Australian Government

Department of Employment and Workplace Relations

SUBMISSION TO THE PRODUCTIVITY COMMISSION

INQUIRY INTO NATIONAL WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY ARRANGEMENTS

September 2003

Contents | **Page**

Contents	Page
Executive Summary	i
Part A	
Introduction	**1**
Current national workers' compensation and OHS arrangements	**3**
Workers' compensation arrangements	4
Occupational health and safety arrangements	7
OHS performance	9
Enforcement and compliance	9
Linkages to other systems	10
Part B –National frameworks for workers' compensation and OHS	**12**
	12
Model 1 – Co-operative model	13
Model 2 – Mutual recognition model	15
Model 3 – Comcare model	16
Model 4 – Uniform template model	17
Model 5 – Extended financial sector regulation model	18
Model 6 – National workers' compensation and OHS model	
Part C – Elements of the workers' compensation and OHS systems	**21**
Self-insurance	21
Access and Coverage	21
Benefits structure (including common law)	23
Premiums	25
Dispute resolution	25
Injury management	26
Interaction with Commonwealth programmes	26
OHS Model	28
Possible regulatory model	28
Enforcement and compliance	29
National institutional arrangements	**30**
Appendixes	
Appendix 1 –OHS legislation applicable to a proprietor of small to medium hotel	32

Executive Summary

1. The Australian Department of Employment and Workplace Relations (DEWR) considers that there is a need for substantial improvement in the operation of Australia's workers' compensation and occupational health and safety (OHS) arrangements.

2. Each State and Territory (State), and the Australian government, provides workers' compensation coverage and regulates health and safety at work for employees who fall within their jurisdiction. For a relatively small workforce, in international terms, there are eleven separate and distinct workers' compensation schemes and ten diverse OHS schemes, along with a raft of other Australian, State, and local government regulatory regimes, which can impact on workplace health and safety.

3. Workplace injury and disease in Australia is a significant human and economic issue. In the financial year 2000-01, the various workers' compensation schemes compensated over 200 fatalities as a result of workplace accidents and more than 140,000 Australians suffered a compensable work-related injury and disease. Compared to other developed countries, Australia's workplace health and safety performance is about 100 per cent below the worlds' best performers in terms of workplace incidents that result in a fatality[1].

4. The available evidence suggests however, that the total number of workplace injuries and diseases in Australia may be much higher than the number eligible for compensation. A survey by the Australian Bureau of Statistics found that over a twelve month period, five percent of the work-force or 477, 800 workers experienced a work-related injury or illness[2]. This equates to an incidence of injury rate of 49.3 per thousand employees, compared to an incidence rate of 15.2 per thousand employees that the workers' compensation schemes actually reported[3]. New Zealand, for the same period, reported a workplace injury rate of 10.5 per thousand employees[4].

5. The economic cost of workplace accidents to workers, employers and the community is estimated to be in excess of $30 billion annually or some 4.3 per cent of Gross Domestic Product[5]. The human cost in terms of pain and suffering to the injured workers and their families is impossible to quantify.

---

[1] Source - International Labour Office, http://laborsta.ilo.org/ Yearly statistics of occupational injuries.
[2] *Work-related injuries Australia*, ABS survey, September 2002.
[3] Workplace Relations Ministers' Council Comparative Performance Monitoring, 4th Report, (4th CPM Report).
[4] *Ibid* – 4th CPM Report
[5] Australian employers pay some $6 billion per annum in premiums (direct costs) – 4th CPM Report, page 74 – and using a multiplier of four times for the employers indirect cost of a workplace accident, total cost to employers is about $30billion. The multiplier for indirect cost is uncertain, the Industry Commission in 1994 used 'three

Workers' Compensation

6. The State-based workers' compensation schemes are complex and inconsistent. There is a notable lack of competition in the underwriting of this form of insurance with the four largest schemes being government monopolies. Three of the four largest State government schemes have substantial unfunded liabilities. Employers operating across jurisdictions must take out separate insurance in each jurisdiction in which they operate. The benefit structures differ between the jurisdictions, even for comparable or identical injuries, resulting in injured employees not been treated consistently across jurisdictions.

7. All Australian workers' compensation schemes are experiencing difficulties in adapting to contemporary work practices. This has exacerbated the inconsistencies across schemes, particularly in core areas of coverage, benefits and compensable injuries and diseases. Due to policy decisions by State governments, employers in most schemes are facing increased costs for compensable injuries - such as stress - over which they have minimal control, or which have been contributed to by factors external to the workplace.

8. The national return-to-work rates of injured workers are falling. Poor injury management by the schemes, along with scheme design, is resulting in more persons being unable to return to work following a workplace accident. Factors contributing to the falling return to work rates include increased use of redemption of benefits by schemes; access to common law damages; and injured workers being 'parked' on benefits for a limited period and then effectively discharged without any further income support, medical benefits, rehabilitation or return to work assistance.

9. One result of the design of the State schemes is that the Australian Government's social security schemes have become a 'de-facto' workers' compensation scheme. The taxpayer funded income support (mainly the Disability Support Pension, Age Pension and Newstart) and health schemes (mainly Medicare), are required to support a substantial number of workers who have suffered a work-related injury or disease.

10. The cost associated with a work-related injury, disease or fatality is the primary responsibility of the employer. The employer is required to insure against these costs through a workers' compensation scheme and the scheme design should encompass those costs. The

---

times', while the 1997-98 Annual Report of Victorian Workcover, page 26, estimated "11"times for employers in the transport industry. The economic cost to the worker and community needs to be added to the employer costs.

social security system is a targeted, means tested safety net for those with no adequate alternate means of support, and it is not intended to meet the cost of a workplace accident.

Occupational Health and Safety

11. National OHS arrangements are similarly complex and inconsistent resulting in added cost to business and providing varying levels of protection for workers. There are ten separate OHS statutory regimes along with other statutory regimes that regulate aspects of OHS.

12. Industry is confronted with a daunting body of regulatory instruments in place across Australia that impact on workplace health and safety. For example, the recent Royal Commission into the building and construction industry found nine principal OHS Acts and another 30 statutes applied to that industry, along with some 20 OHS regulations and 34 other regulations. On top of this, the industry must consult hundreds of codes of practice, advisory standards and guidelines[6].

13. The Royal Commissioner reached the view that the result is a fragmented, disjointed and uncoordinated system of occupational health and safety law and regulation which, when applied to a national industry such as the building and construction industry, is inequitable, wasteful and inefficient[7]. However, the Royal Commissioner could have been referring to any industry.

14. The States have not moved to reduce the OHS regulatory burden on business. The evidence suggests there is a trend towards increasing regulation. For example, recent changes to the NSW regulatory regime which were heralded as "reform" to reduce the regulatory burden, have in fact placed additional compliance burden on business.

15. The existing OHS regulatory regimes across the States create uncertainty for business, particularly small business, in understanding their obligations and solving OHS problems in their workplaces. The existing State-based approach has also resulted in increased complexity for employers who operate across jurisdictions due to the inconsistent adoption by the States of national workplace safety standards into their regulatory regimes. The failure by the States to adopt national safety standards in a consistent and comprehensive manner has reduced protection for workers and others in the workplace.

[6] *Final Report of the Royal Commission into the Building and Construction Industry,*(BIRC Report) Volume 6, page 15, February 2003

Possible National Frameworks

16. DEWR has undertaken an assessment of the six national framework models set out in the Issues Paper released by the Productivity Commission (Commission) as part of this Inquiry. We have identified a number of pros and cons for each model. DEWR also notes there may be other models which could emerge from the Commission's Inquiry.

Design elements of workers' compensation and OHS

17. The design elements of both programmes will depend to a large degree on any preferred national framework model the Commission may identify. To assist the Commission, DEWR has proposed some principles that may help guide the design of core areas of a workers' compensation scheme. A similar approach has been taken in respect of OHS.

18. DEWR has also suggested to the Commission some possible models in respect of the design elements that may further progress establishing a nationally consistent approach in this important area of the economy.

Conclusion

19. Despite attempts over the years to harmonise and establish consistent rules across the schemes for workers' compensation and OHS, it is DEWR's submission that little progress has been achieved. The States have continued to frame the design of their schemes in isolation with an emphasis on perceived local issues or on fostering State-focussed policy objectives of the government of the day.

20. In recent years the number of injuries and diseases compensated by the State workers' compensation schemes has decreased, yet employers premiums have increased, in some States substantially. Fewer workers are being covered by the schemes and the schemes are returning fewer injured workers back to work. The taxpayer also has to directly subsidise a significant number of injured workers and their families. The administrative duplication in the current arrangements is also a major cost to the economy. Overall, the current national arrangements are impacting on both local and international competitiveness.

21. Clearly, there is an obvious need for improvement in the current arrangements to help reduce the unacceptable toll of work-related deaths and disabilities. All governments have agreed to work at the operational level for improvements in workplace safety outcomes by committing to targets established in the National OHS Strategy. This is a positive step, but does not address the fundamental issues that emanate from having eight separate and diverse

---

[7] *Loc.cit*– BIRC Report, page 15.

State-based arrangements, as well as separate arrangements for Australian government employees and two industry based schemes.

22. DEWR submits that governments need to implement a robust national framework for workers' compensation and OHS that will assist in strengthening Australia's social and economic performance.

Part A

Introduction

1. The Minister for Employment and Workplace Relations, the Hon Tony Abbott MP, has Australian Government (Government) portfolio policy responsibility for national workers' compensation and occupational health and safety (OHS) arrangements. The Minister also has portfolio responsibility for the Government workers' compensation schemes, Comcare and Seacare, and the National Occupational Health and Safety Commission (NOHSC).

2. This submission is made by the Department of Employment and Workplace Relations (DEWR) which has responsibility for national workers' compensation and OHS policy in the Australian public sector. DEWR provides policy advice to the Minister on his portfolio responsibilities.

3. The submission seeks to address most areas contained within the terms of reference for the Inquiry and also attempts to answer many of the matters raised in the Commission's Issues Paper released in April 2003. In preparing this submission DEWR has been assisted by three recently released reports which contain a number of recommendations relevant to this Inquiry.

4. Firstly, the Royal Commission into the building and construction industry identified the need for a consistent definition of 'worker' across the various workers' compensation schemes and drew attention to the volume of regulatory instruments that impact negatively on this industry[8].

5. The HIH Royal Commission, in its report released in April 2003, made a number of recommendations that bear on the prudential regulation of workers' compensation insurance[9]. Notably, the Royal Commission recommended that State and Territory governments apply relevant prudential requirements to government insurers and statutory fund schemes (Recommendation 52). Of particular relevance to self-insurers, including the Commonwealth's Comcare scheme, is that the Royal Commission recommended the *Insurance Act* 1973 be amended to extend prudential regulation to all discretionary insurance-like products (Recommendation 42).

[8] *Final Report of the Royal Commission into the Building and Construction Industry,* February 2003 (BIRC Report).
[9] *The failure of HIH Insurance*- The HIH Royal Commission (HIH Report).

6. Finally, the need for greater consistency in workers' compensation schemes was one of the main recommendations of the House of Representatives Standing Committee on Employment and Workplace Relations (HoR Committee) in its report released in June 2003[10]. The HoR Committee also recommended that the Government initiate inquiries to determine the extent to which taxpayer-funded social welfare programmes are subsidising the workers' compensation schemes, and the extent to which workers are currently not covered by any workers' compensation scheme.

7. DEWR also draws to the attention of the Commission, the Workplace Relations Ministers' Council Comparative Performance Monitoring, 4th Report, August 2002 (4th CPM Report). This report will assist the Commission in obtaining a detailed account of Australia's workplace health and safety performance. It is expected the 5th CPM Report will also be available in the near future.

8. In Part A of the submission an overview is provided of national workers' compensation and OHS arrangements, including some key information on Australia's current workplace health and safety performance.

9. Part B of the submission focuses on possible national framework models for both arrangements. To assist in considering the merits of the models identified by the Commission, DEWR has suggested a number of objectives that it considers could be used to guide future workers' compensation and OHS arrangements for Australia.

10. In Part C of the submission, DEWR looks at the design elements that would underpin a national framework for workers' compensation and OHS, including consideration of the infrastructure to support new national frameworks.

---

[10] *Back on the job: Report on the inquiry into aspects of Australian workers' compensation schemes* - House of Representatives Standing Committee on Employment and Workplace Relations, June 2003 (HoR Report).

Current national workers' compensation and OHS arrangements

11. The current structure of worker's compensation and OHS arrangements in Australia stems from the federal system of government. Historically, primary responsibility for the arrangements has rested at the sub-national level with the State and Territory (State) governments. The Government's only direct responsibility relates to providing occupational injury insurance for its own workers and for a scheme covering seafarers. The Government does, however, have national responsibility given the impact of the workers' compensation OHS arrangements on the economy, workplace relations arrangements and social welfare programmes.

12. The incidence and cost of work-related injuries and disease in Australia is unacceptably high. Each year there are over 200 workplace fatalities and more than 140,000 workplace injuries compensated by the various workers' compensation schemes. Compared to other developed countries, Australia's workplace health and safety performance is about 100 per cent below the worlds' best performers in terms of workplace incidents that result in a fatality[11].

13. The available evidence suggests however, that the total number of workplace injuries and diseases in Australia may be much higher than the number eligible for compensation. A survey by the Australian Bureau of Statistics found that over a twelve month period, five percent of the work-force or 477, 800 workers experienced a work-related injury or illness[12]. This equates to an incidence of injury rate of 49.3 per thousand employees, compared to an incidence rate of 15.2 per thousand employees that the workers' compensation schemes actually reported[13]. New Zealand, for the same period, reported a workplace injury rate of 10.5 per thousand employees[14].

14. The economic cost of workplace accidents to workers, employers and the community is estimated to be in excess of $30 billion annually or some 4.3 per cent of Gross Domestic Product[15]. The human cost in terms of pain and suffering to the injured workers and their

---

[11] Source - International Labour Office, *http://laborsta.ilo.org/* Yearly statistics of occupational injuries.
[12] *Work-related injuries Australia*, ABS survey, September 2002.
[13] Workplace Relations Ministers' Council Comparative Performance Monitoring, 4th Report, (4th CPM Report).
[14] *Ibid* – 4th CPM Report
[15] Australian employers pay some $6 billion per annum in premiums (direct costs) – 4th CPM Report, page 74 – and using a multiplier of four times for the employers indirect cost of a workplace accident, total cost to employers is about $30billion. The multiplier for indirect cost is uncertain, the Industry Commission in 1994 used 'three times', while the 1997-98 Annual Report of Victorian Workcover, page 26, estimated "11"times for employers in the transport industry. The economic cost to the worker and community needs to be added to the employer costs.

families is impossible to quantify. To be further included is the cost arising from the complexity and duplication that emanates from a State-based approach to workers' compensation and OHS.

Workers' compensation arrangements

15. Each State has in place its own compulsory workers' compensation regime and regulates health and safety for employees within their jurisdiction. For a workforce of approximately nine and half million - there are eight State-based schemes and the Government scheme for its employees, Comcare. In addition, there are two industry based schemes – the NSW coal industry scheme and the Government scheme for seafarers.

16. All Australian workers' compensation schemes are based on the principle of 'no-fault' compensation, which makes employers liable for all work-related injuries and disease suffered by their workers. While DEWR supports the general principle of "no-fault", it acknowledges that unfettered "no-fault" may contribute to abuse of a workers' compensation scheme founded on this basis. A "no-fault" scheme also does not take into account the degree of employer control over an incident or circumstances that may lead to an injury or disease being determined eligible for compensation.

17. Most of the States overlay their "no-fault" scheme with access to common law remedies with the injured worker needing to prove negligence by their employer. Access to common law damages with consequent large awards and very high legal expenses must ultimately be borne by business and consumers. Other injured workers under a scheme that provides lump sum settlements are also disadvantaged by the reduced pool of funds to distribute in the form of compensation.

18. There are no minimum standards that a State employer-financed workers' compensation scheme must provide to an injured worker. Accordingly, the terms and conditions of this compulsory employer insurance vary from State to State. This has flow-on implications in other areas, as operating in parallel with the State workers' compensation schemes are the taxpayer-funded social security income support schemes and health support schemes. Information provided later in this submission indicates that the design of the State workers' compensation schemes effectively transfers responsibility for a substantial number of injured workers onto the taxpayer-funded programmes.

19. Each of the State-based schemes has evolved in isolation resulting in a diversity of arrangements that impacts on employers, employees and the national economy. For

employers, workers' compensation in Australia is complex and subject to a range of uncontrollable cost drivers. National employers face significant problems from having to take out separate insurance in each of the eight jurisdictions which adds to business costs and increased regulatory burden.

20. Employers are subject to varying premium setting policies and rates across the States even if they conduct the same type of business. Premiums charged are often not risk-based either due to government price controls and/or cross-subsidisation. This results in employers with poor workplace safety performance having little economic incentive to improve and not being penalised for unsafe work practices. Employers also cannot reap the benefits of competition for workers' compensation insurance. Four of the largest schemes are government monopolies and in the other four State schemes with private sector underwriting, the insurers can only operate in individual States.

21. The benefits regimes of the various workers' compensation schemes represent the most identifiable area of inconsistency. No two schemes have the same benefit structure. As a result injured employees across Australia have different outcomes even if they have the same injury and pre-injury income.

22. All schemes, except the South Australian and the two Australian government schemes, have some form of limit on either the duration or quantum of benefits. All schemes also actively engage in offering redemptions/commutation of benefits, by way of lump sum settlements of future compensation payable. Limiting benefits or redemptions of benefits may have some merit to either act as a disincentive for the injured person looking at a compensation scheme as a long-term income stream, or to break the connection with the scheme.

23. However, having these provisions in the benefits regime of a workers' compensation scheme allows a scheme/insurer to offer little in the way of rehabilitation/return-to-work programmes for the injured worker. It is possible for the scheme/insurer to effectively "park" a claimant on benefits until they reach the statutory cut-off or until they redeem future benefits. The scheme/insurer then ceases all obligations to the injured worker, limiting their costs and without achieving a durable return-to-work of the injured worker.

24. A primary goal of a workers' compensation scheme should be to reduce the impact of a workplace injury through effective rehabilitation and return-to-work to the capability of the injured worker. The evidence suggests that the Australian schemes are not achieving this

goal. Available data indicates a deterioration in national return-to-work rates over recent years – the national durable return-to-work rate was 74 per cent for the year 2000-01, down 4 per cent over 1999-00 outcomes[16]. A further indicator of performance is the duration of injury rates. Over 20 per cent of injured workers who are compensated for one week or more off work are still on compensation after 12 weeks[17].

25. The current workers' compensation arrangements are facing a number of challenges. All schemes are subject to viability concerns with three of the four State government schemes currently having substantial unfunded liabilities[18]. Employers in these States will in the future have to meet these liabilities[19]. This is an issue for the Commission in assessing options for a national framework as transferring the unfunded liabilities of State government schemes to private sector insurers or the Government would not be an option.

26. All the schemes are currently grappling with the issue of coverage for workers' compensation purposes. The various schemes rely on the test of a "contract *of* service" for coverage. This traditional approach is being tested by the emergence of different forms of employment and working arrangements which is a reflection of the modern Australian economy and the personal choices which Australians want to make about work, lifestyle, family and security.

27. The uncertainty for employers and employees on basic coverage is mirrored in other areas of current scheme design. Coverage now extends beyond compensation for traumatic injury and disability to occupational stress and diseases, such as musculo-skeletal degenerative disorders. Such types of compensable injuries/diseases may be contributed to by factors external to the workplace such as ageing and degenerative conditions. For compensable stress-related conditions, the contribution of employment does not address the fundamental issue of employer control over the factors that may have given rise to the stress.

28. The cost associated with a work-related injury, disease or fatality is the primary responsibility of the employer. The compulsory insurance employers are required to have should meet the cost of a workplace accident. Yet existing national workers' compensation arrangements are leaving employers, employees and the community with an increasing proportion of the cost primarily due to policy decisions of State governments.

---

[16] *Opt cit* 4th CPM Report, page 108.
[17] *Opt cit* 4th CPM Report, page 10.
[18] The NSW scheme reported a deficit of over $3 billion as at 30 December 2002. Victoria in March 2003 reported unfunded liabilities of over $1 billion and South Australia in May 2003 reported a deficit of $350m.

Occupational health and safety arrangements

29. Similar to workers' compensation arrangements, each State, and the Government, has its own OHS legislative and administrative framework covering workplace health and safety. As a result, there are ten principal OHS Acts supported by subordinate legislation (regulations) and codes of practice. In addition there are a number of industry-specific Acts, regulations and codes of practice that deal with OHS issues, particularly for industries characterised as dangerous or hazardous, such as mining. There are also other Acts that have an ancillary role in OHS, for example in local government and food.

30. The OHS regulatory framework across the jurisdictions, while similar in structure, varies as to obligations imposed on employers and the level of protection for employees. This variation extends to the principal Acts, but is prominent in the regulations that mandate the specific requirements to be achieved at the workplace.

31. A contributing factor to the inconsistency in the regulations is the lack of adoption of uniform safety standards into the regulatory framework by the jurisdictions. The States have actively participated in the development of national uniform safety standards under the auspices of NOHSC. Despite this work, the key elements of only one of the seven priority national standards have been fully adopted by all the States[20]. The approach by the States to the National Standard on Major Hazards Facilities (MHF) provides a good example. All States agreed to the MHF standard in 1996, yet only three States have adopted it into their regulatory framework and as is the norm, all three have adopted it inconsistently.

32. The volume of OHS regulatory instruments was highlighted in the final report of the Royal Commission into the building and construction industry. The Royal Commissioner found that of the ten principal OHS Acts, nine applied to the building and construction industry and another 30 statutes regulated some aspects of the industry's operations. The Royal Commissioner identified some 20 OHS regulations that the industry has to comply with and 34 other regulations which have some application to the industry. On top of this, the industry must consult hundreds of codes of practice, advisory standards and guidelines. The

---

[19] This may be by way of increased premiums or the alternative could be reduced benefits to injured employers as alluded to by the Chairman of the Victorian scheme, see *Financial Review*, 3 March 2003, page 18.

[20] Seven priorities standards were identified by Heads of Government in the early 1990s to achieve national uniformity as the seven covered around 85% of identified workplace hazards or workplaces. The seven standards cover plant, hazardous substances, dangerous goods, manual handling, major hazard facilities, occupational noise and certification standard for users of industrial equipment.

Royal Commissioner commented that "(t)his daunting body of legislation and regulation is administered by at least nine organisations"[21].

33. The Royal Commissioner summed up the position:

> *The result is a fragmented, disjointed and uncoordinated system of occupational health and safety law and regulation which, when applied to a national industry such as the building and construction industry, is inequitable, wasteful and inefficient*[22].

34. However, the Royal Commissioner could have been referring to any industry.

35. Aside from the inconsistency and volume of the State-based OHS regulatory regimes, all are overly prescriptive, placing a significant compliance burden on businesses of all sizes. The evidence suggests the States have not moved in recent years to reduce regulatory burden on business. There is a trend towards increasing regulation. For example, in 2001 NSW made sweeping changes to its OHS regulatory framework. It was heralded as a reduction in the regulatory burden, but a closer examination of the changes reveals that NSW has in fact introduced new requirements that place additional compliance burdens on businesses of all sizes[23]. To further demonstrate that the States have not reduced the OHS regulatory burden, DEWR provides at **Appendix 1** an update on the OHS regulatory instruments that apply to a hotel operator as used by the Industry Commission in its 1995 Report.

36. Small businesses, like hotel operators, do not have the financial and human resources to allocate to understanding the unclear and excessive OHS regulatory regimes in place across the States. This view is supported by a survey conducted in South Australia in 1998 which found "the majority of small employers … did not know which (OHS) Regulations applied to them".[24] The survey also found that "even if small employers did know which Regulations did apply to them, most regarded those Regulations as irrelevant to solving their OHS problems, probably because most Regulations provide a hierarchical/systemised approach to problem solving, rather than providing clear practical guidance"[25].

---

[21] *Opt cit* - BIRC Report, Volume 6, page 15, February 2003
[22] *Loc.cit*– BIRC Report, page 15.
[23] For example, the NSW Act now contains new requirements that relate to mandatory workplace consultations. The Act spells out what will amount to appropriate consultation, when consultation is required, and how consultation is to be done. There is even a legal obligation to consult with employees in determining the consultation arrangements.
[24] *Suggestion for the South Australian Occupational Health and Safety Regulatory System* - Public Discussion Paper 1998, page 3
[25] *Loc.cit,* page 3

37. For businesses that operate across State jurisdictions the costs and complexity is eight fold due to the inconsistent regulatory instruments in place.

Australian OHS performance

38. The impact of the existing regulatory regime on Australia's OHS performance is difficult to measure. The only data available on OHS performance is based on injuries and fatalities compensated by the various workers' compensation schemes, that is, injuries accepted and reported by the schemes. It does not include compensated illnesses from disease (this data is not sufficiently robust to report) or injuries that do not involve time off work or injuries to those workers not covered by the schemes.

39. Over recent years there has been a downward trend in the rate of compensated injuries. This could give the impression that there has been an improvement in Australia's OHS performance. However, this may be misleading as acknowledged by Ministers responsible for OHS and workers' compensation[26]. A number of factors may be influencing the compensated injuries being reported by the various schemes. They include the underreporting of minor injuries; the structural changes by workers' compensation schemes in respect of coverage and entitlement to injuries; changes to the composition of the workforce; and a shift in employment from high risk industries to industries of lower risk, reflecting the Australian economy's change from a manufacturing sector to the services sector.

40. All governments have recognised the need for improvement in Australia's OHS performance. Recently, ministers responsible for OHS endorsed a National OHS Strategy. The Strategy establishes minimum national targets for reducing the incidence for workplace deaths and injuries. The Strategy represents a significant attempt by all governments to focus on OHS outcomes and to improve cooperation and coordination of existing administrative structures.

41. The Strategy does not however attempt to address at this stage of its development any of the existing structural barriers to improving OHS performance in Australia.

Enforcement and compliance

---

[26] See 4th CPM Report, page 7.

42. There is a high degree of common ground in the approach taken to enforcement and compliance across the various jurisdictions, although the types of remedies for breaches vary considerably.[27] There is, however, a noticeable lack of focus on encouraging compliance with OHS obligations with most emphasis placed on punishment after the event rather than on seeking to eliminate or control the risk before an accident occurs.

43. There is also diversity of responsibility for OHS enforcement in the States. All States have a general OHS inspectorate, but other agencies have responsibility for OHS matters for example in respect of electricity and the handling of dangerous goods. In NSW and Western Australia, for example, a separate mining inspectorate operates. Accordingly, it is possible for an employer to have a number of OHS inspectorate activities undertaken by the different agencies, potentially adding to confusion, costs and time.

Linkages to other systems

44. The workers' compensation and OHS programmes are an integral part of Australia's workplace and social structure. The effectiveness of the programmes can have a major bearing on the lives of Australians at work and in their ordinary life. It is therefore critical that the programmes adapt to contemporary work practices and not hold to the traditional basis on which they are founded a century ago in a totally different economy.

45. Over the last decade alone, there has been extensive reform of the Australian economy. The national labour market programmes have undergone wide sweeping changes aimed at improving access to employment. This has been coupled with the adoption of major reform by the Government in the workplace relations system. The Government has also initiated reform of the social welfare system.

46. Workplace relations is now focussed on agreement making at the enterprise and workplace level, enabling workers and managers free to make their own arrangements above a concise set of minimum standards. These reforms have delivered a historically low level of industrial disputation. There is a significant difference between working days lost due to industrial disputes and working days lost due to workplace accidents. In 2001, 350,000 working days were lost due to industrial disputes, compared to some six million days lost due to workplace accidents.

47. The benefits of a workplace relations system focussed on the individual workplace are abundantly clear. Similar benefits could be achieved by shifting the focus from a regulatory

---

[27] Refer *Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand* (2nd

solution for OHS, workers' compensation and the injury management programmes to allowing workplaces to determine their own solutions. Such a shift, however, is difficult to achieve under the diverse and separate State-based arrangements in place today.

48. The Government also recently announced the second stage of its welfare reform package. There are similarities in the social security system and the workers' compensation system. The two systems are complementary and there is considerable interaction, highlighting the need to clearly define the boundaries of the two systems. There are also considerable gaps with some injured workers missing out on income support from either system. While a direct linkage between the two systems is not necessary, there is a need to make sure both systems keep pace with modern society.

49. The aim of the Government in reforming the social welfare system is to ensure that enough is done for jobless families and individuals to encourage them to help themselves, and be involved in the wider community. The Government is also aiming to make the system simpler and easier to understand. In DEWR's view, the workers' compensation and OHS programmes should set goals to become simpler and easier to understand.

Edition, August 2002)

Part B - National Frameworks for Workers' Compensation and OHS

Objective: DEWR considers the core objectives of any national framework should be:

- to facilitate improved workplace safety;
- to provide adequate compensation to injured employees at a reasonable cost to employers;
- to offer a more effective continuum of early intervention, rehabilitation and return-to-work assistance for those injured in the workplace; and
- to remove unnecessary duplication by governments and be cost effective for government, business and the community

50. The terms of reference for the Inquiry ask for an assessment of possible models for establishing national frameworks for workers' compensation and occupational health and safety programmes. The terms imply that any framework would replace the current State-based approach to deliver nationally consistent arrangements for these programmes.

51. In considering options for national frameworks, DEWR was assisted by the six models identified by the Commission in its April 2003 Issues Paper. For ease of reference, DEWR has numbered the models 1 to 6.

Model 1 – Co-operative model

52. The Commission suggests that Model 1 for workers' compensation would be similar to the current approach to OHS. Under this model, the Government and States could establish a body to develop national standards or codes and carry out other functions relating to workers' compensation, but the States would retain responsibility for implementation. The Commission considers such an approach currently applies to the regulation of OHS, road transport and food safety.

53. DEWR's understanding of this model is that the States would adopt nationally agreed "model" regulations into their legislative framework. The "model" regulations could cover core elements of a workers' compensation scheme such as benefit regimes, coverage, rehabilitation and return-to work obligations, self-insurance arrangements and premium setting. Similar to the road transport sector, the 'model' regulations could be hosted under a Commonwealth Act, but not be operative law.

54. The "model" regulations could be agreed by a ministerial council and, as in the case of the road transport sector, be underpinned by an intergovernmental agreement to move to a consistent national framework, while still leaving primary responsibility with the States.

55. As mentioned, the Commission considers this model is along the lines of the current approach aimed at achieving uniformity in OHS regulations by using the NOHSC national standard setting mechanism. DEWR does not necessarily agree with the Commission's conclusion. The current OHS model relies on the States voluntarily adopting national safety standards developed under the auspices of NOHSC. This model in its current guise has achieved minimal success in delivering a consistent national regulatory framework.

56. Some pros and cons of this model are set out below in **Box 1.**

Box 1 – Pros and Cons of national schemes based on "model" legislation

Pros	Cons
• deliver progressive national consistency in OHS and workers' compensation arrangements. • State and Territories have "ownership" of any new arrangements established. • potential reduction in regulatory burden for employers and employees. • all employees treated equally and fairly. • existing State infrastructure in place, no duplication or need to establish new administrative arrangements.	• prospect of delivering only incremental improvements • States may seek to vary regulations to allow other policy objectives to overtake workplace safety and workers' compensation policy objectives. • possible increased cost to some employers if benefits structure changed. • transition to new structure may be slow. • employees losing access to existing common law arrangements may consider any change a disadvantage.

Model 2 – Mutual-recognition model

57. Model 2 envisages the States would agree to mutual-recognition of workers' compensation insurance arrangements, either self-insurance or premiums, and OHS arrangements for multi-State employers.

58. This model would offer national employers or employers who operated in more than one jurisdiction the option of obtaining mutual-recognition of their workers' compensation coverage and OHS arrangements. This could lead to significant savings for employers in administrative costs and allow their employees to have consistent benefits regardless of location. Employers could negotiate national coverage options with insurers in those schemes that have private underwriting. Rehabilitation providers could also offer national packages to employers, by gaining mutual-recognition for their programmes.

59. Employers would also have the option of applying national workplace safety systems. This would lead to reduced compliance costs and more importantly, offer all their employees equal protection.

60. The mutual-recognition model applies in a number of other sectors of the economy. The recent draft report by the Commission on mutual-recognition notes that the operation mutual recognition in the two schemes subject of review "has made a contribution to reducing the

compliance costs of regulation in Australia and New Zealand"[28]. Such an approach may offer the same returns to workers' compensation and OHS programmes.

61. The States have generally shown a reluctance to agree to mutual-recognition in aspects of workers' compensation and OHS. A number of areas have been canvassed in recent years, notably in the area of self-insurance with no positive outcomes. More recently, attempts have been made by the Government to overcome the difficulties that face workers injured away from their home jurisdiction.

62. The States have been aware since the early 1990s of the difficulties that can arise from a lack of cross-border coverage for workers while working temporarily in another jurisdiction. The States have not been able to reach a mutual-recognition agreement to address the issue despite having draft amendments from the Parliament Counsel's Committee (PCC). The Government, under the auspices of the Workplace Relations Ministers' Council, moved the States to consider adopting the PCC's amendments that would have addressed a major inequity for certain workers.

63. At this stage, two States - NSW and Queensland - have pre-emptively passed complementary legislation. Victoria has indicated its intention to pass similar legislation. The other States have been left to accept and pass legislation akin to that of NSW, Queensland and Victoria. There is increasing doubt, however, among the other States that the legislative model agreed by the three largest States will work.

64. Some pros and cons of this model are set out below in **Box 2.**

Box 2 – Pros and Cons of a mutual-recognition model

Pros	Cons
• a mechanism to deliver to certain employers national consistency in OHS and workers' compensation arrangements. • certain employers could offer their employees equitable benefits and could adopt consistent workplace safety arrangements for their employees. • significant reduction in regulatory burden and savings for certain employers. • States and Territories maintain primary responsibility for programmes.	• States have demonstrated reluctance to enter into mutual-recognition in core areas of workers' compensation and OHS. • employers may be tempted to the jurisdiction that is in their best commercial interest. • may lead to increased costs to States. • may lead to increased costs for small employers. • all employers would still face inconsistent scheme designs in core areas such as benefits, dispute resolution and compensable injuries.

Model 3 – Comcare model

[28] *Evaluation of the Mutual Recognition Schemes* – Productivity Commission, 27 June 2003, page xxvi

65. The Comcare scheme, which is established under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act), provides consistency in arrangements across Australia for both employers and employees, regardless of location. The Government scheme covering seafarers, the Seacare scheme, also provides national coverage and is modelled on the Comcare scheme.

66. In 1992, the SRC Act was amended to include section 108C (now section 100c) that extended the scope of the scheme to provide coverage for employees of former Government bodies and, in certain circumstances, corporations who are in competition with Government authorities or former authorities.

67. Legal advice to DEWR indicates that the scope for coverage under this model is relatively wide. Under the legislation, the responsible Minister may declare a corporation eligible to apply for a licence if he or she is satisfied that the SRC Act should apply to the employees of the corporation. It is a discretionary power of the Minister to declare a corporation eligible to apply to the SRC Act scheme regulator for a licence.

68. The Minister for Employment and Workplace Relations has in recent times received a number of applications from private sector corporations seeking to be declared eligible to apply for a licence. At the date of this submission, no private sector corporation has been declared eligible to apply for licence under the provisions of section 100c of the SRC Act.

69. A private sector corporation that obtained SRC Act coverage would have single national workers' compensation coverage. The corporations that have lodged applications with the Minister have asserted this would deliver savings to the corporations and provide benefits to their employees. It would also limit claims of possible competitive neutrality.

70. One potential drawback of this model relates to coverage of occupational health and safety. The Government *Occupational Health and Safety (Commonwealth Employment) Act 1991*(OHSCE Act) establishes the occupational health and safety regime covering Government employees. The Act does not extend to employees of non-Government entities (section 9(1)) and therefore would, unless amended, exclude employees of private sector corporations that may gain coverage under section 100c of the SRC Act.

71. Some pros and cons of this model are set out below in **Box 3.**

Box 3. – Pros and Cons of using the Comcare scheme

Pros	Cons

• eligible employers would obtain national workers' compensation coverage. • all employees of an eligible corporation would have the same access to compensation and the same benefits. • savings in business costs to those corporations gaining coverage. • employers would obtain coverage under a relatively stable scheme which contrasts sharply with State schemes.	• if a large number of corporations with low risk took up the option could impact on the viability of the State schemes. • may cause premiums and other costs to rise for those remaining under the other schemes. • most small business excluded. • current legislative provision only relates to self-insurance option. • potential for increased duplication of workers' compensation arrangements. • no accompanying national OHS coverage.

Model 4 – Uniform template model

72. Under this model the Government and the States could pass mirror legislation to ensure uniformity for all or some core aspects of workers' compensation and OHS. The model envisages using the co-operative federalism approach to deliver uniformity. It is similar in most regards to Model 1 discussed earlier.

73. The use of template legislation and co-operative federalism has delivered significant reforms to the Australian economy. The Government and the States have established national consistency in key sectors of the economy such as the regulation of financial institutions and corporations law (initially). To some degree the transport sector has also achieved national uniformity in certain areas using template legislation, although that sector has now essentially discarded this approach.

74. The use of template legislation does have major drawbacks. The concept of one jurisdiction developing and enacting legislation for another jurisdiction/s is basically a loss of power and flexibility by a jurisdiction. Referral of power by the States to the Government has been the only complete way to overcome legislative attempts to establish national uniform laws. A variation of the mutual recognition model is for the States to refer power to the Commonwealth, while retaining their constitutional authority.

75. Some pros and cons of this model are set out below in **Box 4.**

Box 4 – Pros and Cons of using uniform legislation

Pros	**Cons**
• similar to Model 1, plus • delivered reform in other sectors of the economy.	• similar to Model 1, plus • difficult to achieve consensus on regulations. • complex drafting of regulations. • effectively enacts legislation in "host" jurisdiction. • likely all jurisdictions would have to make

	changes.

Model 5 – Extended financial sector regulation model

76. Under this model the Government could use its constitutional powers to extend coverage to all providers of workers' compensation insurance. All public and private workers' compensation insurers would be subject to uniform prudential and consumer/investor protection by the Australian Prudential Regulatory Authority (APRA) and the Australian Securities Investment Commission (ASIC) respectively.

77. DEWR sees this model being implemented in two phases. Phase one would involve APRA prudential requirements being imposed under the Government's insurance power (section 51(xiii) of the Constitution) in respect of all workers' compensation insurance, other than such insurance that constitutes State insurance not extending beyond the limits of a State. Similar requirements could be imposed under the corporations power on insurers, in so far as the insurers were 'financial corporations' (this would include State bodies that were incorporated for the purposes of conducting financial services), but the use of this power would not overcome the lack of power in relation to State insurance not extending beyond the limits of a State.

78. Phase 2 of the implementation would involve the Government regulating conditions, relying if possible, on the corporations power. This could, for example, cover: benefits (minimum benefit regime); coverage (compulsory); premium setting (establish principles and subject to monitoring by ACCC); self-insurance (prudential and criteria and subject to monitoring by APRA); dispute resolution (establish principles and jurisdictional ADJS subject to ASIC); and rehabilitation (minimum regime and workability options).

79. Legal advice to DEWR is that the corporations power would support the imposition of requirements for the provision of compulsory minimum workers' compensation benefits on constitutional corporations, under arrangements with insurers or by means of APRA monitored self-insurance. Effectively, this model would establish a single national framework for workers' compensation, leading to enhanced protection for all parties. DEWR recognises that this model may leave some gaps in coverage. The model would also involve extensive legislative changes and a range of new responsibilities for a number of Government entities.

80. This model does not address a national framework for OHS, but this could be combined with the option proposed under Model 6.

81. Some pros and cons of this model are set out below in **Box 5.**

Box 5 – Pros and Cons of using uniform legislation

Pros	Cons
• similar to model 1, plus • workers' compensation insurance would be subject to the same level of monitoring as other forms of insurance. • introduces competition into the provision of workers' compensation insurance.	• similar to Model 1, plus • transitional arrangements may be complex. • complex drafting of legislation. • limited role for States. • increased responsibilities for a number of Government agencies. • need to combine with another OHS model. • gaps in coverage.

Model 6 – National workers' compensation and OHS model

82. This model is based on the Government exercising its existing constitutional powers to establish a national workers' compensation scheme and a unified OHS regulatory regime. DEWR is of the view that the Australian Constitution provides the Government with the heads of power to enact a single workers' compensation scheme and OHS scheme.

Workers' Compensation

83. This model differs from Model 5 to the extent that a national workers' compensation scheme could be established by the Government relying primarily on the corporations power.

84. All constitutional corporations and their employees would be covered by a Government workers' compensation scheme. DEWR estimates that usage of the corporations power would provide coverage for about 80-85 percent of employees. The remaining 15 percent consistent primarily of partnerships, sole traders and small businesses which are not incorporated entities and would fall outside of coverage.

85. It could be that a referral of jurisdictional power from the States, in respect of those outside corporations power coverage, would maximise the application of a national scheme. Such an approach would be akin to the model agreed upon by the States and Government in respect of transferring responsibilities for corporations legislation. Alternatively, the States schemes could continue to operate, but to ensure equity to all employers and employees, the States may have to adopt the design elements of the Government scheme.

86. Under this model, the Government would assume responsibility for workers' compensation and would need to establish the necessary infrastructure to support the scheme. The Government would also need to introduce the necessary legislation and supporting regulations that established the design features of the scheme in areas such as insurance arrangements, benefits, access and coverage and dispute resolution.

National OHS scheme

87. Similar to a national workers' compensation scheme, DEWR considers the Government could rely on constitutional powers to pass legislation establishing a national OHS Act with supporting subordinate legislation. The major difference to the workers' compensation model is that DEWR considers a national OHS scheme may cover all employers, employees and others who have duty of care obligations under existing heads of powers.

88. While a single OHS regulatory framework offers a range of potential incentives to deliver better safety and health to all in the workplace, a drawback of such a scheme is that it may not be responsive to local conditions and hazards. The States do adapt their individual OHS regulatory regimes to suit local conditions. There is an issue of whether this is warranted in all circumstances and whether other mechanisms could be developed under a national scheme to meet any specific issues.

89. Some pros and cons of this model are set out below in **Box 6.**

Box 6 – Pros and Cons of national schemes using Government powers

Pros	**Cons**
Similar to Model 1, plus: • extended coverage. • a more flexible system to adapt to changing economy. • removal of competition barriers across Australia. • improve overall national competitiveness.	• potential to leave a number of employers in small State workers' compensation schemes. • Government would need to establish national infrastructure, although could negotiate to use existing State infrastructure. • Government takeover of area of primary State responsibility. • may not provide coverage for local workplace hazards.

90. Each of the models discussed above have a number of advantages and disadvantages, but all offer the opportunity to move towards consistency in national arrangements and the resultant benefits. It may be appropriate that the Commission consider a combination of models more suitable for the different programmes. That is, while model 5 may be suitable for a workers' compensation framework, the OHS framework could be as discussed in model 6 above. For a number of the models, DEWR has identified areas that may cause some implementation difficulties. However, these are not insurmountable. Likewise, the transition to all models would be different in terms of time and complexity. These factors should be a relevant consideration for the Commission.

91. DEWR has not identified a preferred model at this stage as it is considered premature and the Commission through its Inquiry may identify other possible models. In considering

the possible models, DEWR recognises that the key objectives it established earlier can only be delivered by a model that is robust and which provides a solid basis to reduce the incidence and cost of workplace injury and disease. At the same time, the model should overcome the current degree of inconsistency and not add to the complexity. All the above six models achieve these aims to a varying degree with some having the potential to complicate the existing arrangements.

PART C – Elements of the workers' compensation and OHS schemes

92. In this Part of its submission DEWR proposes some objectives the Commission may wish to take into account in developing the elements of a national framework for workers' compensation and OHS. In developing the design elements, DEWR recognises that the final design will depend to a large degree on the Commission's preferred model. DEWR also examines the national institutional arrangements that could support a national framework.

Self-insurance

Objective: Availability of single national workers' compensation self-insurance for employers who meet prudential and regulatory criteria.

93. Under self-insurance arrangements, an employer bears the actual cost of any workers' compensation claim by their workers on a "pay-as-you-go" basis. In these circumstances, the employer faces strong incentives to prevent injury or illness and to achieve an early return-to-work of the injured worker. DEWR considers that the availability of self-insurance to suitable employers offers the prospect of best practice in OHS and workers' compensation arrangements. This would be further enhanced if national employers had the option of taking out single self-insurance, rather than having to meet the existing requirement to take out self-insurance in each of the eight jurisdictions.

94. The prudential and regulatory requirements for self-insurance could be based on best practice options currently in place across the schemes. In this regard, the Comcare scheme has recently used the APRA prudential conditions for general insurers as a basis for establishing prudential obligations for self-insurers under its scheme.

Access and coverage

Objective: Access and coverage elements that ensure:

- protection for workplace injury/illness income replacement and related medical expenses;
- flexibility to adapt to contemporary work practices and choice; and
- recognition of controllability of the workplace risk for compensable injuries and disease.

95. The changing nature of employment arrangements means an increasing part of the workforce may no longer meet the traditional test for coverage under the various workers' compensation schemes. The design of a workers' compensation scheme under any national framework should recognise this aspect. The current approach by the States appears to be to

attempt to ‘rope in’ certain workers who may be engaged as contractors by using deeming provisions or alternatively, to deny coverage for others by using exclusion provisions. This approach goes against the flexibility workers and employers are seeking in their employment relationship.

96. Instead, DEWR has identified three possible options to overcome the current complex and inconsistent approaches to coverage. They are:

(i) Attempt to achieve consistency in the current definitions.

(ii) The second option is based on the principle that employers and employees make their own decisions on coverage for workers’ compensation. Under this option, employers and their employees could either take part in a workers’ compensation scheme (opting in) or choose to provide their own coverage or rely on some other source (opting out). This option would still necessitate an obligation on the employer and employee to have some provision/protection for a workplace injury or disease. This option does, however, raise issues of certainty of coverage.

(iii) Compulsory workplace safety policy protection. This is based on the principle that all those engaged in any form of employment/income-generating work are required to show that they are covered by some form of insurance or have access to compensation should they be injured at work. This is based on the premise that some degree of regulation is warranted in relation to employment conditions. This argument runs along the lines of the existence of general prohibitions for consumers to contract out of provisions enacted for their own protection, so why should the opposite be sanctioned for workers? The option may also go some way to addressing the concerns expressed by the House of Representative Committee when it said “the failure of the workers or their employees to meet their responsibilities in this area may result in substantial cost to the community”[29].

97. The issue of responsibility in scheme design extends to coverage for compensable injuries or diseases. Disease conditions present problems for compensation schemes, particularly with questions of causation and evidentiary issues for sustaining a claim. Stress related claims, in particular, test the degree of employment contribution. To address this issue, DEWR considers two basic principles could be adopted. They are:

(i) Controllability of the risk - the degree and extent of employer control should be used as a practical principle to guide decision making in this area. The relevant tests are:

[29] *Opt cit* HoR Report, page 196.

(a) the extent to which the employer is in a position to exert control over the circumstances associated with a particular injury or illness; and

(b) the extent to which the employer is able to undertake a risk assessment of the hazard.

(ii) Connection to work – this principle relates to the degree of connection to work, that is, "arising out of and in the course of employment".

98. For certain injuries and diseases that are currently compensable, it may be appropriate to consider shifting the burden of proof onto the employee to show that the employer has failed to meet their duty of care (provided for under the OHS legislation), rather than a statutory presumption that the employer is at fault.

99. Under the statutory duty of care provisions, employers are required to ensure the health and safety of their employees and undertake risk assessments of hazards in their workplaces. The idea of risk assessment for physical hazard is well established. However the identification, assessment, minimisation or elimination of so called psychosocial risk, or workplace stressors, is not so well established or straightforward. If employers cannot assess harm with certainty, how can the validity of hazard prevention be measured? The Commission may be assisted by the approach adopted by New Zealand (NZ) in this area[30].

Benefits structure (including common law)

Objective: A statutory benefits regime that:

- provides adequate compensation and is affordable;
- provides incentives for return-to-work while maintaining continuity for the seriously injured who are unable to return-to-work;
- recognises primary responsibility for the cost of a workplace injury or disease rests with the employer; and
- access to common law damages limited to catastrophic injuries.

100. The objective sought in designing a workers' compensation benefits regime is to achieve a balance between providing adequate compensation to the widest group of injured workers as possible and the cost of premiums to the employer. To achieve this goal, a

[30] Stress related conditions are not compensable under the NZ workers' compensation scheme unless resulting from a physical injury. The NZ OHS legislation provides protection for employees in circumstances that may give rise to stress. However, the obligation falls on the employer only if he or she "knows or ought reasonably to know' about a stressed employee. This puts the obligation on the employee to keep the employer informed about specific factors that an employer can control, and its puts an obligation on the employer to deal with such matters in performance appraisals, for example.

statutory benefits regime is the best option. To achieve the objectives identified above, the statutory benefits regime should be built on the following basis:

(i) injured workers receive adequate compensation for work time lost, coverage for medical and related costs and reasonable compensation for non-economic loss in the event of an injury;

(ii) establishing a level and duration of benefits that encourage a return-to-work and are affordable. While the use of step-downs in benefit levels at certain stages may assist in gaining a return-to-work outcome, they can be used as a scheme cost saving measure and may be counter-productive. Scope for weekly benefits to be commuted to a lump sum (redemptions) should be restricted as commutations are often inconsistent with encouraging a focus on rehabilitation and return-to-work;

(iii) those who suffer a serious injury or disease have the necessary financial support and access to other services to maintain quality of life for the duration required; and

(iv) the design recognises that the primary responsibility for the cost of a workplace injury or disease rests with employer.

101. While DEWR considers that best practice objectives in workers' compensation design are more readily achieved through a complete no-fault regime, it recognises that common law has historically played a part in Australian workers' compensation schemes and continues to do so today to varying degrees. As such, DEWR acknowledges that it may be necessary to retain an element of common law under any national framework. Moreover, access to common law or a lump sum settlement may be in the best interest for persons who suffer catastrophic injuries and would benefit from a closure of a claim.

102. In considering options for a common law component in the benefits regime of any national framework, DEWR submits that the Commission needs to take into account developments in other areas of insurance relating to common law. In particular, DEWR draws to the attention of the Commission the reforms underway across the jurisdictions in respect of public and medical indemnity liability insurance.

103. The role of the Government's structured settlements legislation may also be a relevant consideration in examining options for common law damages. Structured settlements and structured orders involve compensating seriously injured persons with regular payments over their lifetime rather than as a one-off lump sum. DEWR notes that Recommendation 7 of the HoR Report calls on the Government to investigate the extent to which current taxation

legislation is inhibiting initiatives of workers' compensation schemes which may benefit the injured workers, such as structured settlements[31]. The Government has not responded to this recommendation as at the date of this submission.

Premiums

Objective: A premium setting system that is risk-based and provides incentives and rebates to employers for maintaining a healthy and safe working environment with the benefits of competitive premiums on offer while ensuring all future liabilities are fully funded.

104. The application of a premium setting system that is risk-based needs to take into account the size of the business. In doing so, the system recognises the differences in exposure levels between small and large business by use of industry pooling, without resort to cross-subsidisation or use of arbitrary caps.

105. Employers of all sizes need to be able to understand the basis for premium levels. The more the employer can relate the premium to their business, the more likely they will endeavour to influence the level by improving safety in their workplace and/or rehabilitating injured workers. Similarly, the premiums need to be affordable for the business, but at the same time maintain the ongoing viability of a scheme. In this regard, insurers should not discount premiums to attract business nor should government policy interfere with premium setting policy that may result in future employers having to meet past unfunded liabilities.

Dispute Resolution

Objective: A dispute resolution system that is focussed on outcomes with an emphasis on resolving any potential dispute at the workplace without having to resort to legal representation. Any such system should retain an appropriate appellate structure.

106. The dispute resolution system is an integral part of a workers' compensation scheme, particularly given the highly adversarial and litigious nature of the industry. Ideally, under the "no-fault" system, potential disputes would be resolved at the workplace before becoming an area of contention. Such a non-adversarial method of dispute resolution would recognise that a no-fault system does not seek to apportion blame. Achieving this would depend to a large degree on whether the employer has dispute resolution procedures built into their human resource management.

[31] *Opt cit* – HoR Report, page 210.

107. Given the nature of this industry, a system that is flexible with a less legalistic approach to dispute resolution offers the best prospect for delivering outcomes in the interest of all parties. Such a system would be based on conciliation and advice, rather than process of law recognising, of course, that access to courts and/or tribunal must be available as a final step.

Injury management

Objective: To provide injured workers with a meaningful and sustainable outcome following a workplace injury.

108. The most effective injury management programme a worker's compensation scheme can establish is one that provides a seamless continuum of injury prevention and rehabilitation services that have a workplace focus. The workers' compensation scheme can make an effective contribution to injury prevention, while at the same time facilitating early intervention in the event of an injury and integrating medical and rehabilitation process with employment practices to achieve a durable return-to-work.

109. There is a direct relationship between the design of the injury management programme and the benefits regime in respect to duration. It is possible for an insurer to effectively "park" a claimant in a scheme and only comply with statutory obligations in respect of rehabilitation or return-to-work. The long-term prospects of the injured worker returning to work may be minimal if this occurs.

110. The skills required to rehabilitate an injured worker are different to those required to manage a claim and a case could be made for a total separation of the two functions within the workers' compensation scheme.

111. A further issue relates to the separation of the worker from the labour market. Existing scheme return-to-work obligations on employers and employees may be largely ineffective. This could be due to the structure of the labour market, with a large percentage made up of small employers. It is difficult for small employers to hold positions open for injured workers or to offer alternative duties. The issue in designing an injury management package is how to gain access for injured workers to labour market programmes and all they have to offer while at the same time recognising that the person's previous employer has responsibilities.

Interaction with Government programmes

112. The various workers' compensation schemes interact with the taxpayer funded:

(i) social security income support programmes; and

(ii) Medicare and residential aged care subsidies.

Social security income support programmes

113. The social security system has partly become a ‘de facto’ compensation scheme, in that it provides income support to people while they wait for their compensation claims to be finalised and also to people who do not return-to-work after an injury who are required to serve a compensation preclusion period. The social security system also provides income support and rehabilitation to those whose injury or illness is not covered by a compensation scheme.

114. Evidence presented to the recent HoR Committee inquiry indicates that 45,000 Centrelink customers per year have their social security payments affected by compensation, of which 80 per cent are workers’ compensation related[32]. A recent national survey revealed that in the preceding twelve months, some 60,000 workers who suffered a workplace injury sought assistance from taxpayer funded programmes[33].

115. DEWR notes that the recent HoR Report commented that there is widespread evidence of at least one significant form of fraud in workers’ compensation occuring against the Government in the form of cost shifting either covertly or overtly from State based workers’ compensation schemes[34]. The HoR Report recommends a qualitative study to assess the extent to which the Government’s income support system is subsidising the workers’ compensation industry.

116. The social security system is a targeted, means tested safety net for those with no adequate alternate means of support. The primary responsibility for assisting people suffering from a workplace injury should rest with compensation schemes. These schemes provide more long-term earnings related payments than the social security system is able to provide.

Medicare

117. There is significant potential for double dipping and cost shifting involving payment of Medicare benefits for medical services which are, or should be, covered by workers' compensation. The *Health and Other Services (Compensation) Act 1995* (HOSCA) provides for recovery of Medicare benefits and residential aged care subsidies where the medical and aged care expenses are the subject of compensation arrangements. The multiplicity of

[32] *Opt cit* HoR Report, page 207.

[33] *Opt cit* – ABS Survey Sept. 2000. At some time during the year ending September 2000, 5% (or 477,800 workers) of the total workforce experienced a work-related injury or illness. Of this population of injured workers over 150,000 received no financial assistance and some 60,000 sought assistance form Medicare and or Centrelink.

workers' compensation schemes in Australia prevents tracking of compensation cases across jurisdictions, reducing the effectiveness of the HOSCA arrangements.

118. The HoR Report expressed the view that the establishment of a national database on compensation cases would facilitate the identification of those on workers' compensation and enable the monitoring of Medicare for the treatment of workplace injuries[35]. DEWR notes that the Committee made the following recommendation:

> *The Committee recommends that the Government determine the extent to which the medical expenses of injured workers are being met by Medicare and the extent to which this system is subsidising the workers' compensation industry*[36]. The Government has not at the date of this submission responded to this recommendation.

OHS Model

Objective: To establish an OHS model that identifies the outcomes required and allows workplace flexibility to achieve those outcomes in a cost effective manner. In doing so, the model needs to provide sufficient guidance to businesses, particularly small business, on the essential requirements to manage risks and control hazards at the workplace without traditional resort to regulations.

119. In considering a suitable OHS model for a national framework, it needs to be recognised that business requires certainty that their work practices meet statutory obligations. This does not necessarily mean the work practices have to be prescribed, as flexibility in the workplace is a core element in safe work practices. In this regard, the employer and their employees are best suited to determine the individual needs of their workplace and what work practices and systems will deliver good OHS outcomes. The role of governments should be to facilitate this process.

120. All governments and industry groups can assist workplaces by the provision of practical resources to enable employers and employees to understand their OHS obligations. A more direct role for governments could be to establish workers' compensation premium policy that rewards employers by way of rebates/discounts on premiums if they achieve a high level of safety outcomes. A final, but equally important, function of governments relates to ensuring the commitment and participation of everyone in a workplace to safety by having an effective compliance and enforcement regime. All in the workplace have roles and responsibilities that need to be clearly defined and awareness that a failure will be appropriately punished.

---

[34] *Opt cit* HoR Report, page *xxii*.

Possible OHS regulatory model

121. One possible model to meet the objective DEWR seeks could be to simplify the existing OHS regulations in place across the jurisdictions and adopt the approach of only regulating the common essential requirements needed to manage a hazard or risk. In this regard, the existing regulatory framework provides a solid foundation to achieve this objective.

122. The regulations could be supported by supplementing the statutory duty of care with (however it is expressed or described) a code of practice. Compliance with the code would be taken to be prima facie compliance with the duty of care. Alternatively, an employer would have the flexibility to meet duty of care obligations by other means than those prescribed in the code. However, the employer would still have to demonstrate by way of a risk assessment that their individual work practices, in effect, were as good as or better than compliance with the code.

123. The model is also consistent with the Robens model[37] that each jurisdiction has adopted as the structure for their regulatory framework. In addition, the move to encourage employers to adopt an OHS management system reduces the need for a prescriptive regulatory framework. It is recognised that an OHS management system at the organisational level can effectively manage hazards and risks in the workplace and improve productivity[38].

124. It is recognised that OHS management systems are not suited to all businesses. Small businesses may not have the skills or resources to establish and maintain such a system. The emphasis of the model DEWR is submitting is to allow workplaces to establish work practices best suited to their circumstances and not have them prescribed by an outside party. Of course, the work practices would and should be subject to a risk assessment by an outside party to ensure duty of care obligations are met.

Enforcement and compliance

125. DEWR submits that the proposed OHS model be supported by an enforcement and compliance approach that focusses on prevention of accidents. The emphasis should be on encouraging compliance with OHS obligations so that workplace risks are eliminated or controlled before accidents and injuries occur.

---

[35] *Opt cit* HoR Report, page 211.
[36] *Opt cit* HoR Report, page 212 – Recommendation 9.
[37] See IC Report 1995, Volume 1, page xxiii for overview of Robens model.
[38] See *Guidelines on Occupational Safety and Health Management Systems* – International Labour Organisation (ILO), 2001.

126. Sanctions such as enforceable undertakings provide the advantage of implementing the workplace changes required to ensure safety, rather than merely penalising the breach and hoping change is affected. Additionally, remedial orders or the mere prospect of such an order can address a risk to safety more quickly than the slow criminal prosecution process. While community expectations regarding punishment must continue to be met, these should only be used within a structured framework – with criminal prosecution used as a measured step, adopted to achieve both compliance and enforcement outcomes. The primary aim of an OHS compliance and enforcement regime should be making workplaces safe.

127. Adopting alternative or additional proactive sanctions will improve safety outcomes as they empower the regulator to intervene and compel change in the workplace before injuries occur. The Australian Competition and Consumer Commission has had success in improving corporate trade practice compliance with the use of similar penalties. There is no reason why similar penalties will not be just as effective in achieving better OHS compliance.

128. The Commission may wish to consider a model along the lines of that developed by the Government for its OHS scheme. A Bill, the *Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002* is before the Australian Parliament and proposes a mix of penalties and compliance mechanisms.

National Institutional Arrangements

129. There are three bodies that contribute to varying degrees to the current national institutional arrangements in respect of workers' compensation and OHS. The peak body is the ministerial council, the Workplace Relations Ministers' Council (WRMC), established under the Australian Heads of Government ministerial council agreement. The WRMC has overall policy responsibility for both areas.

130. The WRMC also has responsibility for national workplace relations issues. While the WRMC includes Ministers from all Australian jurisdictions, the responsibility for workplace relations and workers' compensation and OHS varies across the jurisdictions. On occasions, the Minister with portfolio responsibility for workers' compensation and OHS may not attend a meeting of the WRMC. The Commission may wish to consider this aspect in examining institutional arrangements under any national framework.

131. The second tier of existing national institutional arrangements is conducted under the auspices of NOHSC which was established in 1985. One of the early tasks given to NOHSC

was to develop a nationally consistent OHS regulatory framework under the national standards process. NOHSC was also tasked with providing a national OHS forum for consultation between governments and national employer and employee bodies.

132. The NOHSC national consultative forum, as established under its Act, comprises a representative from each of the States, two Government representatives and three representatives each from ACTU and ACCI. The current structure largely reflects the composition of the workforce and industry in 1985 when it was established. The forum excludes a significant number of organisations, for example, small business and the 75% of the workforce not covered by unions. DEWR also notes that each State has a similar forum to NOHSC. This to a large degree constitutes duplication and potential for different positions being adopted on OHS policy issues at the State and national level.

133. The discussion early in this submission (see paragraph 31) drew attention to the inconsistent OHS legislative framework, primarily due to the States approach to the adoption of national standards agreed to at NOHSC. This raises doubts about the effectiveness of the NOHSC process to deliver national consistency in this important area.

134. NOHSC's primary responsibilities relate to OHS and do not cover workers' compensation. This raises issues as to whether NOHSC is an appropriate body to support any national framework for OHS and workers' compensation. Is there a need for two separate bodies or could NOHSC's responsibilities be expanded to incorporate workers' compensation? It may also be necessary to consider whether the Government and the States should share ownership of any national supporting body/bodies for a national framework. To a large degree the answers will depend on the Commission's preferred approach.

135. Finally, the Heads of Workplace Compensation Authorities and Heads of Workplace Safety Authorities are forums of heads of the various workers' compensation and OHS agencies respectively that meet on an ad hoc basis with no legislative backing or intergovernmental agreement on responsibilities and no reporting lines.

136. These bodies have no mandate. The primary purpose is to provide a forum for agency heads to discuss operational issues and exchange experiences. Members of the group do not generally have policy responsibility for workers' compensation and OHS within their respective jurisdiction. In a number of cases, policy responsibility resides with a government portfolio. Accordingly, DEWR does not consider there are any deficiencies in the existing relationship between the bodies and WRMC as raised in the Commission's Discussion Paper.

APPENDIX 1

OHS legislation applicable to a proprietor of small to medium hotel

1. The 1995 Industry Commission Report demonstrated the amount of regulatory burden faced by employers using an example of a hotel operator in Victoria in 1995[39]. In 1995, the hotel operator had to comply with up to 12 statutes and six codes of practice. An examination of the position today reveals there has been no reduction in the number of legislative instruments that apply to the same employer. It may be even greater based on the analysis provided below which reveals that the operator of a hotel in today Victorian may be subject to 10 statutes, 25 regulations, and eight codes of practice.

Victoria

Principal Acts

- *Occupational Health and Safety Act 1985*
- *Building Act 1993*
- *Building (Legionella) Act 2000*
- *Dangerous Goods Act 1985*
- *Equipment (Public Safety) Act 1994*
- *Health Act 1958*

Regulations

- *Occupational Health & Safety (Asbestos) Regulations 1992*
- *Occupational Health & Safety (General Amendment) Regulations 1998*
- *Occupational Health & Safety (Manual Handling) Regulations 1999*
- *Occupational Health & Safety (Incident Notification) Regulations 1997*
- *Occupational Health & Safety (Issue Resolution) Regulations 1999*
- *Occupational Health & Safety (Noise) Regulations 1992*
- *Occupational Health & Safety (Plant) (Amendment) Regulations 2001*
- *Occupational Health & Safety (Plant) Regulations 1995*
- *Building Regulations 1994*
- *Building (Amendment) Regulations 2000*
- *Building (Legionella Risk Management) (Amendment) Regulations 2002*
- *Dangerous Goods (General Amendment) Regulations 1998*
- *Dangerous Goods (Storage and Handling) Regulation 2000*
- *Equipment (Public Safety) (General) (Amendment) Regulations 1998*
- *Equipment (Public Safety) (General) (Amendment) Regulations 2001*

OHS Codes of Practice:

- Dangerous Goods Storage and Handling (No. 27, 2000)
- First Aid in the Workplace (No. 18, 1995)
- Manual Handling (No. 25, 2000)
- Noise (No. 17, 1992)
- Plant (No. 19, 1995)
- Plant (Amendment No 1) (No. 23, 1998)

---

[39] *Work, Health and Safety* – Industry Commission Report No 47. September 1995, page 46.

- Provision of Occupational Health and Safety Information in Languages Other Than English (No. 16, 1992
- Workplaces (No. 3, 1988)

If the hotel serves meals to patrons it will also be subject to:

- *Food Act 1984*
- *Tobacco Regulations 1997*
- *Tobacco (Amendment) Regulations 2002*

If the hotel is located in a metropolitan catchment area it will also be subject to:

- *Melbourne and Metropolitan Board of Works Act 1958*
- By-Law No. 1: Water Supply Protection
- By-Law No. 2: Waterways and Drainage Protection

If the hotel is located in a designated alpine area it will also be subject to:

- *Alpine Resorts (Management) Act 1997*
- *Alpine Resorts (Management) Regulations 1998*

If the hotel provides accommodation and a swimming pool for guests it will also be subject to:

- *Building (Swimming Pool Fences) Regulations 2001*

If the hotel provides gaming machines for its patrons it will also be subject to:

- *Gaming Machine Control Act 1991*
- *Gaming Machine Control (Clocks) Regulations 2001*
- *Gaming Machine Control (Monitoring & Control) Regulations 1991*
- *Gaming Machine Control (Responsible Gambling Information) Regulations 2002*
- *Gaming Machine Control (Responsible Gambling) (Lighting & Views) Regulations 2001*

2. However, Victoria is not alone. Most other jurisdictions have a similar regulatory regime. For example, in Queensland, the legislative regime is potentially more excessive with a hotel operator potentially subject to 14 statutes, 24 regulations and 10 codes of practice, see below for details.

Queensland

Principal Acts

- *Building Act 1975*
- *Dangerous Goods Safety Management Act 2001*
- *Environmental Protection Act 1994*
- *Guide Dogs Act 1972*
- *Health Act 1937*
- *Liquor Act 1992*
- *Sewerage and Water Supply Act 1949*
- *Workcover Queensland Act 1996*
- *Workplace Health and Safety Act 1995*

Regulations

- *Building Regulations 1991*
- *Building Fire Safety Regulation 1991*
- *Building (Flammable & Combustible Liquids) Regulation 1994*
- *Standard Building Regulation 1993*
- *Standard Sewerage Law*
- *Standard Water Supply Law*
- *Environment Protection (Air) Policy 1997*
- *Environment Protection (Interim Waste) Regulation 1996*
- *Environment Protection (Noise) Policy 1997*
- *Environment Protection (Waste Management) Regulation 2000*
- *Liquor Regulation 1992*
- *Peace and Good Behaviour Act 1982*
- *Workcover Queensland Regulation 1997*
- *Workplace Health and Safety (Advisory Standards) Notice 1998*
- *Workplace Health and Safety (Miscellaneous) Regulation 1999*
- *Workplace Health and Safety Regulation 1997*

OHS Codes of Practice:

- Asbestos Removal AS 1999
- Falls from Heights AS 2000
- First Aid AS 2000
- Manual Tasks AS 2000
- Noise AS 1998
- Plant AS 2000
- Supplement 2 – Legionella control in Air conditioning Units and Cooling Towers 2000
- Supplement 3 – Risk Management AS 2000
- Workplace Amenities 2000

If the hotel serves meals to patrons it will also be subject to:

- *Food Act 1981*
- *Food Hygiene Regulation 1989*
- *Food Standards Regulation 1994*
- *Guide Dogs Regulation 1997*

If the hotel houses a cigarette vending machine on its premises it will also be subject to:

- *Tobacco and Other Smoking Products Act 1998*

If the hotel which has on its premises a pond or area that may serve as a mosquito breeding ground will also be subject to:

- *Health Regulation 1996*

If the hotel is located at Southbank in Brisbane it will also be subject to:

- *Building Units and Group Titles Act 1980*
- *Southbank Corporation (Building Units and Group Titles) Regulation 1992*
- *Southbank Corporation By-Law 1992*
- *Southbank Corporation Regulation 1992*

If the hotel provides gaming machines for its patrons it will also be subject to:

- *Gaming Act 1850*
- *Gaming Machine Act 1991*
- *Gaming Machine Regulation 1991*