on where future efforts should be focused when developing new policy initiatives, safety programmes, and inspection campaigns.

The evaluation of the effectiveness of the Occupational Health, Safety and Welfare Act 1984 itself is built into the legislation. There is provision in the legislation for it to be reviewed every five years and reports made to the Minister and laid before Parliament on the attainment of the objects of the Act, the effectiveness of the operation of the Department and the Occupational Health, Safety and Welfare Commission, and the need for the continuation of the Commission and any committees. The first of these reviews was conducted by Commissioner Laing of the Australian Industrial Relations Commission during 1991. The Report into the Operations of the Occupational Health, Safety and Welfare Act (the Laing Report) was released to the public on 29 March 1992, and tabled in Parliament on 14 May 1992.

South Australia

South Australia accepts Economic Impact Assessments done at a national level on regulations, and codes of practice.

The only evaluation of specifically South Australian programs has been an administrative evaluation of the implementation strategy of the manual handling Regulations and Code of Practice.

Tasmania

Statistical and claims summary information is regularly supplied by the Workers Compensation Board and this is used to identify problem areas and for targeting of inspection programs.

The Subordinate Legislation Act 1992 which is expected to be proclaimed shortly, requires regulation impact statements to be publicised before changes can be processed.

Northern Territory

Workers Compensation data and traditionally recognised high risk industries and occupations such as construction. Consultation with client groups, industry, unions, Government.

Australian Capital Territory

- Use of the tripartite ACT OHS Council
- Strategic Planning using ABS and Injury data reported to the ACT OHS office
- ACT equivalent of the National Injury Surveillance Programme (hospitals).

Comcare

Wherever possible formal evaluation techniques are used to assess effectiveness of activities.

The OHS(CE) Act came into effect on 6 September 1991. the initial implementation phase to establish the workplace arrangements required by the Act has just been completed.

To assess the extent of implementation of the workplace arrangements, a formal survey was conducted of 39 Commonwealth Agencies and 3 key unions. the survey also obtained information regarding clients information needs in regulation to the legislation, and their views on Comcare's performance as the regulatory authority.

At the present time, Comcare Australia's worker's compensation claims data is analysed to target and develop investigation and prevention programs. this covers some 55% of the Commonwealth employment sector. However, with the commencement of new regulations on 29 July 1993, all Commonwealth employers will be required to notify and report to Comcare workplace incidents

which involve death or serious injury or disease to employees or third parties, or serious dangerous occurrences. This information will be used for targeting investigations and prevention strategies.

The review of the effectiveness of the legislation is planned for September 1994. At the present time, performance indicators are being developed, to allow collection of appropriate information to evaluate OHS program activities.

Question 5.3 What interaction is there with the compensation arm of your organisation or the compensation authority in your jurisdiction?

New South Wales

The WorkCover Authority operates as an integrated organisation which has responsibility for both compensation and OHS. There is, therefore, considerable interaction between the internal divisions involved.

Commonly interaction involves exchange and analysis of data, joint projects involving insurance and OHS, prevention promotions using joint information. Internal cooperation and integration involves many formal and informal links, committees and discussions between areas such as prevention, the field inspectorate, rehabilitation, conciliation and various insurance functions in all types of areas and activities.

Our submission to the Inquiry strongly supports integration of OHS compensation and rehabilitation supervision and regulatory responsibility.

Victoria

Currently there is limited interaction between the Department and the WorkCover Authority which provides for compensation funded by levy payments.

Information systems used for targeting purposes are inextricably linked. Further, use of accident compensation reports to supplement and cross-reference OHS investigation reports is made where prosecution is intended.

Queensland

The Division of Workplace Health and Safety and the Division of Workers' Compensation are two discrete program areas within the Department of

Employment, Vocational Education, Training and Industrial Relations (DVETIR).

The Workplace Health and Safety Program receives a substantial amount of funding from the Division of Workers' Compensation to be used for the purposes of industry information and education and for program research and development.

The tripartite peak bodies which provide overall guidance to the operation of these Divisions are the Workplace Health and Safety Council and the Workers' Compensation Board.

To ensure continuity of approach and integration of common issues, the Chairman of these bodies is the Chief Executive Officer, DEVETIR.

The Executive Directors of the respective Divisions do attend the meetings of the other Council or Board as observers.

The department is currently developing strategies which facilitate an improved integration of service activities throughout Queensland.

Western Australia

There is extensive interaction between the Department of Occupational Health, Safety and Welfare and the Workers' Compensation and Rehabilitation Commission. The two bodies undertake joint research projects and promotional activities with the goal of reducing workplace injuries and accidents. The Workers' Compensation and Rehabilitation Commission also provides the Department with workers' compensation claim data to allow the Department to prepare statistical reports on various aspects of occupational health and safety in Western Australia, and to focus its inspection efforts upon those enterprises with a poor health and safety record.

South Australia

Close cooperation with targeting regulatory inspections, joint funding of health and safety programmes, joint registration of employers, policy and programme planning achieved through Joint OHS Advisory Committee, CEO of WorkCover is on OHS Commission, cross membership on various committees.

Tasmania

A very close interaction occurs between the OHS and compensation areas in Tasmania. Both the Workers Compensation Act 1988 and the Industrial Safety,

Health, and Welfare Act 1977 are administered by the Department of State Development and Resources and more specifically the Industry Services Division of the Department. Although the Workers Compensation Board is a body corporate its staff are officers of the Department.

Additionally the Chairman of the Workers Compensation Board is, by virtue of his office, a member of the Industrial Safety, Health, and Welfare Board. Similarly, the Chairman of the Industrial Safety, Health and Welfare Board is, by virtue of his office, a member of the Workers Compensation Board.

Northern Territory

Some authority administers both OHS and workers' compensation.

Use of common data base.

Australian Capital Territory

In 1993 the ACT OHS Office became responsible for the administration and operations of the Workers' Compensation Act 1951.

Comcare

Comcare administers both the Safety, Rehabilitation and Compensation Act, and the OHS(CE) Act.

Question 5.4 What actions have been undertaken by your organisation in the process of national uniformity?

New South Wales

In accordance with the Premier's commitment at the 1991 Heads of Government meeting to achieve uniform standards in OHS and dangerous goods, the NSW WorkCover Authority is actively involved in all phases of the development of national standards, including:

1. Implementation of National Standards

WorkCover has implemented by regulation the following standards declared by the National Commission:

- The National Standard for Manual Handling - implemented by the Occupational Health and Safety (Manual Handling) Regulation 1991

- The National Standard for Synthetic Mineral Fibres - implemented by the Occupational Health and Safety (Synthetic Mineral Fibres) Regulation 1993.
- WorkCover has adopted as approved codes of practice in New South Wales the following national codes of practice:
- The National Code of Practice for the Prevention and Management of Occupational Overuse Syndrome.
- The National code of Practice for the Safe Handling of Timber preservatives and Treated Timber
- The National Code of Practice for the Safe Use of Vinyl Chloride
- The Workplace Injury and Disease Recording Standard (developed jointly by Worksafe Australia and Standards Australia)
- The National Code of Practice for Manual Handling
- The National code of Practice for the Safe Use of Synthetic Mineral Fibres

2. Participation in National Forums

WorkCover is represented on all forums involved in the development of national OHS and dangerous goods initiatives including:

- Senior Officers Group - OHS
- Senior Officers Group - Dangerous Goods
- Administrative Support Group
- Standards Development and Steering Committee
- National Uniformity Taskforce
- National Occupational Health and Safety Commission

WorkCover is also represented on most of the Expert Working Groups responsible for drafting standards and codes of practice.

3. Progression of Dangerous Goods and First Order Priority OHS Standards

The agreed first order OHS priorities are: Manual Handling, Noise, Major Hazardous Facilities, Certification of Users and Operators of Industrial Equipment, Plant and Hazardous Substances. WorkCover has provided significant input into the development of these standards and the proposed dangerous goods standard.

For example WorkCover chaired the Crane and Hoist Expert Working Group established to draft relevant provisions of the Certification Standard, was

represented on two other working groups involved in the drafting of this standard, and is represented on the Certification Implementation Working Group. WorkCover also chaired the Plant Working Party and is coordinating the Expert Review Group responsible for the consideration of public comment and preparation of a final draft.

4. Progression of other OHS standards

WorkCover has been involved in the development of status reports on the second order OHS issues. These reports outline existing regulatory provisions and identify key issues to be resolved. WorkCover coordinated the development of status reports on the following issues:

- manual handling
- synthetic mineral fibres
- asbestos
- demolition
- prevention of falls
- construction
- first aid

5. Plant Pilot Project for the Implementation of OHS Regulations

A WorkCover Pilot Project to assist the implementation of the Plant Safety Standard and the Hazardous Substances Regulation was approved by the Minister on 15 January 1993. The Pilot Project is being progressed in consultation with the Employers' Federation and the Labor Council, and provides \$250 000 for this purpose.

An action plan incorporating implementation strategies is currently being negotiated with industry groups. The focus of the Project will be information, education and training and it will be timetabled to commence with gazettal of the proposed regulations.

Victoria

In November 1991, a meeting of Premiers and Chief Ministers agreed the relevant Ministers should be directed to achieve uniform occupational health and safety standards in relation to dangerous goods by the end of 1993.

In December 1991, the National Occupational Health and Safety Commission agreed to the formation of a tripartite National Uniformity Taskforce to manage

a strategy for harmonisation of existing standards by December 1993. The Taskforce has established the National Occupational Health and Safety Framework to guide national standards development activity.

It identified seven key first order priority areas for achieving national uniformity. These are plant safety; certification of users and operators of industrial equipment; workplace hazardous substances; manual handling; noise; major hazardous facilities; dangerous goods storage and handling.

The major occupational health and safety standards development issues being dealt with by the Department are through the national uniformity framework. Consistency in Commonwealth, States and Territories legislation is overcoming the problem of different standards, which are complex and costly. The Victorian Government is committed to national occupational health and safety standards.

A strong link between occupational health and safety performance is widely recognised. Reforming occupational health and safety regulations will assist workplaces to improve their performance.

National uniformity also contributes to Australia's micro-economic reform agenda. National employers will gain a great deal from national uniformity, through standardisation of operating procedures, training, processes and freeing of staff to move between States and Territories. Significant cost savings should flow from these.

Victorian occupational health and safety standards development activity focuses on the agreed priorities of the National Occupational Health and Safety Commission's OHS Framework. The Department is participating in a number of NOHSC's expert working groups, responsible for progressing the development and implementation of national standards.

Accordingly, national uniformity became the overriding policy consideration for the Department and the focus of its legislative work has been strongly influenced by developments relating to this matter.

Queensland

The division is actively involved as a member of the National Occupational Health and Safety Commission (NOHSC).

Consistent with the decision of Labour Ministers (MOLAC 51), this Division along with other OHS agencies in the states, is actively pursuing the development of national uniformity in OHS standards and legislation.

In this regard, Queensland supports the seven first order priorities which have been established by NOHSC in the development of national workplace health and safety standards. Queensland is represented on the Expert Working Groups for four of these groups.

This Division is represented on the Standards Development Standing Committee for Worksafe Australia.

Western Australia

The Western Australian State Government has supported the steps being taken to achieve national uniformity on minimum standards for occupational health and safety relating to goods and occupations since the matter was agreed to be Premier's and Chief Ministers in November 1991. The Government adopted the position that the National Commission should develop national standards which identify essential requirements of prevention strategies. WA would then adopt those standards in a consistent manner through either the *Occupational Health, Safety and Welfare Act*, the *Occupational Health, Safety and Welfare Regulations* or codes of practice.

The Department of Occupational Health, Safety and Welfare has provided expert advice and other assistance on each of the national uniformity priority areas of safe use of plant; certification of users and operators of industrial equipment; hazardous substances; manual handling; and noise. The Department is currently assisting the Occupational Health, Safety and Welfare Commission with the revision of the *Occupational Health, Safety and Welfare Regulations 1988* to ensure that this legislation reflects new national standards.

South Australia

Implementation of Manual Handling Regulations and Code of Practice, considerable involvement in development work for all priority standards and codes, formal commitment of State to implement agreed national standards.

Tasmania

Tasmania representatives have actively assisted in the preparation of national codes of practice and standards in conjunction with Worksafe Australia.

The OHS legislation is currently being reviewed with a view to eliminating impediments to achieving national uniformity, in particular the duty of care provisions and the evidentiary status provisions for codes of practice are under review.

Northern Territory

Introduction of Work Health (OH&S) Regulations 12/92-incorporated national direction to that date. Involvement with NOHSC/interstate at several levels. Commitment to incorporating nationally uniform legislative requirements when endorsed by NOHSC.

Australian Capital Territory

To date we have adopted:

- Manual Handling Standard
- Asbestos Standard
- Exposure Standards
- Certification of Operator Standard

We are committed to adopting and implementing outcomes of National Uniformity.

Comcare

Actively participate in the uniformity process through membership of the National Uniformity Taskforce, the National Occupational Health and Safety Commission and Worksafe Australia, Standards Development Standing Committee.

Consultation with commonwealth employers and unions on their priorities for development of National Uniformity documents and implementation in Commonwealth employment.

Nominations forwarded and often accepted for representatives from Commonwealth employment to have membership on Worksafe Australia, Expert Working Groups and Reference Groups to develop National Uniformity OHS Standards.

Adoption of a number of codes of practice that have been completed, and amendment of the OHS(CE) Act to facilitate adoption of Worksafe Australia Model Regulations and Standards, uniformly with other jurisdictions, when they are available.

Preparation for arrangements for the development and implementation of administrative arrangements to enable licensing and registration when these are required.

K STATE AND TERRITORY INJURY DATA

This appendix presents a selection of data on injury and illness from each jurisdiction. However, in many cases, comparisons between jurisdictions cannot be made using these data, since they suffer from different reporting methods, coverage, and accuracy. Data for the Seafarers' scheme, due to its recent inception, has not been included.

K1 New South Wales

Table K1 NSW: employment injuries, nature of occurrence 1989–90 — 1991–92

<i>Year ended 30 June</i>	<i>During work</i>	<i>During work break</i>	<i>Road traffic accidents</i>	<i>During recess periods</i>	<i>Commuting accidents</i>	<i>Occupational diseases</i>	<i>Unknown</i>	<i>Employment injuries</i>	<i>Incidence per 1 000 workers</i>
1990 ^a	45 368	216	1 062	206	3 458	7 674	66	58 050	27
1991 ^a	41 057	178	981	186	2 438	8 463	99	53 402	26
1992 ^a	36 549	194	689	226	2 019	9 170	170	49 017	24
1992 ^b	37 969	194	690	226	2 036	9 792	170	51 077	25

^a excludes coal mining cases.

^b includes coal mining cases.

Source: WorkCover Authority of NSW, *Workers' Compensation Statistics: New South Wales 1991-91*

Table K2 NSW: fatalities 1989–90 — 1991–92*

<i>Year ended 30 June</i>	<i>Workplace injuries</i>	<i>Occupational diseases</i>
1990 ^a	78	29
1991 ^a	94	57
1992 ^a	62	44
1992 ^b	69	44

* WorkCover warn that the basis for defining a claim as a new claim in 1991-92 should be taken into account. A death claim is included if it entered the insurer's computer system during 1991-92. However, particularly in the case of deaths resulting from occupational diseases, this date may be well after the date of injury, which for occupational diseases is the date the disease was first reported to the employer.

^a Excludes coal mining cases.

^b Includes coal mining cases.

Source: WorkCover Authority of NSW, *Workers' Compensation Statistics: New South Wales 1991-92*

Table K3 NSW: fatalities and incidence of injury by industry, 1991–92

<i>Industry</i>	<i>Fatalities</i>	<i>Injury incidence rate</i>
Agriculture	21	51
Mining	14	112
Manufacturing	26	37
Electricity, gas and water	6	30
Construction	15	47
Wholesale trade	9	16
Retail trade	9	15
Transport, storage and communication	35	45
Finance, property and business services	15	12
Public administration	4	56
Community services	10	15
Recreation, personal and other services	12	15
Not stated and other	1	n.a.
Total	177	25

n.a. Not applicable.

Source: WorkCover Authority of NSW, *Workers' Compensation Statistics: New South Wales 1991-92*

K2 Victoria

Table K4 Victoria: fatalities 1985 — 1993*

<i>year</i>	<i>number of fatalities</i>	<i>industry</i>	<i>number of fatalities</i>
Jan - Jun 1985	26	agriculture	93
1985–86	28	construction	77
1986–87	46	manufacturing	55
1987–88	34	transport	45
1988–89	51	electricity	15
1989–90	34	trade	15
1990–91	46	public administration	9
1991–92	34	mining	8
1992–93	51	community services	4
Total	350	recreation	3
		finance	2
		communication	1
		not identified	23
		total	350

* shows the number of work related fatalities investigated by OHSA since January 1985. The Authority does not investigate the circumstances behind a death from natural causes whilst at work, nor a traffic accident that occurs during work hours, unless the nature of the work has particular relevance to the accident concerned. The figures are not necessarily compensable deaths. Disease deaths are not included.

Source: Occupational Health and Safety Authority 1993, *A Statistical Profile of Occupational Health and Safety Victoria*

Table K5 **Victoria: WorkCover claims September-December 1985 – January-June 1993***

<i>injury date</i>	<i>no. of claims open</i>	<i>closed</i>	<i>total claims</i>	<i>% of claims</i>
Sept–Dec 1985	686	28 887	29 573	5.0
1986	1 859	89 953	91 812	15.4
1987	2 120	92 510	94 630	15.9
1988	2 356	81 602	83 958	14.1
1989	2 859	79 545	82 404	13.8
1990	3 565	71 138	74 703	12.5
1991	4 460	61 627	66 087	11.1
1992	5 664	53 484	59 148	9.9
Jan–Jun 1993	4 995	8 862	13 806	2.3
total	28 524	567 608	59 6132	100

* The Occupational Health and Safety Authority note that “the number of claims is much lower for 1993 as a result of two main factors. Firstly the changes in the definition of a claim and the guidelines for making a claim and secondly there is a lag for claims incurred to be put on the system (Occupational Health and Safety Authority, 1993, p.7).

Source: Occupational Health and Safety Authority 1993, *A Statistical Profile of Occupational Health and Safety Victoria*, p.7

K3 Queensland**Table K6** Queensland: claims and fatalities 1978-79 – 1992-93

<i>financial year</i>	<i>number of claims lodged</i>	<i>Qld labour force (civilian)</i>	<i>claims lodged as % of labour force</i>	<i>number of fatal claims lodged</i>	<i>fatals as % of total claims</i>
1978-79	81 525	736 300	11.07		
1979-80	86 398	768 400	11.24		
1980-81	91 301	787 700	11.59		
1981-82	100 128	822 600	12.17		
1982-83	89 739	841 300	10.67		
1983-84	85 631	823 500	10.40		
1984-85	83 836	848 000	9.89		
1985-86	86 370	856 500	10.08		
1986-87	79 400	897 100	8.85		
1987-88	77 540	908 400	8.54		
1988-89	83 304	960 600	8.67	164	0.20
1989-90	83 499	1 024 200	8.15	165	0.20
1990-91	77 440	1 112 900	6.96	161	0.21
1991-92	79 077	1 170 700	6.75	135	0.17
1992-93	83 570	1 200 500	6.96	124	0.15

Source data provided by the Workers' Compensation Board of Queensland, 1993

Queensland injury incidence rates (injuries per 1000 workers) were 0.083 in 1988–89 and 0.073 in 1992–93.

Table K7 Queensland: claims lodged 1990-91 – 1992-93

<i>industry</i>	<i>no. of claims 1990-91</i>	<i>no. of claims 1991-92</i>	<i>no. of claims 1992-3</i>
accommodation	1 149	1 345	1 587
building/construction	6 627	6 131	6 330
cleaning	590	676	719
clerical (non-Govt)	2 573	2 552	2 929
commercial travellers	406	441	503
education	977	1 175	1 302
engineering/metal trades	9 199	8 854	9 087
farming/pastoral	2 659	2 568	2 733
Government	8 468	8 381	8 813
health	3 728	4 379	4 797
leisure and sport	2 023	2 134	2 454
local authorities	2 861	3 163	3 518
manufacturing	7 612	7 735	7 850
meat	4 853	5 101	5 456
mining	3 618	3 536	3 521
motor trade	3 793	3 771	4 063
newspaper and printing	467	467	457
other	4 442	4 819	5 243
retail/wholesale trade	6 660	7 015	8 286
shipping and boating	501	470	483
stevedoring	275	309	221
sugar	1 459	1 267	1 199
timber	1 129	1 121	1 128
transport	1 732	1 673	1 888
total	77 981	79 083	83 567

Source: Data provided by the Workers' Compensation Board of Queensland, 1994

K4 South Australia

Table K8 South Australia: fatalities 1988-89 – 1992-93*

<i>year</i>	<i>number of fatalities</i>
1988-89	61
1989-90	44
1990-91	50
1991-92	26
1992-93	26

* these data are for compensable deaths, excluding journey claims, but including diseases.

Source: Data from South Australian WorkCover Corporation, 1993

Table K9 **South Australia: claim incidence rates (reported claims per \$ million remuneration) 1988-89 – 1991-92**

<i>industry</i>	<i>Non-exempt claim incidence rates - for total claims reported comparisons based on 1991-92 values</i>			
	<i>no. of 1988-89 reported claims per \$ million remuneration</i>	<i>no. of 1989-90 reported claims per \$ million remuneration</i>	<i>no. of 1990-91 reported claims per \$ million remuneration</i>	<i>no. of 1991-92 reported claims per \$ million remuneration</i>
agriculture	3.2	3.5	2.9	2.0
mining	1.2	1.4	1.2	0.7
manufacturing	2.4	2.6	2.2	1.8
construction	2.5	2.7	2.8	1.9
wholesale & retail	1.0	1.2	1.0	0.8
transport and storage	1.8	2.2	1.8	1.7
finance, property and business services	0.4	0.5	0.5	0.5
community services	1.1	1.4	1.3	1.1
recreational, personal & other services	1.2	1.4	1.2	1.1
all industries	1.5	1.7	1.5	1.2

Source: Data provided by WorkCover Authority, SA 1993

K5 Western Australia

Table K10 WA: frequency rates by industry

Year	total	agriculture, forestry, fishing	mining	manufac- -turing	electricity, gas and water	construc- -tion	wholesale and retail trade	transport and storage	finance property and business services	public administ- -ration	community services	recreatio n and other services
1982-83	44.5	38.8	82.3	85.5	41.2	72.8	28.7	45.2	9.2	78.5	24.3	27.8
1983-84	42.8	42.2	75.8	73.6	50.4	82.1	25.9	46.6	15.5	69.4	24.7	31.3
1984-85	42.1	43.5	68.4	70.1	48.4	64.8	25.0	46.1	14.1	91.7	27.9	28.9
1985-86	41.5	40.3	56.1	70.0	59.5	69.7	26.3	43.2	14.5	95.1	27.6	26.5
1986-87	39.3	31.0	59.3	70.5	46.9	70.1	23.6	41.4	14.0	83.4	26.4	26.7
1987-88	35.4	30.2	59.7	57.9	52.6	54.3	22.7	48.7	11.6	60.4	26.6	24.0
1988-89	38.1	39.7	59.1	68.7	52.2	64.3	24.8	51.2	11.6	56.9	25.1	24.6
1989-90	37.2	44.1	49.9	73.2	49.9	66.6	24.0	47.6	11.6	48.3	23.4	24.0
1990-91 ^a	36.2	47.4	50.1	58.8	48.8	67.7	23.9	34.8	10.9	49.9	27.2	26.7
1991-92	31.7	48.9	39.5	55.0	33.7	57.4	22.0		9.2	56.5	23.5	23.9

^a Revised.

Source: White, C.B. (Ed.), *State of the Work Environment: Occupational Injuries*, Western Australia 1991-92, Perth, WA, 1993, p.34

Table K11 WA: fatalities 1987-88 – 1992-3*

<i>year</i>	<i>fatalities per million workers</i>
1987-88	32.0
1988-89	41.5
1989-90	39.3
1990-91	38.2
1991-92	37.8
1992-93	33.2

* actual figure 1987-88, 2 year average for 1988-89, 3 year moving average 1989-90 on.

Source: White, C.B. (Ed.), *State of the Work Environment: Occupational Injuries*, Western Australia 1991-92, Perth, WA, 1993, p.29

K6 Tasmania

Table K12 Tasmania: fatalities 1989-90 – 1992-93

<i>Cause of death</i>	<i>1989-90</i>	<i>1990-91</i>	<i>1991-92</i>	<i>1992-93</i>
motor vehicle accident	8	6	1	4
electrocution	1	-	-	1
falling object	1	2	1	1
hit by vehicle	-	1	-	-
crush	-	-	2	1
hit by object	-	-	1	-
total injury	10	9	5	7
disease	0	3	0	0
total fatalities	10	12	5	7

Source: Data provided by the Workers' Compensation Board of Tasmania

Table K13 **Tasmania: employment injuries reported by industry**
1990-91 – 1992-93

<i>industry</i>	<i>1990-91</i>	<i>1991-92</i>	<i>1992-93</i>
finance, property	416	370	363
mining	521	403	311
electricity, gas, water	797	654	503
transport, storage	869	830	768
recreation	953	1 011	1 004
public administration	1 080	1 130	972
agriculture	1 213	1 340	1 186
construction	1 590	1 655	1 466
wholesale, retail trade	2 554	2 512	2 251
community services	3 694	3 601	3 809
manufacturing	6 560	6 150	5 782
total	20 247	19 656	18 415

Source: Data provided by the Workers' Compensation Board of Tasmania

K7 Northern Territory

Table K14 NT: claims by industry and incidence rate, 1992-93

<i>industry</i>	<i>claims</i>	<i>per cent</i>	<i>no. employed</i>	<i>1992-93</i>	<i>1991-92</i>
agriculture	264	6.9	n.a.	_a	_a
communication	1	0.0	1 000	1.00	_b
community services	845	22.0	15 300	55.23	53.7
construction	314	8.2	400	66.81	69.2
electricity, gas, water	97	2.5	1 000	97.00	105.0
finance, property and business services	193	5.0	5 400	35.74	26.3
manufacturing	318	8.3	1 900	167.37	175.9
mining	299	7.8	1 800	166.11	224.6
public administration	332	8.6	6 400	51.88	57.6
recreation, personal and other services	381	9.9	7 200	52.92	100.7
transport and storage	263	6.8	1 900	138.42	156.3
wholesale and retail trade	541	14.0	9 100	59.45	54.8
total	3 848		55 700	69.08	70.97

a there is no available data for number of persons employed in the Agriculture industry.

b no data provided to the Commission.

Source: Work Health Authority, Northern Territory, *Workplace Injuries Statistical Supplement for 1992-93*

Table K15 NT: occupational injuries and diseases, 1987-88 – 1991-92

	<i>1987-88</i>	<i>1988-89</i>	<i>1989-90</i>	<i>1990-91</i>	<i>1991-92</i>
Injuries – fatalities	6	12	17	9	3
other	3 175	3 512	3 579	3 811	3 410
total injuries	3181	3 524	3 593	3 820	3 413
Disease– fatalities	1	4	2	2	1
other	313	305	396	514	418
total	314	309	398	516	419
total injuries and diseases	3 495	3 833	3 991	4 336	3 832

Source: Industry Commission Survey B

K8 Australian Capital Territory

Table K16 ACT: employment injuries: extent of disability by time lost and cost of claims 1989-90

<i>Extent of disability</i>	<i>Occupational and Commuting injuries</i>			<i>Occupational diseases</i>			<i>Total</i>		
	<i>number</i>	<i>time lost (weeks)</i>	<i>claims costs (\$000)</i>	<i>number</i>	<i>time lost (weeks)</i>	<i>claims costs (\$000)</i>	<i>number</i>	<i>time lost (weeks)</i>	<i>claims costs (\$000)</i>
death	2	0	79	-	-	-	2	0	79
permanent disability:									
– total	-	-	-	1	0	20	1	0	20
– partial	31	1 702	1 417	4	107	74	35	1 808	1491
temporary disability	1 621	6 604	3 643	75	1 119	566	1 696	7 723	4 208
non-fatal disability time lost ^a									
≥52 weeks	23	2 227	1 169	9	743	285	32	2970	1 454
26 to 52 weeks	30	1 081	335	3	102	101	33	1183	436
13 to 26 weeks	28	522	422	5	83	29	33	605	451
8 to 13 weeks	55	549	294	9	85	70	64	634	364
6 to 8 weeks	45	303	171	1	6	2	46	309	173
4 to 6 weeks	84	400	200	9	45	35	93	445	235
2 to 4 weeks	242	647	464	13	31	21	255	678	484
1 to 2 weeks	382	507	333	10	15	19	392	522	352
1 day to 1 week	732	369	255	16	8	5	748	377	259
total non-fatal cases	1 621	6 604	3 643	75	1 119	566	1 696	7 712	4 208
total all cases	1 654	8 306	5 138	80	1 226	660	1 734	9 532	5 798

* More recent data is unavailable for the ACT. The ACT Occupational Health and Safety Office is currently upgrading its internal data processing mechanisms.

^a Includes temporary disability.

Source: Data provided by the ACT Occupational Health and Safety Office

Table K17 ACT: number of employment injuries in the retail and construction industries 1989-90 – 1990-91*

Industry	number of injuries by extent of disability				total number of cases
	temporary	permanent partial	permanent total	death	
(1989-90)					
construction	276	13	-	1	290
retail trade	345	6	-	-	351
(1990-91)					
construction	339	12	-	1	352
retail trade	421	8	-	-	429

* the retail and construction industries are the largest sectors in the ACT.

Source: Data provided by the ACT Occupational Health and Safety Office

K9 Comcare

Comcare did not respond to the Commission's request for data on injury and illness rates in time for publication.

L CONDUCT OF THE INQUIRY

L1 Terms of reference

The reference, which was received on 5 November 1992, required the Commission to report within fifteen months.

The main focus of the inquiry is how to best reduce the total costs (personal and economic) resulting from incidents giving rise to work related injury and illness.

The activities covered by the reference are OHS arrangements, compulsory workers' compensation insurance schemes, the operation of common law in this arena and the operation of employment contracts (either awards or enterprise agreements).

The reference also covers the activities of major players in this area: such as insurers, the legal and health professions, purveyors of risk management and those most intimately involved — employers and employees.

The terms of reference are shown immediately preceding the Overview and Recommendations and Findings of this report.

L2 Conduct of the inquiry

In January 1993, the Commission released an Issues Paper to assist participants in preparing their submissions for the initial round of public hearings.

In the early stages of the inquiry the Commission held discussions with a wide range of interested parties (Attachment L1). The purpose of these discussions was to identify and canvass views on likely issues, to discuss the Commission's approach to the inquiry and to help identify other interested parties.

Additional visits and discussions with interested parties were also warranted as the inquiry progressed. These too are noted in Attachment L1.

The Commission conducted an initial round and final round of public hearings in all States and the ACT to obtain information and to seek participants views on issues. Initial public hearings were held as follows:

- Hobart 5 April 1993
- Canberra 6 April 1993
- Sydney 14,15 & 16 April 1993

- Perth 20 & 21 April 1993
- Melbourne 26, 27 & 28 April and 13 May 1993
- Brisbane 29 April 1993
- Adelaide 3 & 4 May 1993

Final public hearings were held as follows:

- Adelaide 27 & 28 September 1993
- Perth 29 September 1993
- Hobart 4 October 1993
- Brisbane 6 & 7 October 1993
- Canberra 12 October 1993
- Melbourne 13, 14 & 22 October 1993
- Sydney 27 & 28 October 1993

The Commission sought additional data on workers' compensation and OHS from administering authorities in each jurisdiction. Copies of the surveys used, and survey respondents, are listed at Attachment L2.

The organisations and individuals who have made submissions to the inquiry are listed at Attachment L3.

Attachment L1 Visits and discussion program

A list of visits, according to location, is provided below.

Brisbane

Queensland Workers' Compensation Board

Trades and Labor Council of Queensland

Canberra

Department of Health, Housing, Local Government and Community Development

Department of Industrial Relations

Department of Social Security

Department of Transport and Communications

Comcare

Professor N. Gunningham

Dr I. McEwin

Dr A. Hopkins

Sydney

WorkCover Authority of NSW

Self Insurers Association of New South Wales

Employers' Federation New South Wales

Worksafe

Pacific Dunlop

Labour Council of New South Wales

Melbourne

Richard Cumpston

The Victorian WorkCover Authority

Victorian Employers Chamber of Commerce and Industry

Insurance Council of Australia Limited

Preferred Care Networks

Metal Trades Industry Association

Victorian Injured Workers Centre

Victorian Trades Hall Council Injured Workers Group

BHP Steel

Nissan Castings

Newcastle

BHP Rehabilitation Centre

Hunter Rehabilitation Service

Newcastle City Council

Shortland Electricity

Hunter Action Group Against WorkCover

Attachment L2 Data surveys

L2.1 Workers' compensation questionnaire

1. Coverage

a) The Commission is interested in the proportion of workers covered by the scheme, and the proportion covered by self insurers. If the number of workers is unavailable, an estimate based on remuneration would be useful.

Coverage-Scheme*	30/6/92	30/6/91	30/6/90	30/6/89	30/6/88
Number of workers Or estimate based on remuneration					
No. of workers receiving benefits					

*Not including self insurers

Coverage-Self insurers	30/6/92	30/6/91	30/6/90	30/6/89	30/6/88
No. of self-insurers					
Number of workers Or estimate based on remuneration					

Insurance Companies

Insurance companies	30/6/92	30/6/91	30/6/90	30/6/89	30/6/88
No. of insurance companies*					
Minimum market share (by share of premium) of an insurance company*					
Maximum market share (by share of premium) of an insurance company*					

*Includes Authorised Agents

2. Claims

a) What constitutes a claim for your records?

For example, are all workplace injuries recorded, or only injuries resulting in a minimum number of lost work days?

b) The Commission is attempting to build up a data base of claims data which is comparable across jurisdictions. Worksafe Australia uses a cut off of claims involving time lost from work of 5 working days or more. Can you provide data on this basis?

If "NO", on what basis can you provide data? Can you suggest how it may be made comparable? For example, can you estimate how many claims would involve less than 5 working days lost from work?

c) For the financial year (1 July to 30 June), for claims involving less than 5 lost working days:

Applications for benefits*	1991-92	1990-91	1989-90	1988-89	1987-88
No of applications for benefits received in year					
No of applications for benefits accepted immediately					
No of applications for benefits accepted after dispute					

*All benefits, including weekly benefits, medical etc.

d) For the financial year (1 July to 30 June), for claims involving 5 or more lost working days:

Applications for benefits*	1991-92	1990-91	1989-90	1988-89	1987-88
No of applications for benefits received in year					
No of applications for benefits accepted immediately					
No of applications for benefits accepted after dispute					

*All benefits, including weekly benefits, medical etc.

e) For the financial year (1 July to 30 June) for claims involving 5 or more lost working days:

Open or active claims	1991-92	1990-91	1989-90	1988-89	1987-88
No of open or active claims at end period*					

*Total open claims, including claims received in previous years and not closed.

f) What is your definition of an open or active claim?

3. Claims Processing

a) For non common law claims involving 5 or more lost working days received between 1 July 1991 and 30 June 1992:

Non-Common Law Claims 1991-1992	Number
Accepted or denied within 5 days*	
between 6 & 10 days*	
between 11 & 15 days*	
between 16 & 20 days*	
between 21 & 25 days*	
between 26 and 30 days*	
in over 31 days*	

*days including weekends and public holidays

4. Claim Duration

For claims duration, all claims, including those involving less than 5 lost working days, for benefits of any type, may be included. If data for less than 5 lost working days is not collected, record zero for claims open for less than 5 days.

a) Are employers permitted to terminate employees during the lifetime of a claim?

b) For non common law claims received between 1 July 1986 and 30 June 1992:

Non-common law claims duration 1986-1992	Number	Average (Mean) Cost of Claim	Number of claimants where employment terminated
How many claims remained open or active less than 5 days?			
from 6 to 30 days?			
from 31 to 90 days?			
from 91 to 180 day?			
from 181 to 365 days?			
from 1 to 2 years?			
from 2 to 3 years?			
from 3 to 4 years?			
longer than 4 years?			

c) For non common law claims received between 1 July 1991 and 30 June 1992:

Non-common law claims duration 1991-1992	Number	Average (Mean) Cost of Claim	Number of claimants where employment terminated
How many claims remained open or active less than 5 days?			
from 6 to 30 days?			
from 31 to 90 days?			
from 91 to 180 days?			
from 181 to 365 days?			
from 1 to 2 years?			
How many claims are still open?			

d) For common law claims received between 1 July 1986 and 30 June 1992:

Common law claims duration 1986-1992	Number	Average (Mean) Cost of Claim	Number of claimants where employment terminated
How many claims remained open or active less than 5 days?			
from 6 to 30 days?			
from 31 to 90 days?			
from 91 to 180 days?			
from 181 to 365 days?			
from 1 to 2 years?			
from 2 to 3 years?			
from 3 to 4 years?			
longer than 4 years?			

e) For common law claims received between 1 July 1991 and 30 June 1992:

Common law claims duration 1991-1992	Number	Average (Mean) Cost of Claim	Number of claimants where employment terminated
How many claims remained open or active less than 5 days?			
from 6 to 30 days?			
from 31 to 90 days?			
from 91 to 180 days?			
from 181 to 365 days?			
from 1 to 2 years?			
How many claims are still open?			

5. *Reopened Claims*

a) What systems do you have to detect claims which are aggravations and recurrences of previous injuries?

b) For claims closed (or inactive) between 1 July 1986 and 30 June 1992, how many were subsequently reopened (or became reactivated) in the following time periods:

Reopened weekly benefit claims 1986-1992	Number	Average (Mean) Cost of Claim	Number of claimants where employment terminated
How many claims for weekly benefits were reopened or reactivated in less than 5 days?			
within 6 to 30 days?			
within 31 to 90 days?			
within 91 to 180 days?			
within 181 to 365 days?			
within 1 to 2 years?			
within 2 to 3 years?			
within 3 to 4 years?			
after more than 4 years?			

c) For weekly benefit claims closed (or inactive) between 1 July 1991 and 30 June 1992, how many were subsequently reopened (or became reactivated) in the following time periods:

Reopened weekly benefit claims 1991-1992	Number	Average (Mean) Cost of Claim	Number of claimants where employment terminated
How many claims were reopened or reactivated in less than 5 days?			
within 6 to 30 days?			
within 31 to 90 days?			
within 91 to 180 days?			
within 181 to 365 days?			
within 1 to 2 years?			

6. Cessation of Benefits

a) For claims closed (or becoming inactive) between 1 July 1986 and 30 June 1992:

Reason for Cessation of Benefits 1986-1992	No of claims
Closed because of return to work.	
Closed because reached maximum benefits, including redemptions to maximum benefits.	
Closed because of redemption of benefits below maximum benefit threshold.	
Closed because of death of claimant.	
Closed because of notional earnings type test.	
Other (Please specify).	

b) For claims closed (or becoming inactive) between 1 July 1991 and 30 June 1992:

Reason for Cessation of Benefits 1991-1992	No of claims
Closed because of return to work.	
Closed because reached maximum benefits, including redemptions to maximum benefits.	
Closed because of redemption of benefits below maximum benefit threshold.	
Closed because of death of claimant.	
Closed because of notional earnings type test.	
Other (Please specify).	

7. Relationship with the Department of Social Security

a) For claims received between 1 July 1986 and 30 June 1992:

1986-1992	Number/\$
Number of claims subject to a recovery notice (Notice of Charge) from the Department of Social Security	
Average amount of the Charge	

b) For claims received between 1 July 1991 and 30 June 1992:

1991-1992	Number/\$
Number of claims subject to a recovery notice (Notice of Charge) from the Department of Social Security	
Average amount of the Charge	

8. Return to Work

a) What is your definition of “return to work”?

For example, does it include claims that involved no time off work; does it include only claims that required rehabilitation; does it include return to part time as well as full time work, and return to alternative duties as well as normal duties; and does it include a minimum duration of the return to work ?

b) How is your return to work rate calculated?

c) What was your return to work rate for the period 1 July 1991 to 30 June 1992?

d) What is your return to work rate calculated on the following basis:

Claimants - who had at least 5 days off work,
 - who returned to full time work,
 - for a continuous period of at least 6 months;

as a proportion of all claims which involved at least 5 days off work:

Period	Return to work rate
From 1 July 1986 to 30 June 1992 (1986-1992)	
From 1 July 1991 to 30 June 1992 (1991-1992)	

9. *Employment Incentive Schemes*

a) Do you have an employment incentive scheme?

That is, financial incentives for employers to employ injured workers, such as wage subsidies and premium exemptions.

If yes, please describe the basic features of your scheme:

b) For the period from 1 July 1991 to 30 June 1992:

Persons employed under employment incentive scheme	
Cost of employment incentive scheme	

10. *Second Injury Schemes*

a) Do you have a second injury scheme?

That is, special treatment of recurrence or aggravation of a previous workers' compensation claim, such as no employer excess, exclusion of recurrences or aggravation from experience rating.

If yes, please describe the basic features of your scheme:

b) For the period between 1 July 1991 and 30 June 1992:

Number of persons eligible for scheme	
Claims on second injury scheme	
Cost of "second injury" claims*	

**If possible. If this cannot be calculated, please explain where costs are allocated.*

11. *Disputed Non-Common Law Claims*

a) What was your first level of appeal for workers disputing scheme decisions in 1991-1992?

b) For claim disputes decided at the first level of appeal between 1 July 1991 and 30 June 1992*:

Reason for Dispute	Ave. Dispute Length	Worker Appeal Lost	Worker Appeal Upheld Partly or Fully	Appeal With-drawn	Other	Total
Disputes over Rejection of initial claim						
Disputes over Reduction of benefits						
Disputes over Table of Maims/Injuries						
Disputes over Compensation for medical and like costs						
Disputes over Termination of benefits						
Other (Please specify)						
Total first level appeals decided						

*Not including common law claims

c) What were your second and subsequent levels of appeal for workers disputing scheme decisions in 1991– 1992?

d) For claim disputes decided at second or subsequent levels of appeal between 1 July 1991 and 30 June 1992*:

Reason for Appeal	Ave. Length of Appeal	Worker Appeal Lost	Worker Appeal Upheld Partly or Fully	Appeal With-drawn	Other	Total
Appeals over Rejection of initial claim						
Appeals over Reduction of benefits						
Appeals over Table of Maims/Injuries						
Appeals over Compensation for medical & like costs						
Appeals over Termination of benefits						
Other (Please specify)						
Total second and subsequent level appeals decided						

*Not including common law claims

12. Industry Level Data

a) What claim payments and premiums were related to the following industry classifications between 1 July 1991 and 30 June 1992? (These classifications are based on the Worksafe Australia summary of the Australian Bureau of Statistics 'Australian Standard Industrial Classification Division and Subdivision Industry Codes'.):

		INDUSTRY	Total Costs Incurred	Total Premium Levied	Average Premium Rate	Highest Premium Rate	Lowest Premium Rate
DIVISION	A	AGRICULTURE, FORESTRY, FISHING & HUNTING					

Subdivision	01	Agriculture					
	02	Services to Agriculture					
	03	Forestry & Logging					
	04	Fishing & Hunting					
DIVISION	B	MINING					
Subdivision	11	Metallic Minerals					
	12	Coal					
	13	Oil & Gas					
	14	Construction Materials					
	15	Other Non-Metallic Minerals					
	16	Services to Mining					
DIVISION	C	MANUFACTURING					
Subdivision	21	Food, Beverages & Tobacco					
	23	Textiles					
	24	Clothing & Footwear					
	25	Wood, Wood Products & Furniture					
	26	Paper, Paper Products, Printing & Publishing					
	27	Chemical, Petroleum & Coal Products					
	28	Non-Metallic Mineral Products					
	29	Basic Metal Products					
	31	Fabricated Metal Products					
	32	Transport Equipment					
	33	Other Machinery & Equipment					
	34	Miscellaneous Manufacturing					

		INDUSTRY	Total Costs Incurred	Total Premium Levied	Average Premium Rate	Highest Premium Rate	Lowest Premium Rate
DIVISION	D	ELECTRICITY, GAS & WATER					
Subdivision	36	Electricity & Gas					
	37	Water, Sewerage & Drainage					
DIVISION	E	CONSTRUCTION					
Subdivision	41	General Construction					
	42	Special Trade Construction					
DIVISION	F	WHOLESALE & RETAIL TRADE					
Subdivision	47	Wholesale Trade					
	48	Retail Trade					
DIVISION	G	TRANSPORT & STORAGE					
Subdivision	51	Road Transport					
	52	Rail Transport					
	53	Water Transport					
	54	Air Transport					
	55	Other Transport					

	57	Services to Transport					
	58	Storage					
DIVISION	H	COMMUNICATION					
Subdivision	59	Communication					
DIVISION	I	FINANCE, PROPERTY & BUSINESS SERVICES					
Subdivision	61	Finance & Investment					
	62	Insurance & Services to Insurance					
	63	Property & Business Services					
DIVISION	J	PUBLIC ADMINISTRATION & DEFENCE					
Subdivision	71	Public Administration					
	72	Defence					
DIVISION	K	COMMUNITY SERVICES					
Subdivision	81	Health					
	82	Education, Museum & Library Services					
	83	Welfare & Religious Institutions					
	84	Other Community Services					

		INDUSTRY	Total Costs Incurred	Total Premium Levied	Average Premium Rate	Highest Premium Rate	Lowest Premium Rate
DIVISION	L	RECREATION, PERSONAL & OTHER SERVICES					
Subdivision	91	Entertainment & Recreational Services					
	92	Restaurants, Hotels & Clubs					
	93	Personal Services					
	94	Private Households Employing Staff					
DIVISION	M	NON-CLASSIFIABLE ECONOMIC UNITS					
Subdivision	99	Non-Classifiable Economic Units					

13. Employer Compliance

The Commission is interested in your perception of compliance by employers with premium liabilities.

a) For the financial year 1 July 1991 to 30 June 1992:

		Worksafe ASIC Codes	Estimated Premium Avoided	Premium Paid	Premium Avoided as % total*
DIVISION	A	Agriculture, Forestry, Fishing & Hunting			
		Meat Processing			
DIVISION	B	Mining			

DIVISION	C	Manufacturing			
DIVISION	D	Electricity, Gas & Water			
DIVISION	E	Construction			
DIVISION	F	Wholesale & Retail Trade			
DIVISION	G	Transport & Storage			
DIVISION	H	Communication			
DIVISION	I	Finance, Property & Business Services			
DIVISION	J	Public Administration & Defence			
DIVISION	K	Community Services			
DIVISION	L	Recreation, Personal & Other Services			
DIVISION	M	Non-Classifiable Economic Units			

*Estimated premium avoided as a proportion of (estimated premium avoided plus premium paid)

14. Expenditure

a) What payments were made in the following areas in the last 5 financial years?: (Where disaggregation is not possible, please supply information in aggregated form.)

	1991-92	1990-91	1989-90	1988-89	1987-88
TOTAL PAYMENTS TO INJURED WORKERS					
Weekly Benefits to worker					
Weekly Benefits to dependents					
<i>LUMP SUMS</i>					
<i>Table of Maims/Injuries for:</i>					
Death					
Permanent Impairment					
Pain & Suffering					
<i>Total Table of Maims/Injuries:</i>					
Common Law Settlements					
Redemptions					
<i>TOTAL LUMP SUMS</i>					
Other					
TOTAL PAYMENTS TO INJURED WORKERS					
TOTAL ASSOCIATED COSTS					
<i>Medical Hospital & Like:</i>					
General Medical Practitioner					
Specialist Medical Practitioner					
Other Treatments					
Hospital					
Rehabilitation					
Pharmacy, Aids & Appliances					
Travel & Ambulance					
<i>Total Medical Hospital & Like:</i>					
Common Law Legal					
Investigation & Fraud					
Repayments to Social Security					
Admin/Operating Expenses					
<i>Dispute Resolution*</i>					
Legal					
Administrative					
<i>Total Dispute Resolution:</i>					

<i>Authorised Payments:</i>					
OHS & Prevention:					
Medical panels					
Dispute Resolution Bodies					
Other (Please specify)					
<i>Total Authorised Payments:</i>					
Other					
TOTAL ASSOCIATED COSTS:					
TOTAL EXPENDITURE					

**Not including common law claims*

15. Common Law Legal Costs

The Commission is seeking to determine the extent of total legal costs associated with common law claims. Insurers and other parties frequently have information about legal costs, but that information is partial. The following questions are designed to elicit some estimate of the extent of total legal costs borne by insurers, employers, workers and the legal system itself.

a) What was included in your total common law legal costs in the financial year 1991– 1992? Has this changed over time?

For example, your own costs, and the payment of any other party's costs for which you are liable.

b) What common law legal costs of either party, or the tribunal or Court were not covered in financial year 1991–1992? Has this changed over time?

For example, workers' costs for those cases you win.

c) Can you make a rough estimate of the magnitude of common law legal costs not included in your total common law legal costs for the financial year 1991– 1992? On what would you base this estimate? Has this changed over time?

For example, party costs not included in your costs, court costs not included in your costs, legal costs for cases settled out of court and not included in your legal costs, legal advice provided externally or internally, but not included in legal costs. An estimate of these costs as a proportion of your reported common law legal costs would be useful.

16. Dispute Resolution Legal Costs

a) What was included in your total dispute resolution legal costs for the financial year 1991–1992? Has this changed over time?

For example, your own costs, and the payment of any other party's costs for which you are liable.

b) What dispute resolution legal costs of either party, or the hearing body were not covered in financial year 1991–1992? Has this changed over time?

For example, workers' costs for those cases you win.

c) Can you make a rough estimate of the magnitude of dispute resolution legal costs not included in your total dispute resolution legal costs in financial year 1991–1992? On what did you base this estimate? Has this changed over time?

For example, as a proportion of your reported dispute resolution legal costs. Even a general order of magnitude would be useful.

17. Special Levies

a) Have you imposed any special levies or surcharges to cover unfunded liabilities of your scheme? What is the nature of this special levy or surcharge? Has it changed over time?

18. Premiums

Please complete the table both if you have, or have not, imposed any special levies or surcharges.

If you have imposed any special levies or surcharges to cover unfunded liabilities of your scheme, please remove the special levy or surcharge when filling in the following table.

a) For each of the following financial years:

Premiums	1991-92	1990-91	1989-90	1988-89	1987-88
Average premium rate					
Maximum premium rate in theory*					
Actual maximum premium rate					
Minimum premium rate in theory*					

Actual minimum premium rate					
-----------------------------	--	--	--	--	--

**That is, the maximum/minimum rate an enterprise could be charged under your scheme. If theoretically unlimited, please state "unlimited"*

19. Experience Rating

a) Do you have an experience rating scheme?

For each of the following financial years:

Experience Rating	1991-92	1990-91	1989-90	1988-89	1987-88
Proportion of enterprises receiving higher than industry/class rate premiums.					

Total value of premiums levied at higher than industry/class rate.					
Proportion of enterprises receiving the industry/class rate premium.					
Total value of premiums levied at the industry/class rate.					
Proportion of enterprises receiving lower than industry/class rate premiums					
Total value of premiums levied at lower than industry/class rate.					

20. Bonus/Penalty Schemes

a) Do you have a bonus/penalty scheme?

b) For each of the following financial years:

Bonus/Penalty	1991-92	1990-91	1989-90	1988-89	1987-88
Proportion of enterprises receiving a penalty.					
Total value of penalties levied.					
Maximum penalty levied					
Proportion of enterprises receiving a bonus.					
Total value of bonuses paid.					
Maximum bonus paid					

21. Income

Income	1991-92	1990-91	1989-90	1988-89	1987-88
Total premium income*					
<i>Investment income from:</i>					
Dividends interest & commissions					
Net property income					
Gain on realisation of investments					
Change in market value of investments					
<i>Total Investment Income:</i>					
Movement in outstandings					
TOTAL INCOME					

*Includes government schemes and insurance companies, excludes self insurers.

22. Quality of Service

a) How do you measure the quality of service provided to employers?

- b) How do you measure quality of service to injured workers?
- c) What steps (if any) do you take to measure employer satisfaction?
- d) What steps (if any) do you take to measure injured worker satisfaction?

23. Relations with Government

- a) Did you pay a dividend to the State government in 1991/1992?
- b) Has such a dividend ever been paid ?

L2.2 Survey of occupational health and safety

1. Total occupational injuries and diseases

Total injuries and diseases	1986/87	1987/88	1988/89	1989/90	1990/91	1991/92
<i>Injuries - fatalities</i>						
- other						
- total						
<i>Disease - fatalities</i>						
- other						
- total						
Total injuries and diseases						

2. Inspections

Inspections	1986/87	1987/88	1988/89	1989/90	1990/91	1991/92
No. of workplaces in jurisdiction						
No. of inspections conducted						
No. of inspectors						
Cost of conducting inspections *						
No. of improvement notices issued						
No. of prohibition notices issued						

Note: please describe how you calculated the cost of inspection (eg. does it relate to the operating costs of an 'Inspection Division' within your organisation?)

3. Fines *

Fines on employers	1991-92	1990-91	1989-90	1988-89	1987-88	1986-87
No. of offences						
No. of times the maximum fine has been imposed						
Average fine imposed						
Fines on employees	1991-92	1990-91	1989-90	1988-89	1987-88	1986-87
No. of offences						
No. of on-the-spot fines issued						
Maximum fine imposed on employees						
Average fine imposed on employees						

* *excluding fines imposed by the courts*

4. Court processes and prosecutions

Court processes	1991-92	1990-91	1989-90	1988-89	1987-88	1986-87
No. of prosecutions						
No. of jail sentences imposed						
Maximum jail sentence actually imposed						
Average jail sentence imposed						
Maximum fine imposed by the courts						
Average fine imposed by the courts						

5. Policy Issues

The following questions relate to OHS policies and processes at the state level, and require brief written responses.

a) What major changes in legislation have been introduced over the period of 1986–87 to 1991–92 which could influence the performance of occupational health and safety measures, both nationally and individual jurisdictions?

b) What measures and techniques (eg. cost benefit analysis, regulation impact statements) does your organisation use to evaluate the effectiveness of:

- the introduction or continuation of regulations?
- the introduction, prioritisation and continuation of safety programs?
- inspection and targeting of inspection efforts?
- existing OHS policy initiatives?

c) What interaction is there with the compensation arm of your organisation, or the compensation authority in your jurisdiction?

d) What actions have been undertaken by your organisation in the process of national uniformity?

L2.3 List of survey respondents

Workers' compensation authorities

- Comcare Australia
- WorkCover Authority of New South Wales
- Victorian WorkCover Authority
- Workers' Compensation Board of Queensland
- Workers' Compensation & Rehabilitation Commission (Western Australia)
- WorkCover Corporation (South Australia)
- Workers Compensation Board of Tasmania
- The Department of State Development and Resources (Tasmania)
- Labour Relations Policy Division of the Chief Ministers Department (Australian Capital Territory)
- Work Health Authority (Northern Territory)
- The Seafarers Rehabilitation and Compensation Authority

Occupational health and safety authorities

- Comcare Australia

- WorkCover Authority of New South Wales
- Occupational Health and Safety Authority - Department of Business and Employment (Victoria)
- Department of Employment, Vocational Education and Training and Industrial Relations - Division of Workplace Health and Safety (Queensland)
- Department of Occupational Health, Safety and Welfare of Western Australia
- South Australian Occupational Health and Safety Commission
- Tasmanian Government - Industry Services Division
- Work Health Authority (Northern Territory)
- Australian Capital Territory Government - ACT Occupational Health Safety Office
- Seafarers Rehabilitation and Compensation Authority

Attachment L3 Inquiry participants

The 209 organisations and individuals who made submissions to the inquiry are listed below. Participants marked (*) presented submissions at public hearings. The remainder made written submissions only.

Participant:	Submission Number
Mr Janos Paskandy	1
* Preferred Care Network Pty Ltd	2
Rodd Semmens	3
Dr Andrew Hopkins	4
Sutherland Shire Council	5
* Institute of Actuaries of Australia	6
National Insurance Brokers Association of Australia	7
Commonwealth Bank Officers Association	8
* The NSW Workers' Compensation Self-Insurers' Association	9
Ms Marilyn Hill	10
* Superannuated Commonwealth Officers' Association	11
Association of Risk & Insurance Managers of Australia	12
Robert Buchanan Consulting Pty Ltd	13
G A Wood & D Morrison	14
* Mend	15
State Electricity Commission of Victoria	16
* Self-Insurance Association of Australia	17
* National Safety Council of Australia - Qld Division	18
Barbara Bennett	19
Australian Medical Association (Victorian Branch)	20
* Mr Max McIntyre ¹	21
* Tasmanian Confederation of Industry	22
* Toyota Motor Corporation of Australia Ltd	23
Resthaven	24
* Norman Lindsay & Associates Pty Ltd	25
Victorian Automobile Chamber of Commerce	26
Construction Forestry Mining Energy Union - ACT Divisional Branch	27
* The Australian College of Occupational Medicine	28
* Australian Chamber of Manufacturers	29
South Australian Employers' Federation	30
Workers' Compensation Development	31

¹ Previously listed as Communication Workers Union - Telecommunications & Services Branch

* Deloitte Ross Tohmatsu - Occupational Health & Safety Division	32
Australasian Meat Industry Employees' Union	33
* Hunter Action Group Against WorkCover	34
* Tasmanian Trades and Labour Council	35
Labour Council of New South Wales	36
BHP Steel	37
1 Ahern Morris & Vincent	38
Automotive Metals and Engineering Union	39
Lander & Co	40
* Automotive, Metal & Engineering Union Vehicle Division (Victoria Branch)	41
Commonwealth Bank	42
Work Health Authority	43
* Workers' Compensation and Rehabilitation Commission - WA	44
* ACTU	45
* AMCOR	46
* Aust Earthmovers & Road Contractors Federation and Council of Small Business Organisations of Aust Ltd	47
Reserve Bank of Australia	48
* Self Insurers Association of Victoria	49
* Queensland Law Society Inc	50
Chamber of Commerce & Industry SA Inc	51
* Preferred Care Networks	52
* Tasmanian Government	53
* Chiropractors' Association of Australia (Victoria) Ltd	54
* The Law Society of the Australian Capital Territory	55
* South Australian Government	56
Meat and Allied Trades Federation of Australia	57
Aged Services Association of NSW and ACT	58
Joint Coal board	59
Communication Workers Union of Australia	60
ACT Government	61
Meat and Allied trades Federation of Australia (Tasmanian Division)	62
* Queensland Department of Employment, Vocational Education, training and Industrial Relations	63
* WA Shearing Contractors Association Inc	64
* Insurance Council of Australia	65
SGIO Western Australia	66
* National Transport Federation Ltd	67
Shop Distributive and Allied Employees Association	68
Self-Insurers Association of Western Australia	69
* Don Stewart	70
* Metal Trades Industry Association	71

* Telecom	72
* Chamber of Commerce and Industry (WA)	73
Engineering Employers Association	74
* Trades and labour Council of Western Australia	75
Rigby Jones Pty Ltd	76
* Queensland Confederation of Industry	77
* The NSW Bar Association	78
* National Farmers Federation	79
* Department of Social Security	80
* Slater & Gordon	81
* Trades & Labor Council of Queensland	82
* Australian Chamber of Commerce & Industry	83
* Victorian Trades Hall Council	84
* Victorian Injured Workers Centre	85
Shop Distributive & Allied Employees Association (Queensland)	86
Australian Workers Union (Queensland)	87
* Queensland Department of Employment & Vocational Training and Industrial Relations - Division of Workplace Health & Safety	88
* Victorian WorkCover Authority	89
* Victorian Employers' Chamber of Commerce & Industry	90
* Norman Lindsay & Associates Pty Ltd	91
WorkCover Authority of New South Wales	92
* Dept of Health, Housing & Community Services - Commonwealth Rehabilitation Service	93
* WorkSafe Australia	94
* Construction Forestry Mining and Energy Union	95
Queensland Mining Council	96
Norma Gardner	97
The Employers Federation of New South Wales	98
* Tasmanian Chamber of Mines Ltd	99
Australia Post	100
NSW Branch of the Australian Medical Association	101
Pat Snowden	102
Victorian Bar Council	103
Northern Region Injured Workers Support Group	104
Harry Collins	105
CFMEU - United Mine Workers	106
Kevin D Silcock	107
Mrs R L McIntosh	108
* Tasmanian Government Insurance Office	109
* Victorian Government	110
Department of Social Security	111
Submission withdrawn	112
Mr E.H. Heinke	113

Department of Industrial Relations	114
Mr. Geoff D. Olle	115
Dept of Health, Housing, Local Government & Community Services	116
* Mr. Barry Durham	117
Mr. Rob Cordiner	118
Comcare Australia	119
* South Australian Government - WorkCover Corporation	120
* Chamber of Commerce and Industry SA, Inc.	121
* Self-Insurers Association of Australia	122
Victorian Automobile Chamber of Commerce	123
* Self-Insurers Association of Australia	124
* Law Society of Tasmania	125
* Mr Richard Cumpston (plus Addendum DR126)	126
* Tasmanian Trades and Labor Council	127
Mr John de Groot	128
* Deafness Council of NSW Inc.	129
* Chamber of Commerce and Industry of Western Australia (Inc)	130
* The Western Australian Workers' Compensation Self-Insurers	131
* Association	
* GIO Australia	132
* South Australian Employers' Federation	133
* Self-Insurers of South Australia	134
Tasmanian Chamber of Commerce and Industry Ltd	135
* The Australian Medical Association - Tasmanian Branch	136
* Queensland Glass Manufacturers Company	137
Presidents' Chambers Industrial Court of SA.	138
* Queensland Government	139
* Australian Mines and Metals Association (Inc) - Tasmanian Branch	140
* Superannuated Commonwealth Officers' Association (Federal	141
Council) Incorporated	
Australian Liquor Hospitality and Miscellaneous Workers Division	142
(Victorian Branch)	
* Law Institute of Victoria	143
Victorian Bar Council	144
Tasmanian Chamber of Commerce and Industry Ltd	145
Tasmanian Farmers and Graziers Association	146
* The Law Society of the Australian Capital Territory	147
The National Insurance Brokers' Association of Australia	148
The Australian Workers' Union of Employees, Queensland Branch	149
* The Australian Chamber of Manufacturers	150
Robert Buchanan Consulting Pty Ltd	151
Insurance Council of Australia	152
* National Farmers' Federation	153
Toyota Motor Corporation Australia Limited	154

* Victorian Injured Workers Centre	155
* Ms Sue Forbes	156
The Victorian Institute of Occupational Safety and Health	157
The Automotive, Metals and Engineering Union	158
Queensland Government	159
* Australian Council of Trade Unions	160
* Aged Services Association of NSW and ACT Inc.	161
Finance Sector Union of Australia	162
* Metal Trades Industry Association	163
* The NSW Workers' Compensation Self-Insurers' Association	164
Tasmanian Government Insurance Office	165
* IRS Total Injury Management	166
Victorian Employers' Chamber of Commerce and Industry	167
* Broadmeadows Community Occupational Rehabilitation Centre Inc.	168
* Communication Workers' Union	169
Timber Trade Industrial Association	170
The Institute of Actuaries of Australia	171
Lincoln-Carlisle Professional Management Services Pty Ltd	172
Timber Trade Industrial Association	173
* Chiropractors' Association of Australian (National) Limited	174
* The Labor Council of NSW	175
* Worksafe Australia	176
* Insurance Council of Australia Ltd	177
* The Law Society of New South Wales	178
Business Council of Australia	179
Prime Minister and Cabinet	180
Australian Chamber of Commerce and Industry	181
Queensland Employer Organisations	182
Retail Traders Association NSW	183
Northern Territory Government	184
BHP	185
Queensland Mining Council	186
The Australian Chemical Industry Council	187
National Tertiary Education Industry Union	188
OCTA Nominees P/L	189
Doctors' Reform Society (NSW Branch)	190
AWU FIMEE	191
Hunter Action Group Against WorkCover	192
The Legal Profession of NSW (both branches)	193
Mr Kevin D. Silcock	194
Australian Association of Audiologists in Private Practice Inc.	195
Tasmanian Association of Vocational Rehabilitation Providers	196
AMCOR	197
The Motor Accidents Authority of New South Wales	198

Self-Help Network for Injured Workers	199
Mr John Sultana	200
Tasmanian Government	201
Australian Medical Association Limited (ACT)	202
* Queensland Law Society Inc.	203
The Association of Superannuation Funds of Australia Limited	204
WorkCover Authority (NSW)	205
The United Trades & Labor Council of SA	206
Kahn & Clahr	207
Department of the Premier and Cabinet (Victoria)	208
Bar Association of Queensland	209
Professor Harold Luntz	210
Australian Centre for Environmental Law (ACT)	211
Law Society of Western Australia	212
Law Council of Australia	213