Victorian Government Submission

Productivity Commission Inquiry into “National Workers’ Compensation and Occupational Health and Safety Frameworks”

15 August 2003

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This submission makes reference to the views and conclusions expressed by some organisations. Use of such references should not be interpreted as implying endorsement, by the Victorian Government, of any organisation cited herein.

1 Executive Summary

It has been nearly 10 years since the Productivity Commission's predecessor (the Commission), the Industry Commission, examined an area touching on the economic security and wellbeing of all working Australians in terms of their safety at work, the competitiveness of the economy and its capacity to provide jobs.

The Victorian Government is committed to growing Victoria for the benefit of all Victorians. A workers' compensation scheme that is efficient, fair and administered in a financially responsible manner makes a significant contribution to the competitiveness of the State, its capacity to attract business investment and employment growth. The Victorian Government is committed to strengthening workers' compensation and occupational health and safety (OH&S) arrangements and would not accept an approach that compromised these arrangements or reduced the competitiveness of Victorian business.

The Victorian Government is also committed to a fair, equitable and safe workplace for all Victorians. Workers' compensation and OH&S make a vital contribution to this objective.

The Commission must focus on the implications of worker's compensation and OH&S for workplaces, business investment and employment growth, across Australia; these issues have formed the subject of recent reviews.

The States and Territories are achieving greater national consistency in important areas of workers' compensation and OH&S. The Victorian Government is keen to progress these issues as a matter of priority.

Competitive federalism has proven highly effective in driving change, and facilitating the adoption of best practice arrangements through the very real experience of competition and cooperation between Australia's States and Territories. There is no evidence to suggest that a "one scheme fits all" approach would deliver a successful model or that such a model could be sufficiently responsive to the challenges experienced in divergent regions across Australia.

This Inquiry presents the Commission with a significant challenge to demonstrate a robust, quantified case for change. Any enhancements to the current arrangements must appropriately recognise the high cost of transition, be pragmatic and provide clear, tangible, benefits to all stakeholders. The Victorian Government is also determined to ensure the retention of Victoria's competitive premium setting arrangements. Victorian employers benefit from the second lowest average premium rate of all States and Territories at 2.22 per cent.

The Commission must recognise the tri-partite nature of workers' compensation and OH&S as this has significant implications for change. Extensive consultation is essential to ensure that the Commission bases its findings and recommendations upon a comprehensive analysis of the rights and interests of employees, employers and the respective State, Territory and Commonwealth Governments.

2 Introduction

A fair and equitable workers' compensation scheme

The Victorian Government is committed to fairness and safety at work. Central to building a fairer, more equitable and safer workplace is the need to foster a cooperative employee/employer relationship. The primacy of this relationship is recognised through an on-going focus on delivering positive outcomes for employers and employees alike, whilst recognising the fundamental rights of Victorian workers, to a safe and healthy environment.

The Victorian Government is committed to growing Victoria for the benefit of all Victorians.

A fair and efficient worker' compensation scheme, administered in a financially responsible manner and offering competitive premiums to employers, contributes to the competitiveness of the State, business investment and employment growth.

Benefits, realised in the form of stable premium levels and appropriately structured benefit levels, can only be achieved through a workers' compensation scheme that is administered efficiently, fairly and in a financially responsible manner.

Key elements of the Victorian workers' compensation scheme are:

- common law rights for seriously injured workers
- fair and just benefit levels
- premium levels that are competitive with other states and do not unfairly burden small business
- premium levels that contribute to the competitiveness of the Victorian economy
- encouragement and incentives to ensure that injured workers receive just and timely benefits
- an obligation upon employers to maintain employment for injured workers
- access to rehabilitation programs for injured workers
- access to a fair dispute resolution process.

In the related area of Occupational Health and Safety (OH&S), all Australian Governments share a common understanding that a safe and healthy work environment is best achieved through the active participation of employees, employers and their representatives in the development of health and safety policy and legislation.

The Victorian scheme has evolved, over time, in response to a broad range of community preferences and needs. The development of this scheme reflects a series of unique characteristics and features of the Victorian workplace environment, such as industry mix, workforce composition and geographical distribution.

The most important change to the Victorian workers' compensation scheme in the last decade has been the removal and subsequent re-introduction of access for injured workers to the common law. The re-introduction of common law rights was based upon a strong philosophical commitment to individual rights and, more importantly, the right of seriously

injured workers to sue negligent employers. However, community and stakeholder input is evident in other aspects of the Victorian workers' compensation scheme, such as:

- premium setting principles
- benefit levels
- claims management.

In 2002, the Victorian WorkCover Authority (VWA) embarked upon a review to deliver "Fairer, Simpler Premiums". This is an ongoing priority for VWA as it promotes greater transparency, simplicity and clearer incentives upon employers and employees to reduce the overall incidence and severity of workplace injury and illness.

A national workers' compensation scheme?

The Commonwealth Minister for Employment and Workplace Relations has requested the Productivity Commission (the Commission) to undertake an *Inquiry into National Workers' Compensation and Occupational Health & Safety Arrangements* (the Inquiry). This Inquiry follows a series of reviews and inquiries on national consistency for workers' compensation by the House of Representatives, the Royal Commission into the Building and Construction Industry, the Labour Relations Ministers' Council, the Heads of Workers' Compensation Authorities (HWCA) and the former Industry Commission.[1]

The States have been solely responsible for the provision of workers' compensation and the regulation of OH&S standards since Federation. During this time, Victoria has developed principles essential to the operation of a stable, fair and efficient workers' compensation scheme.[2] Other workers' compensation jurisdictions have realised similar principles in different ways. A range of characteristics distinguish each Australian workers' compensation jurisdiction, including:

- geographical dispersion
- industry mix
- population base
- economic activity.

All these characteristics shape the different workplace cultures evident in the States and Territories; similarly different legal and political structures, health systems and insurance markets have emerged in each Australian jurisdiction. Whilst a trend towards greater national consistency is evident in these markets, the compulsory nature of workers' compensation and its role in protecting the interests of injured workers means that it places a set of unique demands upon governments.

Interaction between these factors and community needs and preferences means that each workers' compensation scheme has evolved differently. The degree of influence exercised by the community is manifested in:

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[1] Throughout the remainder of this submission, the Productivity Commission and its predecessor, the Industry Commission, are referred to as the Commission.

[2] *Cf*. The HWCA discussion of "five key principles which together constitute the HWCA's shared vision for workers' compensation systems in all Australian jurisdictions." HWCA, *Promoting Excellence: National Consistency in Australian Workers' Compensation: Interim Report*, May 1996, p. 1

- the principles of premium design
- benefit levels and structures
- access to common law
- benefit administration.

State-based schemes have proven adept at managing community needs, preferences and the historical legacies presented by each jurisdiction. It is unlikely that a nationally based scheme would be able to deliver the same real and tangible benefits. In pragmatic terms, a robust and stable, state-based scheme offers some real advantages, including:

- greater flexibility and responsiveness, resulting in a greater capacity to address, quickly and efficiently, new issues as they emerge
- the greater scope for innovation and creativity offered by the experiences of competitive federalism
- the ability of state-based schemes to undertake scheme design and make adjustments while minimising the occurrences of negative impacts that may simultaneously emerge elsewhere in the scheme.

Some national consistency may be achieved through the identification and prioritisation of key issues and an analysis of those aspects of workers' compensation and OH&S that would benefit, most greatly from greater uniformity. A comparison of jurisdictions allows the identification of features representing best practice. Overall, this approach is preferable as it recognises that the achievement of best practice relies upon successfully addressing a range of critical factors that extend beyond legislative form to reflect workplace and legal cultures. Geographic, industry, demographic and economic characteristics also shape the experience of different schemes in realising best practice.

Models for national consistency

The Commission proposes that a nationally consistent workers' compensation scheme could be achieved via a range of differing models. The Commission has been requested to consider, at least, the following options:

- a single national regime based upon Commonwealth legislation
- uniform template legislation
- financial supervision
- an expanded Comcare scheme
- mutual recognition
- cooperative frameworks.

However, the degree of difference evident between workers' compensation jurisdictions provides some indicator of the difficulty associated with negotiating a single national scheme. Arguably, a national scheme cannot effectively balance the divergent community preferences evident at the state level.

Interactions between employee groups, employer groups and governments form the basis of current workers' compensation schemes across Australia. Reconciling differences in

this tri-partite environment, on a national level, would present a significant, if not insurmountable, barrier to the successful development and operation of a national scheme.

In practical terms, moreover, the development of a national scheme represents a significant undertaking requiring the development of a legal framework and its contents. The *Accidents Compensation Act 1985 (Vic)* provides a useful indication of the legislative task involved in the development of a national scheme, it extends to more than 250 provisions alone (excluding a series of extensive, associated regulations).

Experience demonstrates that it is not possible to articulate one clearly superior workers' compensation model capable of addressing the many unique challenges presented by the different workers' compensation and OH&S jurisdictions. The United States experience reinforces this conclusion, despite a strong culture of sharing and learning between more than 50 workers' compensation systems, there has been no convergence upon one best practice model.

The HWCA, in 1997, recognised that:

> "…the Australian schemes have come to grips with the establishment and maintenance of socially equitable (e.g. long term enduring benefits at a high level for the seriously injured) and financially disciplined, fully funded schemes."[3]

This conclusion suggests that there is no clear driver for wholesale systemic change to address challenges and issues common to all Australian workers' compensation schemes. Instead, States are focussed upon undertaking targeted change designed to enhance and refine specific aspects of current structures. The disruptive nature of transition to a national system and the high levels of transit costs associated with the introduction of a new scheme are significantly greater than the inherited costs and lack of connectivity associated with the retention of the current frameworks.

Even though all States may be committed to achieving national consistency, a number of factors will mean that the same set of foundation principles will be realised differently. The legal framework used to implement these principles will result in a number of different consequential impacts. Furthermore, the different workplace and legal cultures, inherent to each State, mean that States undertake implementation and compliance activities in different ways. Although the scheme design may remain consistent, there is no guarantee that the same outcomes would be achieved across all jurisdictions.

Extrapolating the same scheme across jurisdictions will lead to a number of variations between jurisdictions due to fundamental differences between the States and Territories. As consistent policy principles can be applied through a wide range of different legal forms this will result in different cost and equity outcomes

Competitive federalism

The experience of competitive federalism has revealed that States are adept at developing and applying a range of creative and innovative solutions to address issues specific to their jurisdiction. Some recent examples that demonstrate the advantages of competitive federalism include the introduction of medical panels, the changing role of claims management and conciliation functions in dispute resolution processes.

States have developed a range of institutions and arrangements, formal and informal, to promote greater cross-fertilisation between jurisdictions in the fields of workers' compensation, OH&S and a range of other areas, such as:

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[3] HWCA, *Promoting Excellence: National Consistency in Australian workers' compensation - Interim Report*, May 1996, p. 38 at 3.10.

- national research, statistical and policy based forums such as the National Occupational Health and Safety Commission (NOHSC), the Australian Institute of Health and Welfare (AIHW), and the Australian Council for Education Research (ACER)

- inter-governmental agreements such as the three that underpin the National Competition Policy (the Competition Principles Agreement, the Conduct Code Agreement and the Agreement to Implement the National Competition Policy and Related Reform)

- ministerial councils such as the Labour Ministers' Council and the Workplace Relations Ministers' Council (WRMC)

- officials' forums such as the HWCA, the Heads of Work Safety Authorities (HWSA) and related benchmarking projects such as the Comparative Performance Monitoring project.

The Victorian Government recognises the importance of benchmarking projects, such as the Comparative Performance Monitoring project, in facilitating transparency and scrutiny of each workers' compensation model. Such projects are vital in ensuring that each scheme is exposed to competitive pressures to appropriately balance premiums and scheme funding against benefit levels, whilst encouraging more efficient scheme administration practices.

States have also proven successful in the development of bi-lateral and multi-lateral agreements such as the Victorian, New South Wales Cross Border Agreement that has operated from 1993.

The Commissions' task

The Commission has so far presented little, or no evidence, of the greater costs presented by the current state-based workers' compensation and OH&S schemes, especially those schemes operating in Victoria. In the absence of a robust, quantified cost analysis, demonstrating clearly identified benefits there is no persuasive case for a single national scheme.

In selecting a preferred framework for national consistency, the Commission must focus upon the relative benefits and costs associated with each model for national consistency. The Commission must be mindful of the practical difficulties and costs associated with the development of a framework to deliver such consistency. A more pragmatic approach is to continue focussing upon the incremental achievement of greater national consistency.

The Commission must clearly relate the contributions, offered by each model, to achieving overall policy objectives. This means that specific, tangible benefits and costs must be tied to identifiable and discrete community interests. The benefits of a national workers' compensation model must also be sufficient to offset the transitional costs associated with the adoption of a new, national framework.

Any model for national consistency cannot be based upon any loss of benefits, currently enjoyed by Victorian workers, for the delivery of a nationally consistent model.

The Victorian Government recognises that there may be some discrete areas that may derive benefits from greater rationalisation and integration between jurisdictions, such as:

- enhanced dispute resolution processes

- the introduction of common definitions

- streamlined self-insurance processes.

However, the benefits derived from such change are expected to be small. Furthermore, in many instances, the achievement of greater inter-State uniformity may prejudice the degree of harmonisation and stability already achieved at an intra-State level. Such impacts could undermine the achievement of fair and equitable outcomes for Victorian employees.

The Commission is faced with a clear challenge to address these many outstanding issues. In the absence of a robust, quantified analysis demonstrating costs and benefits the Victorian Government is committed to the experience of competitive federalism and, therefore, the retention of current frameworks.

3 Terms of Reference

3.1 Access and coverage

Definition of "worker"

The capacity of workers' compensation to achieve fair and equitable outcomes is premised upon injured workers successfully accessing compensation benefits. The treatment of definitional terms such as worker, work-related injury or illness, the relationship between an injury or illness and the workplace and remuneration are assuming greater significance with the growth of non-traditional forms of employment. The strong growth in casual, part-time and fixed term employment as well as a rapid expansion in the use of contractors, outworkers and labour hire firms raises vital issues of equity and efficiency.

Changing labour market practices such as the growth in independent contractors, sub-contractors, outworkers, the self-employed and labour hire firms pose a challenge to equitable coverage and demand a high degree of flexibility. The importance of this issue, nation-wide is self-evident. Over a 17-year period from 1983-84 to 2000-01, the number of small businesses increased from 620,600 to 1,122,000 representing an average annual growth of 3.5 per cent.[4] Current VWA practice involves a case-by-case assessment to determine whether injured workers meet the current definition of a "worker" by reference to the common law test of contract of service. The trend in some industries to outsource high-risk activities can mean that the question of coverage has significant financial implications for both employers and employees.

The *Outworkers (Improved Protection) Act 2003* is an important legislative strategy initiated by the Victorian Government to promote greater equity and fairness by:

- addressing the level of protection afforded to outworkers
- ensuring that outworkers receive their lawful entitlements
- providing a consistent regulatory regime between outwork performed in New South Wales and Victoria.

Under this legislative initiative, outworkers in Victoria are defined as employees for the purposes of the following legislation:

- *Outworkers (Improved Protection) Act 2003*
- *Long Service Leave Act 1992*
- *Occupational Health and Safety Act 1995*
- *Public Holidays Act 1992*
- *Federal Awards (Uniform System) Act 2003*.

By defining outworkers as employees for the purposes of this legislation, uncertainty surrounding the employment status of outworkers is removed and ensures they will receive

[4] ABS, *Small Business in Australia*, 1321.0, 2001, p. 13.

the same employment protection afforded to other employees under these pieces of legislation.

While this measure addresses the issue of outworkers, adapting other labour market practices presents further challenges to the definition of the term worker. Clarification can assist in minimising disputes relating to the correct identification of the employer. This is a common issue for labour hire firms where there may be more than one possible employer. Definitions should seek to clearly attach responsibility to one employer for both workers' compensation premiums and benefits.

Key terms such as employee and remuneration are central to other legislative schemes such as personal income tax, payroll tax and industrial relations legislation. Consistency in definitions across these schemes will often reduce compliance costs for business. Therefore, proposals for consistent definitions for workers' compensation schemes to achieve national consistency must take into account the implications for consistency across legislative schemes and the compliance cost implications for business.

The Commission may wish to develop options for a broad definition of the term "employee" and/or "worker". However, establishing a common definition of "employee" may present significant costs – this must be a key consideration for the Commission and all workers' compensation schemes alike. The Victorian Government also recognises that such change to promote greater harmonisation upon a national level may adversely affect the degree of consistency achieved between Victorian legislative instruments. This may compromise the delivery of fair and equitable outcomes to Victorian workers.

The incidence of premium evasion points to the need for flexibility in enforcement. Jurisdictions across Australia have adopted different approaches to address artificial arrangements primarily designed to evade the cost of providing workers' compensation, payroll tax and meeting other employer/employee obligations. Deeming provisions to expand the employment relationship are used in New South Wales, South Australia and Queensland.

Other issues requiring greater consistency to facilitate equitable, fair and efficient outcomes are set out below.

Relationship of injury or illness to employment and its' contribution to the injury or illness

All Australian jurisdictions have developed different responses to the treatment of recess and journey claims. This issue is highly significant in relation to the distribution of costs between statutory workers' compensation schemes, transport accident schemes, individual superannuation, private income protection insurance and the broader community via the Commonwealth health and social security system.

The Victorian Government would support initiatives to promote greater consistency in the definition of such terms between jurisdictions. This would promote a greater understanding that the burden of caring for impaired members of the community needs to be appropriately allocated to employers – where they have directly contributed to the creation of this cost burden. This issue also has broader implications for the principles that underlie scheme design and the development of appropriate incentives for all employers and employees to reduce the incidence and severity of workplace harm.

3.2 Benefit design and access to common law

The Commission is focussed upon the identification of principles to guide the design of a compensation structure that will inform a national framework. Due to the significant variation in benefit design between Australian jurisdictions, the Commission is focussed

upon identifying best practice features inherent to such models that are clearly superior for providing income replacement and meeting medical and related costs in an equitable manner.

Benefit design comprises a range of critical interactions between:

- the benefit structure
- benefit levels
- administration of benefits provided
- the broader environment in which the scheme operates.

As a result, significant complexity is associated with amending the underlying principles of benefit design and changing actual benefit levels. Benefit design is one of the most important aspects of workers' compensation schemes. The need to avoid adverse incentives presents some of the greatest challenges for system designers. The need to provide adequate benefits to minimise hardship must be balanced against the need to encourage the optimum recovery of the injured worker through rehabilitation and Return To Work (RTW) programs (where appropriate). The equitable allocation of costs to the insurer, employer and, more broadly, the community is also a priority.

Benefit models

The design and structure of benefit provision is largely reflective of overarching scheme objectives. The most fundamental issue to be determined is the question of whether such schemes are trying to compensate:

- lost earnings
- pain and suffering
- medical and related expenses
- costs generated from dispute resolution
- any other attributable costs.

In response, three broad workers' compensation models have emerged in Australia.[5]

1. Pure no-fault model

Under schemes utilising this model, compensation is provided for people with a work-related injury or illness regardless of whether either the employer or worker was at fault. Such schemes do not aim to compensate an individual for their total lost earning capacity.

2. Short-term statute/long-term common law model

Under this model, workers' compensation is designed to compensate injuries of a relatively short duration. Long-term income loss occasioned by permanent disability is compensated under common law.

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[5] Department of Treasury & Finance, *Working Party Report: Restoration of Access to Common Law Damages for Seriously Injured Workers*, February 2000, pp. 33-34.

3. Hybrid model

Under this model, long-term statutory benefits are available but common law damages may be accessed thereby terminating statutory-based income support.

Access to common law

The most notable differentiator between these models is the availability and access of workers to common law damages. For example, no common law damages are available in South Australia, Northern Territory and the Australian Capital Territory. Even where common law damages are available, there may be significant differences between jurisdictions in areas such as:

- maximum limits upon available damages for pecuniary loss and non-economic loss such as pain and suffering
- minimum impairment thresholds
- election between common law rights or statutory benefits.

The use of minimum impairment thresholds (assessed against the American Medical Association Guides Ed. 4) is an important differentiator between jurisdictions as this provides an important mechanism for balancing the benefits of access to common law against the certainty of statutory benefits provided at reduced levels.

The re-introduction of common law rights by the Victorian Government in April 2000 demonstrated a strong philosophical commitment to individual rights and, importantly, the right of seriously injured workers to sue negligent employers. As a result, in Victoria, common law damages are payable for:

- pecuniary loss up to $933,000
- pain and suffering up to $406,000.[6]

It is commonly recognised that access to common law offers the following advantages:

- full indemnity
- the full impact of the injury on the claimant is assessed taking into account factors such as age, sex, occupation and social activities
- a claimant may use damages to reconstruct their lives (i.e. make appropriate investment decisions)
- punitive consequences for negligent employers
- the common law is flexible and adaptable to changing social and economic circumstances.

Return to work and rehabilitation incentives for employers and employees can, potentially, be affected by access to common law damages. There can also be additional cost risks that are shaped by the design of the common law regime. Governments need to balance a range of possible factors, including:

[6] *Victorian Government Gazette*, 26 June 2003, G. 26, pp. 1567-1573.

- costs and risk imposed upon the workers' compensation scheme
- the impact of common law in diffusing the rehabilitation and RTW incentives imposed upon injured workers
- the advantages provided to a claimant as a result of access to common law.

The re-introduction of the common law required the Victorian Government to manage some specific challenges, such as:

- ensuring that the Victorian court system is integrated into processes for determining the level of work-related impairment
- limiting the capacity of self-insurers to engage in legal disputes against claimants so as to ensure that VWA can assess and manage whole-of-scheme precedent implications.

Access to the common law is only one example of the differences evident in the benefit structures that apply in each workers' compensation scheme across Australia.[7]

Principles of statutory-based workers' compensation benefits

Each jurisdiction has based the provision of statutory benefits on the following principles.

- Initial levels of compensation should be provided at levels less than pre-injury earnings to reinforce the natural incentives placed upon workers to adopt safety conscious behaviours in the workplace.
- Income replacement should be provided at levels that step down over time to encourage rehabilitation and return to work.

However, in designing their respective workers' compensation schemes, jurisdictions have realised these objectives in different ways. For example, there are significant differences between schemes in the design of benefit structures, such as the use of step down payments, caps, treatment of impairment/non-economic loss, the basis for determining weekly benefits, access to lump sum payment, the payment of medical and related expenses, use of redemptions, the treatment of spouses and dependents, death benefits and common law thresholds.[8] These differences reflect historical developments regarding the priorities and policy choices of the States and are strongly grounded in community preference.

State-based workers' compensation schemes have been in operation for over eight or nine decades and have built up an extensive body of expertise and practical knowledge in this complex and volatile area. This state-based approach to workers' compensation means that local conditions and preferences have played a central role in the design and administration of workers' compensation.

The need for workers' compensation to address local needs and conditions means that each jurisdiction has applied key principles and concepts of workers' compensation differently. This means that it is not possible to clearly establish one definitive set of

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[7] A related issue is interaction between personal injury torts with other actionable causes based upon product liability or public indemnity. It is possible that an injured worker may claim common law damages via these fields of law if tort-based personal injury damages are restricted in that jurisdiction.

[8] *Cf.* HWSCA, "Benefits", *Workers' Compensation Arrangements in Australia and New Zealand*, November 2001 pp. 18-31.

principles or criteria for the design of a compensation structure that is clearly superior and capable of meeting the specific needs presented by each jurisdiction across Australia.

Transitional issues

Amending the principles of benefit design and changing actual benefit levels highlights the transitional costs involved in adapting to community preference. In Victoria, these costs take the form of:

- the need to manage claims under three different benefit regimes (pre-1985, pre-1992 and current)
- the need to manage a long tail of claims.

The Victorian workers' compensation scheme is not the only one to have experienced changes to benefit design. Managing two grandfathered benefit structures within one jurisdiction demands significantly greater resources and costs to maintain:

- trained staff to manage claims under each benefit regime (including developing and maintaining training materials)
- compatible information technology systems capable of supporting different benefit regimes
- developing and maintaining user manuals and resources to support staff, on a day-to-day basis, in the administration of the different benefit structures.

Each jurisdiction would present a similar suite of challenges. Accordingly, transition to a nationally consistent framework (irrespective of the preferred model) would present substantial transitional and ongoing operational costs of a scale beyond that previously experienced.

The benefits associated with transition to a nationally consistent benefit structure are speculative. To date, no Australian study has demonstrated quantifiable benefits or cost savings that may be realised from the implementation of a national model. In addition, the costs of developing and implementing a new national model are uncosted.

The Victorian Government is not persuaded that the introduction of a nationally consistent benefit structure would deliver sufficient benefits to offset the very substantial costs of transition. As part of its Inquiry, the Commission must focus on the development of a detailed, quantifiable business case for the implementation of a national framework evidencing the tangible benefits of national consistency.

3.3 Incentives and Return To Work

All Australian workers' compensation schemes recognise the importance of early intervention and RTW programs following the occurrence of a workplace injury or illness.

The employer/employee relationship is based upon mutual rights and responsibilities; this means that the management of workplace injury and illness is a critical issue for both parties. Furthermore, injury management presents significant cost benefit implications to all stakeholders – employers, employees, insurers/claims managers, underwriters and scheme regulators. In recognition of the centrality of the employer/employee relationship in promoting positive outcomes the Victorian Government has implemented educational initiatives to foster the creation of a cooperative work model. This educational program is based upon a series of best practice principles articulated by the Commission in 1994 to achieve better rehabilitation and RTW as a part of workers' compensation scheme. These principles include:

- prompt intervention and early referral
- maintaining effective communication
- employer and employee cooperation
- provision of alternative duties and periodic review
- workplace based rehabilitation programs supported by strong financial incentives and obligations placed upon both parties
- retraining.[9]

These principles have achieved broad acceptance[10] and, consequently, all workers' compensation schemes have developed rehabilitation and RTW strategies that focus upon realising these behaviours by emphasising:

- the responsibility of employers to maintain opportunities within the workplace for injured employees
- worker responsibilities to participate in rehabilitation and RTW initiatives
- incentives for new employers of injured workers.

Common acceptance of these principles does not mean that the States have adopted uniform approaches to promoting these behaviours. For example, Victoria has initiated an educational campaign whilst South Australia has introduced compulsory RTW plans. These different approaches demonstrate that encouraging these behaviours is not easily mandated through a regulatory regime. The Australian Rehabilitation Providers Association highlights these challenges stating that increasing control and regulation does not automatically lead to better outcomes, as does the Australian Industry Group (AiG) who comment that instruments such as written RTW plans are more commonly understood as a compliance issue "rather than a legitimate part of the rehabilitation process".[11] This is evidenced by the Tasmanian experience in 2001-02 where durable RTW outcomes of 79 per cent exceeded the Australian average even though no accreditation procedures, fee setting or other controls were in place.[12] Accordingly, there are significant challenges in identifying and extracting best practice in achieving rehabilitation and durable RTW outcomes. This conclusion is reinforced by the findings of the Comparative Performance Monitoring report that few guidelines or principles can be established that greatly influence

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[9] Industry Commission, *Workers' Compensation in Australia*, Canberra, 4 February 1994, p. 127.

[10] These principles are reflected in the HWCA's seven elements of best practice scheme design for total injury management and subsequently cited with approval by the House of Representatives Standing Committee on Employment and Workplace Relations. (See House of Representatives Standing Committee on Employment and Workplace Relations, *Back on the Job: Report on the Inquiry into Aspects of Australian workers' compensation schemes*, June 2003 pp. 163-165 at 7.14.)

[11] AiG, *Productivity Commission Inquiry – National Frameworks for Workers' Compensation and OH&S Submission*, July 2003, p. 32.

[12] Australian Rehabilitation Providers Association, *Submission to the House of Reports Standing Committee on Employment and Workplace Relations Inquiry into Aspects of Australian Workers' Compensation Schemes*, August 2002, p. 5.

the degree of success associated with specific worker rehabilitation programs and the implementation of durable RTW plans.[13]

The Comparative Performance Monitoring project[14] concluded that rates of durable RTW were different for:

- English-speaking workers (75 per cent) compared with injured workers who spoke a language other than English (59 per cent)
- workers being giving suitable duties at the time of RTW (89 per cent) and in subsequent stages.

Clearly there is a range of factors impacting on the effectiveness of rehabilitation outcomes, including:

- the effectiveness and quality of administration, including access and equity
- the role of injured workers' support groups
- provision for rehabilitation coordinators
- education and research on rehabilitation and the need to link this back to prevention.

These factors reflect the primary importance of the employer/employee relationship in achieving rehabilitation and durable RTW outcomes, where appropriate. Jurisdictions may successfully create a regulatory environment to ensure a culture of compliance, however, such approaches do not mean employers will provide appropriate support and workplace environment for the RTW of injured employees. To successfully address this issue, workers' compensation schemes must focus, at an operational level, upon the creation of a cooperative workplace model.

To successfully address rehabilitation and RTW, the Victorian Government is focussed upon fairness and safety at work at an operational level through:

- appropriate encouragement and incentives to ensure that injured workers receive just and timely benefits
- obligations on employers to maintain employment for injured workers – with a strong emphasis upon applying practical outcomes for injured workers rather than termination of employment upon the expiry of a statutory period
- improved choice and access to rehabilitation programs for injured workers.

Recent initiatives include the implementation of incentives for new employers of injured workers, a greater focus on improving claims management and RTW plans.

The Victorian Government contends that the proximity of state-based workers' compensation schemes to the workplaces they regulate is essential to achieve the best rehabilitation and RTW outcomes. State-based regimes are inherently more flexible and agile in their capacity to address local needs and respond to changing workforce conditions.

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[13] WRMC, *Comparative Performance Monitoring: Fourth Report,* Canberra, August 2002, Part C.

[14] *Ibid.* Part C, Figures 82,85 and 86. Seacare rehabilitation and RTW results were excluded from this discussion due to the unique nature of the Seacare workforce.

The Victorian Government does recognise that greater success may be achieved in this field. An issue of particular importance that requires improvement is the inter-relationship of state-based workers' compensation schemes and the health and social welfare net. The benefits of a nationally consistent framework for these issues may be questioned. The Victorian Government would welcome the Commission giving further consideration to different models to undertake further analysis and research (through initiatives such as the Comparative Performance Monitoring project) to identify mechanisms and strategies to realise better outcomes for injured workers.

3.4 Dispute resolution

Workers' compensation schemes are characterised by very different approaches to dispute resolution. Availability and access to common law damages is a significant factor impacting on the administration and costs of each workers' compensation scheme across Australia. The re-introduction of common law rights to Victorian workers evinced a strong commitment by the Victorian Government to the fundamental right of seriously injured workers to sue negligent employers. In comparison, some jurisdictions including South Australia, Queensland, the Northern Territory and the Commonwealth have abolished common law rights for injured workers.

A policy-based commitment to common law rights for injured workers does have financial implications. For example, in 2000-01, great polarities are seen between jurisdictions in the numbers and costs of legal disputes:

- in South Australia where no common law rights are available, up to four per cent of total workers' compensation claims costs related to legal disputes whilst in New South Wales, up to 19 per cent of total workers' compensation claims costs related to legal disputes
- the average legal cost per dispute for:
    - South Australia totalled to $3,220
    - Comcare amounted to $10,031
    - New South Wales up to $12,072
    - Australian Capital Territory totalled $17,805.[15]

During this same period in Victoria, legal costs absorbed up to eight per cent of total claim costs and the average legal cost per dispute was $5,440. Arguably, these differences are likely to reflect a range of characteristics inherent to each State such as the presence of a more litigious legal environment.

Commenting generally upon the experience of Australian workers' compensation jurisdictions, the Comparative Performance Monitoring project concluded that access to common law inflates costs in those schemes. However, it was also noted that some jurisdictions, including Victoria, have minimised these impacts through effective legal case management. Upon re-introduction of common law rights to Victorian workers, the Victorian Government stated:

> "The commitment of this Government to restore common-law rights to seriously injured workers has an equal commitment to ensure that the costs of the restoration of

[15] *Ibid.* Part C, Figures 74 and 76. The average legal cost per dispute in the Northern Territory amounts to $19,637. However, this high cost reflects the structure in place to manage legal disputes in the Northern Territory where legal resources are utilised as part of claims management decision-making processes.

> common-law rights are confined and the number of common-law claims and the cost of those claims can be actuarially measured in a reasonably predictable manner."[16]

The Victorian experience demonstrates that different regimes have formulated a range of approaches to dispute resolution in their own jurisdictions. Other features utilised in the design and structure of dispute resolution procedures include:

- medical panels
- the referral of matters to conciliation.

The Comparative Performance Monitoring project also highlighted factors that correlate to lower dispute rates, including:

- the period since implementation of benefit regime
- claims officer experience
- clarity of dispute-handling processes.[17]

The capacity of the Comparative Performance Monitoring project to formulate these guiding principles to inform schemes in the development of effective dispute resolution processes demonstrates the creative value of competitive federalism in formulating and applying different strategies.

This experience reinforces the view of the Victorian Government that dispute resolution models implemented in other jurisdictions may offer valuable insights into more effective ways to:

- tailor legal systems
- successfully manage legal disputes
- achieve conciliated outcomes in workers' compensation disputes.

The area of dispute resolution offers significant scope to all workers' compensation schemes to undertake further research, analysis and evaluation to assist in the development of more efficient and effective mechanisms for the management of legal disputes. The Commission has provided no evidence demonstrating the quantified cost benefits that would accrue from the implementation of a nationally consistent framework for the management of legal disputes.

Competitive federalism offers jurisdictions an important opportunity to examine different models and strategies that have been developed and implemented. The Victorian Government may support a policy forum designed to facilitate a greater shared understanding of the factors to drive the development of equitable, efficient and effective dispute resolution mechanisms.

[16] The Minister for WorkCover, the Hon. Mr Cameron, *Second Reading Speech*, *Accident Compensation (Common Law and Benefits) Bill*, Legislative Assembly, Parliament of Victoria, 13 April 2000.

[17] Comcare is characterised by similar features and also has extremely high dispute rates (24 per cent) representing a significant exception to these conclusions.

3.5 Self-insurance

Workers' compensation authorities are responsible for undertaking a range of functions such as claims management on behalf of employers who participate in the general workers' compensation premium pool. In foregoing these advantages, self-insured organisations are able to influence claim costs (through encouraging rehabilitation and durable RTW outcomes). However, self-insurance arrangements place great pressure on workers' compensation schemes to ensure that any reduction to the claims costs of self-insured organisations is consistent with the rights and obligations of injured workers under that scheme. Large employers, across Australia, support self-insurance due to advantages such as:

- minimising workers' compensation premiums
- greater scope to more closely align workers' compensation to other human resource functions
- the opportunity to assume much greater control of claims management, rehabilitation and RTW programs.

The Commission has itself recognised the value of self-insurance in providing clear incentives for the senior management of self-insurers to focus upon building a "culture of care" within these organisations.

The Victorian scheme places particular obligations on self-insurers who are viewed as role models for other employers in terms of workplace safety, claims management and occupational rehabilitation.[18] Self-insurers are subjected to a rigorous screening process to ensure that such organisations have, and are likely to maintain, a safe work environment and high quality total injury management. In addition, self-insurers must provide acceptable third party financial guarantees to protect the scheme from the cost of claims in the event of liquidation.

There are currently 37 licensed self-insurers in Victoria. The prevalence of self-insurance varies greatly between jurisdictions, for example:

- there are 68 self insurers in New South Wales (including group and specialised self-insurers)
- there are 66 self-insurers in South Australia (plus Government Departments and Authorities)
- there are 18 self-insurers in Tasmania
- there are 5 self-insurers in the Northern Territory.[19]

The widespread use of self-insurance in South Australia means self-insured companies employ almost 40 per cent of the States' total workforce. In comparison, Victorian self-insurers represent approximately 10 per cent of total Victorian employee remuneration.[20]

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[18] Victorian WorkCover Authority, *Annual Report 2001-02*, October 2002, p. 69.

[19] HWSCA, *Workers' Compensation Arrangements in Australia and New Zealand,* November 2001, pp. 8-9.

[20] Victorian WorkCover Authority, *Annual Report 2001-02*, October 2002, p. 69.

A review of current self-insurers across Australia indicates that there may be a number of organisations that would seek to maximise the opportunities arising from the creation of a nationally consistent self-insurance regime.

However, there are some notable exceptions to the Comcare regime. Former Commonwealth authorities, including the Commonwealth Bank of Australia and Qantas, although eligible to access the Comcare regime, have remained within the general premium pools of state-based workers' compensation schemes.

Self-insurers operating in only one regime may be reluctant supporters of change, concerned that the stability of their home jurisdictional schemes may be disrupted by the introduction of a nationally based self-insurance scheme. Such change may, potentially, jeopardise the licences granted to relatively smaller-sized self-insurers.

The introduction of a nationally based self-insurance scheme may offer large employers a significant competitive advantage. The departure of large national employers from a States' workers' compensation scheme may directly contribute to increased risk and volatility in that scheme, increasing the cost burdens upon remaining employers. This is particularly the case where, as in a number of states including Victoria, New South Wales and South Australia, schemes carry unfunded liabilities.

National self-insurance models

There are two general models for the introduction of a nationally based self-insurance scheme.

Template legislation

There may be scope for greater consistency in the criteria and processes for licensing of self-insurers. This model would be used to develop and apply a standard form of self-insurance. Key issues to be addressed would include:

- the introduction of nationally consistent eligibility criteria – for example, there are currently significant differences between jurisdictions in the number of employees required to be eligible:
  - New South Wales – greater than 1000
  - South Australia – greater than 200
  - Queensland – new applicants must have more than 2000 employees
  - Victoria – no threshold levels applied.
- the development of consistent standards for risk retention, third party financial guarantees, reinsurance and associated prudential supervision, taking into account the differing risk profile associated with benefit structures and other scheme characteristics.

Mutual recognition

The HWCA gives extensive consideration to models for the implementation of a nationally consistent self-insurance model. Their preferred model was based upon "mutual recognition" and:

> "the development of processes such that an employer, once having applied in one jurisdiction and satisfied acceptable national standards, would as of right be able to self-insure in each jurisdiction in which it operates under that jurisdiction's law."[21]

Under this model, an application for national self-jurisdiction would be lodged in the home jurisdiction of a company (i.e. the location of the head office). This jurisdiction would then liaise with other jurisdictions and, with their approval, coordinate the issuing of a self-insurance licence by each jurisdiction under an umbrella self-insurance arrangement.

Under this model, each jurisdiction would retain an inherent power to subsequently revoke, where justified, the application of that licence within their jurisdiction.

However, the HWCA itself has expressed only cautious support for the mutual recognition of self-insurers as:

> "concerns nonetheless remain about the capacity of employers to administer the provisions of a number of pieces of legislation which differ not only in benefit structures, but also in such matters as the times for lodging an determining claims, rehabilitation and return to work requirements and dispute resolution processes." [22]

The operation of a nationally-based self-insurance scheme, utilising a mutual recognition approach, would present significant challenges for each jurisdiction as it is unlikely that all jurisdictions would form a common view on eligibility criteria, prudential standards, monitoring and reporting. Under the current, state-based arrangements, the approval and re-approval process is one of the few levers available to workers' compensation schemes to ensure regulatory compliance by self-insurers. Under a mutual recognition model, the capacity of schemes to influence the regulatory activities of self-insurers is further negated.

Self-insurance is designed to facilitate greater flexibility in underwriting the costs of compensation. However, a national self-insurance model, based on mutual recognition does not extend to benefit structures, penalties and sanctions as these would remain unchanged in each jurisdiction.

It is unlikely that all jurisdictions would support the introduction of a single national scheme to overcome the systemic issues presented by multiple jurisdictional-based regimes. One concern relates to potential fears that this model would be based upon the adoption of the lowest common denominator, thereby materially prejudicing the interests of employees.

As noted above, some small self-insurers are concerned that the introduction of a national self-insurance scheme may endanger the stability of state-based self-insurance regimes.

A related issue for the Victorian Government is the potentially negative impacts that may result from the introduction of a nationally based scheme. Whilst such models may produce greater harmonisation between jurisdictions, there is a strong possibility that intra-state benefits, based upon the application of consistent standards and principles within Victoria, would be lost. For example, the VWA and the Transport Accident Commission (TAC) have developed closely integrated procedures to ensure seamless case management, and the correct allocation of costs for cases such as journey claims.

Greater consistency in self-insurance is likely to deliver few cost savings. Furthermore, incentives upon self-insurers to recognise claims, maintain a positive OH&S environment, promote rehabilitation and RTW outcomes depend upon the benefits provided under the relevant scheme. As scheme design reflects community preferences, this is another way

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[21] HWCA, *Promoting Excellence*: *National Consistency in Australian Workers' Compensation,* Canberra, May 1997, p. 45.

[22] *Ibid.*, p. 45.

in which workers' compensation schemes and OH&S, through its legislative instruments can influence workplace cultures and behaviours within self-insured organisations.

The introduction of uniform or consistent self-insurance eligibility criteria for self-insurance could lead to anomalous outcomes within and between jurisdictions. This means that the Commission should focus upon those aspects that offer a limited scope for rationalisation, such as:

- affiliation arrangements
- risk retention
- prudential requirements.

Application and monitoring procedures may be better streamlined between jurisdictions, removing some administrative burdens upon private companies; however, the Victorian Government is not persuaded that such discrete changes would deliver the benefits necessary to offset the substantial costs associated with the introduction of a national self-insurance scheme.

3.6 Fairer simpler premiums

Australian workers' compensation schemes are designed to reflect key principles of equity, stability, prevention and simplicity. However, a range of factors impact upon the capacity of workers' compensation authorities to achieve premium levels based purely upon an experience-based assessment of risk, these include:

- historical decisions relating to fund performance and management
- the degree of cross-subsidisation, past and present, built into scheme design
- the level of self-insurance within that jurisdiction
- definition of remuneration
- industry mix
- business size[23]
- underlying service costs
- maintenance of ratio of net assets to claim liabilities
- the use of deductibles
- the impact of State taxes.

Balancing incentives and prediction is a key challenge for any rating system.

> "Actuarial theory aims to maximize the predictive power of the premium calculation. This seeks to find the best compromise between responsiveness to real changes and stability in the face of random fluctuation. To this theoretical approach…[features are added that are] intended to create or enhance incentives for workplace safety, injury treatment and return to work, and to stabilize premium rates, so that rate changes are

[23] The issue of credibility affects small businesses – this refers to the difficulty of undertaking a meaningful experience based assessment for small employers.

> less disruptive. Striking the right balance between these three factors: responsiveness, incentives and stability, is a difficult and often highly political matter."[24]

A comparison of historical trends demonstrates that the premium rates of different workers' compensation schemes in Australia diverge significantly. From 1995-96 to 2001-02, Victoria has maintained a low average premium rate in comparison to other jurisdictions.[25]

The Victorian Government recognises that successful premium design depends upon premiums closely reflecting the real costs associated with the degree of risk presented by a given business undertaking. In addition, it is vital that premium rates are sufficient to maintain a fully funded, financially viable scheme that minimises the levels of cross-subsidisation within that scheme.

In April 2002, the VWA launched a review to deliver "Fairer, Simpler Premiums". This reflected a Bracks Government election commitment for:

- a stable workers' compensation scheme administered in an efficient, fair and financially responsible manner
- premium levels competitive with other states and which do not unfairly burden small business.[26]

The objectives of this three-year review program are to:

- increase the incentives to drive and reward improvements in workplace safety by placing greater emphasis on employer experience
- reduce the complexity of the system and enhance transparency
- provide employers with a greater choice of premium options through the provision of optional programs such as voluntary excess and group rebate.

VWA has developed a three-year plan to undertake:

- improvements to the stabilisation of rates for small employers (i.e. those with a total payroll of less than one million)
- changes to the definition of workplace
- the introduction of a single premium rate for larger employers
- simplified premium notices
- halving the cost of buy-out insurance

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[24] Institute of Actuaries, *Initial Submission to the Productivity Commission Inquiry into National Workers' Compensation and Occupational Health & Safety* Frameworks, Sydney, June 2003, p. 16

[25] HWSCA, *Workers' Compensation Arrangements in Australia and New Zealand*, November 2001. However, it is recognised that a comparison of premium levels between jurisdictions is not straightforward. Premium comparisons are problematic due to the level of self-insurance within a jurisdiction, variations in the definition of remuneration, variations in the industry mix within a jurisdiction and the use of excesses by employers to meet initial claims costs. *Cf.* WRMC, *Comparative Performance Monitoring – Fourth Report*, Canberra, August 2002

[26] Australian Labor Party – Victorian Branch*, Labor Listens Then Acts: Labor's Plan for Building a Stronger and Fairer Community in Victoria*, 2002, Ch. 10.

- improvements to the rules regarding classification of workplaces
- improvements to succession rules
- changes to the premium setting formulae to ensure more appropriate recognition of an employer's individual experience
- simplification of workplace industry classification rates
- experience based upon a performance index to compare the employer's performance against industry rates.

The Commission has not demonstrated the cost benefits of establishing national consistency for workers' compensation premiums. The current state-based system supports the autonomy of workers' compensation schemes to design premiums based upon local conditions and needs. In comparison, a national system would offer little scope to design efficient premiums that promote appropriate employer incentives for greater workplace safety. Moreover, the size of a nationally based system means that the central premium setting principles would have lesser capacity to influence and minimise inequitable distributional impacts. Finally, there is a possibility that a national workers' compensation scheme would, inevitably lead to significant cross-subsidisation upon the following range of factors between:

- geographic locations
- industry type
- large and small employers
- different generations.

The Victorian Government is committed to maintaining an independent premium setting capacity. Mechanisms such as the Comparative Performance Monitoring project leverage off the principles of competitive federalism by ensuring transparency and accountability through allowing greater scrutiny of workers' compensation funds and their management. Such vehicles ensure that States remain highly conscious of the importance of a fully funded and stable scheme that provides clear and direct incentives to employers to maintain safe workplace environments.

3.7 Market structure

Statute based workers' compensation

The Victorian workers' compensation scheme is delivered via a statutory monopoly in the form of a single statutory provider. Licensed claim agents undertake claims management and the Victorian Funds Management Corporation (VFMC) is responsible for selecting private fund managers to manage all investments. However, VWA underwrites all Victorian workers' compensation, thus maintaining full risk retention within the central fund. This structure enables VWA to take advantage of the benefits of scale and intermediation through the pooling of risk.

This structure provides some clear advantages to VWA. The advantage of competition are recognised in the area of claims management – where economies of scale are also relatively minor, whilst in the case of funds management, the benefits of scale are effectively realised through the use of external providers.

The benefits of optimising the scheme in this way are:

- enhanced levels of service provision
- ensuring better value per premium dollar
- providing employers with choice in the selection of claims agents

Workers' compensation differs from private property and casualty insurance products such as income protection insurance because of:

- compulsory participation
- uniform benefits
- long-tail claims structure
- strong enforcement provisions to uphold the regulatory framework.

Workers' compensation also differs from social welfare in that despite compulsory participation and uniform benefits, the level of benefits varies with individual characteristics such as pre-injury income and degree of impairment.

The long-tail claims structure means that capacity to meet claim liabilities must be maintained for decades. This claims structure involves risks that private insurers are reluctant to accept. In addition, this claims structure also means that claimants are, potentially, exposed to a high risk of insurer insolvency.

The mandatory nature of workers' compensation insurance imposes a corresponding burden upon the Government to ensure that workers' compensation insurance premiums are available and affordable to all employers. This requirement suggests limitations upon the role and benefits of competition. Accordingly, a National Competition Policy review commissioned by the Victorian Government supported the retention of a central authority.[27]

The AiG also recognised the central role of government in the provision of workers' compensation.

[27] Department of Treasury and Finance, *National Competition Policy: Report on the Third Tranche Assessment in Victoria's Implementation of the National Competition Policy,* Melbourne, March 2002, p. 123.

> "Workers' compensation is a social system designed to provide workers with protection if they are injured at work. To protect small employers from the impact of a single very expensive claim, cross-subsidies need to be in place. Financial incentives are also needed to facilitate return to work and improved OH&S performance. This cannot be achieved in a scheme that does not have central control over premium setting mechanisms."[28]

The VWA, through WorkSafe, is also responsible for regulating OH&S. Whilst operationally separate, this structure ensures that the organisation maintains an overall, integrated view of the workplace.

National markets

The Commission's Issues Paper contains a number of models that indicate a greater role for a national market. Efficient provision of workers' compensation depends heavily upon the development of an appropriately structured market to minimise the significant risk of market failure.

Experience in the development of national markets for gas and electricity highlight the difficulties in structuring integrated and efficient national markets. Partial measures, such as those that could be achieved through the creation of a national self-insurance scheme fail to take an integrated view that adequately recognises the possible impacts on state-based schemes. It is likely that such initiatives may create greater, downward cost pressures on state-based workers' compensation schemes that typically result in increased premiums for small business.

The potential scope for private participation in workers' compensation is limited, in practice, to agency arrangements and outsourcing of underwriting by the values and expectations of the wider Australian society. Experience in fields such as public liability insurance demonstrate that coverage may be, at best, partial where risk is poor or presents significant problems for assessment. Similarly, competition for market share can lead to unsustainable underwriting practices that ultimately lead to government intervention.

Recent Tasmanian experience demonstrates the important role that may be played by a government in the field of workers' compensation to avert market failure. In its early years, the Tasmanian scheme was characterised by under-pricing of insurance premiums; this was succeeded by a period of loss-leader behaviour and then Tasmanian employers experienced dramatic increases in premium rates following the introduction of the *Workers' Rehabilitation and Compensation Act 1998*. The Tasmanian Government introduced significant amendments to this legislation, effective from July 2001 that led to a significant reduction in premium rates, for example, the indicative average premium rate in 2003-04 in 2.48 per cent in comparison to 1999-00 when it was 3.1 per cent.[29]

Private insurance markets may lead to fluctuating premium levels and volatile market behaviour that may, in the absence of government intervention, result in a market failure. In such instances, there is a real possibility that government will be left to act as an insurer of last resort. The importance of community expectations and pressures were evident following the collapse of HIH where the Commonwealth, State and Territory Governments immediately came under pressure to provide assistance.[30] This is a real danger for the

[28] AiG, *Productivity Commission Inquiry – National Frameworks for Workers' Compensation and OH&S Submission*, July 2003, p. 41.

[29] Tasmanian Government, *Submission to the Productivity Commission Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks*, July 2003, pp. 9-10.

[30] The States and Territories undertook to meet most outstanding HIH builders warranty and compulsory third party claims whilst the Commonwealth formed the non-profit, insurance industry operated company HIH Claims Support Pty Ltd to meet some claims other than workers compensation and builders warranty. *Cf*. The HIH Royal Commission, *The Failure of HIH Insurance: A Corporate Collapse and Its Lessons*, Vol. 1, pp. 62-63 at 3.7.

Victorian Government as Victorian workers' compensation legislation provides a right to all eligible workers' compensation claimants to compensation even where their employer has failed to maintain their workers' compensation insurance premiums.

Prudential regulation

The Australian Prudential Regulation Authority (APRA) is responsible for the development of prudential regulations and standards designed to protect the interests of consumers accessing financial services such as general insurance and banking. Prudential requirements are informed by the nature of the product and the structure of the market. An obligation is imposed on private insurance companies to maintain adequate capital resources; this is designed to engender confidence on the part of policyholders, creditors and the market more generally in the financial soundness and stability of the insurer.[31] Essentially, APRA standards are designed to provide a buffer against unanticipated losses. Furthermore, in the event of such difficulties, these standards should, ideally, mean that the insurer is able to continue operating while such problems are addressed or resolved.

Publicly owned organisations, such as the VWA, are subject to oversight through institutions such as the Auditor-General and through the engagement of independent actuarial services.[32] A publicly owned, transparent and accountable, workers' compensation scheme provides a high degree of stability and certainty. In the event of underperformance, VWA claims liabilities would be secured through the mandatory nature of employer participation in the scheme. This certainty ensures Victorian workers' compensation benefits from some degree of certainty. A similar guarantee is denied to private insurers who are exposed to the operation of market forces that can also lead to an erosion of the premium base.

Prudential regulation is an essential feature of private insurance markets to prevent unsustainable competitive behaviour and protect consumer interests. However, the unique nature of workers' compensation and the corresponding obligation upon governments to ensure its availability and accessibility means that government is responsible for maintaining a stable and efficient workers' compensation scheme that promotes fair and equitable outcomes for employers and employees. The Victorian Government continues to support a publicly owned workers' compensation provider. The application of prudential regulation, designed for the supervision of a private insurance market, is inappropriate.

3.8 Occupational Health and Safety

The Victorian Government believes that, rather than seeking to establish another nationally uniform OH&S framework, the Federal Government should provide a greater level of support to the existing national system. Strong relationships between Australian jurisdictions have led to the development of robust processes and mechanisms that, today, underpin a program of broad national consistency on OH&S program delivery. For example, the emergence of a National OH&S Strategy and a national standard development process evidence the success of current state-national approaches. The formulation of this national framework has delivered a cost-effective approach to dealing with OH&S within the context of current Commonwealth and state powers. The Victorian Government supports a strengthening of existing arrangements and standards.

The introduction of a further model might not be any more successful in achieving national consistency than current approaches. These approaches deliver significant advantages in allowing each Australian jurisdiction to develop and respond to emerging local and national issues within the context of a national legislative framework. Current arrangements, far

[31] APRA, *Prudential Standard GPS 110: Capital Adequacy for General Insurers*, July 2002.

[32] *Cf.* Victorian WorkCover Authority, *Annual Report 2001-2002*, Melbourne, October 2002, pp. 61-62.

from diluting nationally consistent approaches to OH&S in respective jurisdictions, demonstrates the capacity of States to successfully promote greater national consistency in OH&S law, despite a weakening commitment by the Commonwealth to nationally consistent OH&S programs. The degree of national commitment to the achievement of a nationally consistent OH&S program may be measured by reference to the decreasing levels of funding to the National Occupational Health and Safety Commission (NOHSC) over an extended period of time.

Achievement of national consistency through the co-operative efforts of the jurisdictions permits a degree of experimentation and learning in individual States and Territories that can contribute to a national process of continuous improvement.

The Commission's Terms of Reference replicate the same topics addressed by the Industry Commission Inquiry on Work, Health and Safety.[33] The Victorian Government notes that nearly all recommendations resulting from this Inquiry have been successfully implemented by each jurisdiction.

The Terms of Reference presuppose that current OH&S laws are fragmentary and inconsistent across jurisdictions and, thus, impose an onerous compliance burden upon multi-jurisdictional companies. The Commission has presented no evidence demonstrating the application of inconsistent OH&S standards between different jurisdictions and the associated costs. This is because the differences in standards are minimal in nature and effect. All States have developed similar performance-based legislation founded upon the Robens model and incorporating the key concepts of “duty of care” and “practicability”.

Nationally consistent OH&S standards

It is possible to highlight a range of nationally consistent OH&S standards that have been successfully adopted via processes facilitated by NOHSC, the HWSA, the WRMC and the Department of Workplace Relations Advisory Group (DOWRAC).

- The adoption of National Standards for Dangerous Goods and Hazardous Substances across Australia.

- The introduction of a national certification scheme for operators of plant and equipment widely used in the building and construction industry. National certification will provide a consistent training and certification process and nationally transferable credentials.

- The development of a national construction standard and associated codes of practice for demolition and prevention of falls from height was recently endorsed by NOHSC members. Victoria has indicated that it is prepared to lead the development of a prevention of falls standard to be adopted in other jurisdictions.

- The agreement of the States and Territories to adopt a declaration of the National List of Exemptions for prohibitions on the use of all asbestos and asbestos-containing materials (effective from December 2003).

- In May 2003, HWSA agreed to the introduction of a national OH&S campaign on manual handling, falling from height in construction and young persons in manufacturing, to be coordinated by appointing responsible jurisdictions to plan and sponsor individual projects.

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[33] Industry Commission, *Work, Health and Safety: Inquiry into Occupational Health and Safety*, Canberra, April 1995.

Achieving greater national consistency

The Victorian Government recognises that, while the current regulatory models applying in each jurisdiction are similar, and that there are few substantive differences between subordinate instruments, there is room for improvement in ensuring consistent approaches to applying regulatory and enforcement standards across Australia. Ways in which the process could be improved include ensuring that national standards are drafted in a way that they can be readily integrated into jurisdictional legislative frameworks without a need for substantial further work at State and Territory level, and jurisdictions making a greater commitment to adopt agreed national standards within a more consistent timeframe.

The Victorian Government is focussed upon achieving positive OH&S outcomes and an equitable operating environment for business. These objectives may be supported, at a national level, by:

- ensuring that NOHSC is adequately resourced by the Commonwealth to fulfill its key role of facilitating a process for developing nationally consistent arrangements for adoption by respective jurisdictions

- utilising current national processes – facilitated by NOHSC, WRMC, HWSA and DOWRAC - to achieve reductions in regulatory duplication and ensure effective regulatory development processes that maximise the limited resources of governments in administering OH&S laws.

Costs of transition to a national scheme

The introduction of a national regime could create unnecessary confusion and high cost imposts on duty holders (as a result of having to change existing arrangements to comply with a new regime) whilst, potentially, creating significant disruption and cost for employers operating solely within State borders.

In sum, the Victorian Government is supportive of the Commission's objective of achieving national consistency and simplifying the level of compliance with OH&S standards; however, this can be achieved, in the field of OH&S, through existing processes facilitated by the National OH&S Strategy 2002-2012. The Commission has provided no evidence that the lack of a nationally consistent approach imposes significant compliance costs on business. Moreover, the current level of convergence and consistency among jurisdictions on OH&S arrangements suggests that dismantling current state-based arrangements in favour of a nationally based legislative framework is an inappropriate strategy to address national consistency. Furthermore, it would impose significant unwelcome costs on Victorian employers and the economy.

3.9 System interfaces

A significant issue for the States and Commonwealth is the relationship between the Commonwealth taxpayer funded social security and public health systems with state-based workers' compensation schemes. This is an increasingly problematic issue in those "situations where employees are willing to work but denied the opportunity"[34] as injured workers who do not achieve a return to work may move between Commonwealth and state-based schemes. Much emphasis is placed upon the danger of injured workers becoming the responsibility of the Commonwealth Government and the Commonwealth's social security system operating as a de facto workers' compensation system. However, under the current arrangements and given the changing nature of the workforce, there is clear scope for costs to be inappropriately attributed to state-based workers' compensation schemes.

Historically, workers' compensation has been premised upon the protection of the worker and the need to allocate the costs of work-related injury and illness to employers. This approach is generally recognised as the most efficient mechanism for the allocation of costs within the community, designed to ensure that the cost of treating injured workers is directed to employers and, ultimately, reflected in the overall costs of producing a good or service.

Workers' compensation schemes are responsible for delivering a mixed good providing public and private benefits to injured workers, employers and the broader community. Accordingly, there are some fundamental philosophical issues regarding the question of who should pay for the cost of treating injured workers. A closely related issue is the provision of community-wide social welfare under the Commonwealth social security and public health systems.

Premium design

The Victorian Government recognises the ongoing importance of premium design as a means of imposing appropriate, targeted, incentives upon employers to:

- lower the overall incidence and severity of work-related injury and illness
- contribute to worker rehabilitation and promote greater levels of durable RTW.

As a result, the VWA review to achieve "Fairer Simpler Premiums" is founded upon the principle that workers' compensation premiums must reflect the true cost of work-related injury and illness. However, there are some instances where it is not possible to easily and directly attribute all such costs to workers' compensation. Workers' compensation schemes across Australia overlap with:

- the public health system
- the social security system
- the taxation system
- superannuation
- state-based schemes (i.e. no-fault statutory accident compensation schemes).

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[34] House of Representatives Standing Committee on Employment and Workplace Relations, *Back on the Job: Report on the inquiry into aspects of Australian workers' compensation schemes*, Canberra, June 2003, p.66 at 3.163-3.164.

The attribution of costs between these systems may be influenced by the structure and design of workers' compensation in each jurisdiction. Factors influencing the allocation of costs may include:

- benefit design
- availability of common law
- the treatment of recess and journey claims
- the changing nature of workforce structures (i.e. definition of worker and the relationship between the place of employment and the injury or illness).

Jurisdictional differences compound the scope for inequitable outcomes, with the Commonwealth, taxpayer funded, social security and public health systems required to meet costs that may, in some jurisdictions, be covered by the operation of state-based workers' compensation (and other statutory, no-fault compensation) schemes. Jurisdictional differences in scheme design may result in significant anomalies and unfair distributional impacts between States. The Commission should focus upon identifying opportunities within workers' compensation schemes, including premium design, for enhancing national consistency that will minimise the uneven distributional impacts.

Interaction between the Commonwealth and state-based systems

The transfer of individuals between workers' compensation and the social welfare net arises because the boundaries between these two systems are complex and blurred. For example:

- conditions for which individuals claim compensation may not be clearly attributable to work – this arises in respect of conditions of gradual onset and those commonly associated with ageing
- an injured worker recovering from the initial injury or illness is prevented from successfully re-entering the workforce for reasons such as the development of a second injury or psychological conditions or, alternatively, geographic restrictions upon access to labor markets.

Many discussions focus upon the unfair transfer of costs to the Commonwealth, taxpayer funded, social security system. However, the Victorian Government is also mindful that costs are transferred from the Commonwealth to State workers' compensation schemes. Workers' compensation is payable for injuries (including the aggravation of injuries) that may only have a tenuous connection with employment and where the age and general health status of the person is a significantly greater contributory factor to the injury or illness suffered.[35]

The changing nature of workers' compensation and improving standards of care are important factors affecting the inter-relationship of workers' compensation and social security systems. Most of the recent growth in Victorian workers' compensation liabilities may be attributed to non-demonstrable soft tissue injuries. For example, "sprains and strains" represent an increasing proportion of all Victorian workers' compensation claims[36] and long term claims[37]; furthermore, such claims have proven the most expensive.[38]

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[35] *Cf.* The AiG discusses this issue in greater detail. AiG, *Productivity Commission Inquiry – National Frameworks for Workers' Compensation and OH&S Submission*, July 2003, pp. 29 -31

[36] See: http://www.workcover.vic.gov.au/dir090/vwa/home.nsf/[ages/stats_blank2/$File?t3a.html

[37] See: http://www.workcover.vic.gov.au/dir090/vwa/home.nsf/pages/stats_blank2/$File?t9d.html

Anecdotally, there is also some evidence to suggest an increasing level of workers' compensation claims are for psychological conditions such as stress. Factors contributing to such conditions include labour market composition, employment arrangements and work practices. Such claims present a convergence of issues related to the broader labour market human resource issues as well as more straightforward health problems.

These issues suggest that there is increasingly greater scope for inequity resulting from interactions between the Commonwealth, State and Territory systems. A conflict results from the differing roles of the Commonwealth social welfare system and state-based workers' compensation schemes. The former is concerned with the nature and objectives associated with a community-wide sharing of costs associated with a welfare function that is, appropriately, undertaken at the Commonwealth level. In comparison, the primary nature and function of a workers' compensation scheme is to effectively contain the costs to workers' compensation to that state where the cost originated.

The relationship between the Commonwealth and state-based systems presents significant implications for the achievement of equitable and fair outcomes for Victorian injured workers. The States and Commonwealth must work closely to minimise the inequitable impacts resulting from these system-based interactions. The Commission is referred to the following examples.

Social security and taxation

Under the *Social Security Act 1991* (Cth) the payment of compensation, whether paid in the form of a lump sum or periodic payment for economic and/or non-economic loss, affects most social security income support payments and all compensation affected payments. Compensation, assessed under Part 3.14 of the *Social Security Act 1991*, and paid as a lump sum may preclude the payment of past and future pensions or benefits.

Periodic compensation income is treated differently from other forms of income such as social security benefits. This may result in a dollar for dollar direct deduction or, alternatively, be assessed as ordinary income depending on who receives the compensation and when it is received. Accordingly, injured workers can be more disadvantaged than any other group where their total payments are lower (such as casual or part time workers) and can be a real disincentive to claiming workers' compensation. This can lead to anomalous results leaving some injured workers more disadvantaged than any other group where their total payments are lower (such as casual or part time workers). In these cases, there is a real distinctive to claiming workers' compensation.

In a recent draft ruling the Australian Taxation Office raised the prospect of changed taxation arrangements for structured settlements. Such a measure would serve to discourage the payment of benefits, using this form, at a time when schemes are moving to favour such payments. The attachment of negative taxation consequences to structured settlements means that there are real limitations upon the usefulness of this option.

The application of preclusion periods also means it is difficult to manage the transition of individuals from workers' compensation to the social welfare net.

Job seeker assistance

Access to intensive job seeker assistance is limited by reference to the duration of unemployment benefits; this means that claimants under workers' compensation are precluded from accessing this greatly needed assistance even though they may have been subject to long-term unemployment.

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[38] See: http://www.workcover.vic.gov.au/dir090/vwa/home.nsf/pages/stats_blank2/$File/t11b.html

3.10 Frameworks for national consistency

A nationally consistent workers' compensation scheme has attracted widespread consideration. Under the current Terms of Reference, the Commission has been asked to consider (but is not limited to) the following models.

National regime

Comprising workers' compensation and OH&S, this model would entrench the overriding authority of the Commonwealth to legislate the activities of state-based workers' compensation schemes and OH&S standards.

As recognised by the Commission during the 1994 *Inquiry into Workers' Compensation in Australia*, the concept of a single national scheme presents questions of fundamental importance regarding:

- the Commonwealth constitutional authority to enter into the field of workers' compensation
- the potential for double premium obligations on employers to fund the cost of the new scheme and fund liabilities under existing schemes
- the degree of support from key stakeholders including industry, States and Territories and unions for the introduction of a single uniform scheme.

The Commonwealth Government may seek to rely upon its constitutional powers to legislate any matter with respect to external affairs [s.52(xxix)], trade and commerce among the states [s.52(i)] and trading or financial corporations [s.52(xx)] as a means of entering the workers' compensation field.

However, even if successful under these combined heads of power, the Commonwealth could not establish constitutional authority to legislate workers' compensation with respect to the following groups within the community:

- unincorporated entities (including sole-traders, self-employed individuals and partners) operating within the jurisdictional boundaries of any one State
- state government employees.

The enactment of Commonwealth workers' compensation legislation would result in highly inequitable outcomes for employers and workers across the wider community through the creation of two separate workers' compensation regimes in each Australian State. This approach would also entrench schematic duplication, complexity and inefficiency. These problems could only be overcome by States referring legislative authority to the Commonwealth under s.52(xxxvii). The same anomalies would result if the Commonwealth sought to rely upon its insurance power pursuant to s.52(xiv) as this head of power is clearly limited to "insurance, other than State insurance".

As noted by the Commission in 1994, many industry-based groups were highly apprehensive of the potential effects of introducing a single national scheme due to a potential explosion of costs associated with implementation, transition and ongoing operations. The AiG has also noted the significant hurdles associated with a single national scheme (or the adoption of a uniform legislation model).[39]

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[39] AiG, *Productivity Commission Inquiry – National Frameworks for Workers' Compensation and OH&S Submission*, July 2003, p. 6.

A single national scheme would undermine the inherent capacity of jurisdictions to respond to local needs and issues presented

Expanded Comcare model

Large employers, having elected to opt out of state-based workers' compensation schemes would join the Commonwealth Comcare scheme as a result of broadening Comcare eligibility criteria.

The expansion of Comcare was first mooted in 1991, as part of *The Review of Comcare Program* (The Brown Review) and was also considered by the Commission in 1994 within a broader context of realising a nationally competitive workers' compensation market.

In 1994, the Commission recognised that the expansion of Comcare is inappropriate, stating:

> "…it is debatable whether the proposed extension of Comcare is the most appropriate means of developing national competition."[40]

The Commissions' Issues Paper gives little indication of the expanded Comcare model would work. While the model may mean a substantial transfer of risk to Commonwealth taxpayers, selective entry criteria may preclude small business employers due to the difficulty of assessing such risk. If the model were to result in access by low risk and large employers only, premiums in state-based schemes will be placed under increased pressure. The Commission should carefully consider the implication of this proposal for small business premiums.

Uniform template legislation

The application of uniform template legislation, or applied laws regime, would create national harmonisation between state-based workers' compensation schemes and OH&S laws by requiring jurisdictions to enact complementary "mirror" legislation.

Uniform template legislation has been successfully used to create a harmony between the States and Territories in areas such as:

- establishment of the Australian Securities and Investments Commission
- development of the Corporations Law regime
- regulation of non-bank financial institutions
- the consumer credit code
- food safety standards.

Uniform template workers' compensation legislation presents fewer constitutional issues than the development of a national regime. However, as noted formerly by the Commission, the success of this model depends on joint Commonwealth, State and Territory based cooperation, coordination and agreement. Experience, based on the introduction of a national Corporations Law regime, suggests that such agreements can take up to 10 years to secure.

The Victorian Government does not support the introduction of national uniform template legislation for workers' compensation and OH&S. Template legislation is an inflexible and

[40] Industry Commission, *Workers' Compensation in Australia,* Canberra, February 1994, p. 215.

inefficient vehicle for achieving uniformity as it constrains the ability of jurisdictions to respond to local needs and conditions. The OH&S model provides one example where States and Territories have successfully agreed to the adoption of common essential requirements, rather than focus on the detailed aspects of template legislative provisions. Furthermore, in areas such as food regulation, we have seen States overcome unwieldy, slow processes for the development of national standards by States assuming responsibility for driving the process of legislative reform. Furthermore, in many cases, national standards are based upon legislation or regulation first introduced in Victoria, New South Wales or Queensland.

The standardisation of outcomes is not guaranteed simply by legislative uniformity. It also relies upon the consistent interpretation, application and enforcement of such standards. The experience of industry classifications used as part of setting workers' compensation premiums demonstrates a clear divergence between schemes and, thus, illustrates how uniformity may be lost with the progress of time.[41]

The Victorian Government does not believe that uniform template legislation is a preferable model for achieving greater consistency across jurisdictions.

Financial sector regulation

Legislative power would be conferred upon the Commonwealth to support licensing and regulation of state-based workers' compensation insurance activities.

APRA is responsible for the prudential regulation of banks, insurers, building societies, credit unions, friendly societies and superannuation funds. Focussed primarily upon the development and enforcement of prudential standards and practices, APRA seeks to provide some degree of certainty that the financial interests of policyholders, depositors and superannuation fund members are appropriately protected through the observance of prudential standards relating to capitalisation, liquidity and governance. APRA's prudential regulation and oversight role is reinforced through its interventionist powers.

The entry of Commonwealth regulatory authorities, such as APRA, into areas such as state-based workers' compensation would, presumably, be based upon the Commonwealth's constitutional powers with respect to corporations, the trade and commerce and insurance powers.[42] However, there are clear limitations upon the scope of this power; moreover, under the Federation settlement, the States have retained clear constitutional responsibility for insurance at the state level. This is an untested area, however, it remains unlikely that the States would devolve legislative responsibility for workers' compensation to the Commonwealth Parliament.

The Victorian Government recognises that the role of APRA is critical to the protection of consumer interests in an open market. However, the same considerations do not apply to workers' compensation schemes operating under a statutory monopoly. In Victoria, like some other workers' compensation jurisdictions, the Government is responsible for a centrally managed-fund. Access to public funding means all policyholders are provided with a strong assurance of the long-term viability of the workers' compensation scheme. Accordingly, the Victorian Government does not support an expanded regulatory and

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[41] For example, Victorian and South Australian industry classifications are based on the ABSW ASIC code; Western Australia and New South Wales base industry classifications upon the ANZSIC code while Queensland has introduced its own industry classification system based on the ANZSIC system with some alterations specifically designed for Queensland. *Cf.* HWSCA, "Premium Setting", "*Comparison of Workers' Compensation Arrangements in Australia and New Zealand,* November 2001, p. 41

[42] See discussion relating to a national regime above.

oversight role for Commonwealth agencies such as APRA in the area of workers' compensation.

Mutual recognition

This model, comprising OH&S and workers' compensation, would result in a national market whereby registration in one jurisdiction is deemed to meet registration requirements in other jurisdictions.

The Commission's Issues Paper provides little detail of the mutual recognition model. Mutual recognition legislation generally provides for reduced barriers to inter-state and trans-Tasman trade. It provides that:

- registered occupations (e.g. legal practitioners) can obtain registration in one participating jurisdiction by virtue of registration in another participating jurisdiction
- goods that can be sold in a participating jurisdiction by virtue of complying with the requirements for sale in another jurisdiction.

Mutual recognition affects market access and does not remove the obligation to comply with the law of the jurisdiction in which the good or service is being provided. Mutual recognition would therefore not affect the coverage of state laws governing workers' compensation and OH&S, but would presumably provide for the licensing of private insurers where that insurer is licensed in another participating state. In the case of Victoria where there is no provision for licensing private underwriters of workers' compensation, the potential scope and application of mutual recognition would be limited.

Cooperative model

A nationally based forum would be responsible for developing and setting policy directions and strategies. States and Territories would be subject to a corresponding obligation to implement policy in accordance with collective agreements and undertakings.

A principle based model, where States and Territories are required to implement policy in accordance with collective agreements and undertakings, developed via a national policy forum may offer an appropriate mechanism to develop greater national consistency in workers compensation.

The success of a national policy forum will depend upon identifying key features that shape the success of such agencies. The NOHSC experience provides some useful lessons. The effectiveness of this forum has been constrained by decreased funding over an extended period of time; however, there remain some important aspects such as:

- a focus upon establishing commonly agreed essential requirements between members
- gaining Ministerial "in-principle" commitment to policy proposals before undertaking a detailed policy program to ensure a more efficient allocation of resources.

NOHSC provides one clear example of a national policy forum designed to promote greater OH&S consistency between jurisdictions.

The Victorian Government also refers the Commission to a range of other, alternative, agencies that have successfully undertaken policy research, development and evaluation. These include:

- the Australian Centre for Educational Research (ACER)
- the Australian Institute of Criminology (AIC)

- the Australian Institute of Health and Welfare (AIHW)
- the European Agency for Health and Safety at Work
- the Road Transport Commission
- the Murray-Darling Basin Commission.

An examination of these, and other relevant, models may assist the Commission to develop a model for a national policy forum for consideration by jurisdictions following the Commission's release of the Draft Report in September 2003. The Commission should also focus upon presenting a range of design principles and recommendations, for all jurisdictions to consider, relating to:

- objectives (including development of a broad agenda)
- structure and composition (i.e. membership)
- funding
- deliverables and outputs.

The Draft Report will allow the States and Territories to give further consideration to this model and allow States, including Victoria, to develop an informed position on the value of a national policy forum.

Achieving national consistency

The experience of competitive federalism demonstrates that the promotion of consistency and uniformity between workers' compensation jurisdictions results, organically, from ongoing interaction between schemes. Australian States and Territories have demonstrated their ability to promote innovation and realise best practice in workers' compensation as a result of the current federated structure.

A nationally consistent workers' compensation and OH&S scheme is premised upon the identification and implementation of best practice. However, in 1997, HWCA clearly recognised that:

> "…the Australian schemes have come to grips with the establishment and maintenance of socially equitable (e.g. long term enduring benefits at a high level for the seriously injured) and financially disciplined, fully funded schemes.[43]

This conclusion suggests that that there is no need for systemic change to address issues and challenges associated with the current workers' compensation schemes operating across Australia.

State-based workers' compensation and OH&S schemes have operated for over eight or nine decades, successfully developing an extensive body of expertise and practical knowledge in this complex and volatile area. In the current environment, the States and Territories have assumed a vital role. The HWCA commented favourably upon this feature of Australian workers' compensation schemes, stating:

> "One of the distinctive features which has characterized the management of workers' compensation schemes has been the process of quiet borrowing between systems of features which have been shown to be demonstrably effective elsewhere. While to an

[43] HWCA, *Promoting Excellence: National Consistency in Australian Workers' Compensation*, Canberra, May 1997, p. 38 at 3.10.

> outsider, such a process may appear to be a protracted and elongated affair, in a very real sense, there is an osmotic process of national consistency upon best practice lines taking place on a continuing basis."[44]

The development of cross-border arrangements between Victoria and New South Wales illustrates this incremental process of harmonisation between schemes.

Beneficial competition between schemes has played a central role in facilitating ongoing improvements to scheme performance between jurisdictions.

State-based workers' compensation schemes also offer significant advantages allowing local conditions and preferences to play a central role in the design and administration of workers' compensation. Australian States and Territories provide dramatic contrasts. The Law Council of Australia provided the following illustration.

- Geographic – Western Australia and Tasmania.
- Industrial – Queensland and Victoria.
- Population base – Tasmania and New South Wales.
- Economic – South Australia and New South Wales.[45]

Developing a single, national workers' compensation and OH&S scheme is premised upon the identification and adoption of best practice. However, each workers' compensation and OH&S scheme has emerged in response to community needs and preferences, coupled with an evidence-based approach that takes account of locally-sourced hazard and injury data, demographics, the industrial landscape, legal frameworks and other factors. Moreover, the Institute of Actuaries highlights that changing community values and expectations means that there is no ideal national workers' compensation model, stating:

> "It is also important to realise that any scheme exists in a dynamic environment. Economic, social, political, health, technological and employment conditions all change over time and may vary by jurisdiction, industry etc. Workers' compensation and occupational health and safety schemes must be able to adapt over time. They also need to be able to respond appropriately to the needs of different areas. Consistency and stability do not imply rigid uniformity. It is also necessary to expect that there will be unexpected consequences of any changes (and of some things that remain the same). It will be necessary to respond to these."[46]

Each workers' compensation scheme is engaged in an on-going task to balance the constantly shifting expectations of competing stakeholder interests. This means that there is no perfect model for workers' compensation and that the preferred option, as supported by the Victorian Government, is a flexible and robust workers' compensation scheme that can quickly respond to a changing political and economic environment. The Institute of Actuaries notes that:

> "There is also a major political dimension to this question…While a single national scheme, whether public or private sector based, does offer advantages, these may not be sufficient to over-ride the desire of each state, as determined by its representative

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[44] HWCA, *Promoting Excellence: National Consistency in Australian Workers' Compensation – Interim Report*, Canberra, May 1996, p. 38 at 3.11.

[45] Law Council of Australia, *Submission to the Productivity Commission*, "Inquiry into National Workers' Compensation and Occupational Health and Safety", 12 June 2003, p. 8.

[46] Institute of Actuaries, *Initial Submission to the Productivity Commission,* "Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks". Sydney, June 2003, p. 7.

> government, to choose the underwriting system which it believes best balances the competing needs and demands of its stakeholders."[47]

The Victorian Government seeks to deliver a workers' compensation scheme based on fair and equitable outcomes for Victorian employees and employers. Achieving these outcomes is based upon the capacity of the Victorian scheme to respond to the specific needs of the Victorian community. This means that the Victorian Government would consider moderate initiatives proposed by the Commission to achieve national consistency across workers' compensation and OH&S schemes provided such approaches do not fundamentally constrain the capacity of jurisdictions to respond, quickly and efficiently, to the needs of the community.

Formal mechanisms such as the Comparative Performance Monitoring project have proven invaluable in identifying emerging trends and exemplary features of different workers' compensation scheme and facilitated their introduction to other jurisdictions. The Victorian Government appreciates that vehicles promoting competitive federalism between workers' compensation schemes are essential to address perceived criticisms associated with publicly owned schemes such as a lack of innovation or commitment to service improvement.

The Victorian Government recognises the important role of competitive federalism as a "change agent" promoting innovation and harmonisation amongst workers' compensation and OH&S schemes. However, this experience has relied upon the ongoing autonomy of the States and Territories. The Victorian Government may support a nationally focused workers' compensation policy forum, however it is essential that any such forum be based upon areas of common interest between the jurisdictions where there is a meaningful prospect of engagement and, importantly, agreement.

[47] *Ibid*, p. 22.

Appendix A: Reports

The Victorian Government refers the Commission to the following reports.

Department of Treasury and Finance, *Going Forward – Health & Safety Review*, Victoria, October 2000

Department of Treasury and Finance, *National Competition Policy Review of Victoria's Workplace Accident Compensation Legislation*, Victoria, September 2000

Department of Treasury and Finance, *Report of the Working Party on Restoration of Access to Common Law Damages for Seriously Injured Workers*, Victoria, February 2000

Office of the Auditor-General, *Management of Claims by the Victorian WorkCover Authority*, Victoria, November 2001

W. E Upjohn Institute for Employment Research, *Victorian Workers' Compensation System: Review and Analysis*, Kalamazoo, Michigan, 1997

Victorian WorkCover Authority, *Annual Report 2001-2002*, Melbourne, October 2002

Victorian WorkCover Authority, *Annual Report 2000-2001*, Melbourne, October 2001

Victorian WorkCover Authority, *Premium Review Final Summary Report*, Report undertaken with assistance of AT Kearney, Melbourne, June 2002

Victorian WorkCover Authority, *Premium Review, Supporting Material*, Report undertaken with assistance of AT Kearney, Melbourne, June 2002

Victorian WorkCover Authority, *Strategy 2000*, Melbourne, 2002

Victorian WorkCover Authority, *WorkCover: The Case for Change*, Melbourne, 2000