



**PRODUCTIVITY COMMISSION INQUIRY INTO  
NATIONAL WORKERS' COMPENSATION  
AND OCCUPATIONAL HEALTH AND SAFETY  
FRAMEWORKS**

**JULY 2003**

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## 1. Objectives of Workers Compensation and OHS Schemes

Despite the differences between workers' compensation and occupational health and safety (OHS) schemes throughout Australia there have been significant improvements in injury and fatality rates over the last three decades.

This picture illustrates that these schemes are achieving some universal objectives. These objectives should be considered when examining national frameworks, and any evaluation should be carried out in relation to the efficient fulfilment of these objectives.

The broad consensus reached by workers, employers, academics and policy makers suggests that "the fundamental objectives" of workers compensation and OHS schemes are:

- to prevent workplace injuries and illnesses;
- to ensure that, when injuries occur, the injured worker receives health care for maximum medical improvement or return to pre-injury health;
- to maximise the opportunity for an injured worker's return to full employment;
- to provide injured workers with income protection until they are able to return to work;
- to recognise non-economic and/or economic loss of permanently impaired workers;
- to ensure that the contributions to the system fully cover the cost of liabilities for injuries and illnesses arising out of current employment;
- to ensure that the cost of the system to employers preserves the competitiveness of business in a competitive world market; and
- to ensure the system achieves these goals efficiently and effectively. <sup>1</sup>

The NSW Government considers that an 'ideal' workers compensation and OHS scheme should be fair, efficient and affordable, and based on the following objectives:

- the prevention of workplace injury should be the ultimate goal. This can be achieved by a consultative approach to identifying, assessing, controlling and/or eliminating health or safety risks;
- injured workers (especially seriously injured workers) and their families should be the focus of workers compensation arrangements;
- injured workers (especially seriously injured workers) and their families should be provided with income support during incapacity, and be compensated for

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Jenny Neary and John Walsh *Competitive Underwriting of Workers' Compensation*, IAA 6th Accident Compensation Conference Seminar 1996 at p 37.

permanent impairment;

- when workplace injuries do occur, injured workers should get optimum treatment to enable them to return to sustainable employment as quickly and safely as possible;
- employer costs should be commensurate with the inherent risks of their industry, and reflect their performance in injury prevention and management; and
- benefit structures should be straightforward and support return to work strategies.

In determining the design of a workers compensation and OHS scheme there must be some degree of balance maintained between the various objectives. The most difficult question facing policy makers is to decide on the "right" balance. Each jurisdiction, depending on demographic, social, economic and environmental considerations will invariably design their systems to achieve the right balance.

## **2. National Frameworks and a Nationally Consistent Approach to Workers' Compensation and OHS Programs:**

Under Australia's federal system of government the States have primary responsibility for workers compensation and OHS. Each State possesses a discrete workers compensation scheme and OHS system.

America and Canada also have federal systems of government where the States have primary responsibility for workers compensation and OHS. However, despite proposals to create national workers compensation and OHS systems in these two countries, both have preferred to maintain State based systems, on the basis that they can be more easily tailored to suit local conditions.

There are arguments for and against maintaining discrete State systems. Arguments for maintaining discrete State systems include:

- State systems better reflect local needs and preferences;
- policies are made and operations conducted at a closer level to employers and workers; and
- competitive federalism encourages innovation and experimentation.

Arguments for creating national systems include:

- economies of scale;
- consistency of results between jurisdictions (ie benefit levels would not depend on the State in which a worker is employed); and
- national systems discourage hidden disincentives to cross border trade and commerce.

Consistency in Australia's state based OHS and workers compensation systems is supported through forums including the Workplace Relations Ministers Council (WRMC),

the National Occupational Health and Safety Commission (NOHSC) and Heads of the Workers Compensation Authorities (HWCA). These forums enable the States and Territories to work together on issues of national significance.

NOHSC's objectives include raising awareness of OHS issues, strengthening the formulation of policies and strategies relating to OHS matters as well as facilitating links between the jurisdictions (including those in other countries). An example of successful co-operation by States through NOHSC is the agreement to the introduction of a National OHS Strategy that includes national priority action plans and national targets for the reduction of workplace incident and fatality rates by 40% and 20% respectively by 2012. These targets were championed by NSW and have been incorporated in WorkCover's corporate plan for 2003-06.

Another recent example of the successful cooperation between the States is in cross border arrangements for workers compensation. WorkCover NSW is working closely with other jurisdictions through HWCA to simplify the workers compensation insurance arrangements for employers who operate interstate. NSW and Queensland have recently amended their workers compensation legislation to implement cross border arrangements. All other jurisdictions are currently preparing equivalent legislation and participating in a steering committee to facilitate this process. This legislation means that employers will no longer require multiple workers compensation policies for workers who are working temporarily in other States. Employers will only need to have workers compensation coverage in the worker's 'State of connection'.

### **3. National Self-Insurance**

NSW employers can apply to become self-insurers, and group self-insurers,<sup>2</sup> provided they can demonstrate that they can meet their financial and workers compensation obligations.<sup>3</sup>

The effect of these self-insurance arrangements is to:

- relieve the employer of their obligation to pay insurance premiums;
- allow the employer to underwrite their own risk; and
- allow the employer to take control of their own claims administration, injury management and return to work programs.

WorkCover has adopted a series of licensing policies that are designed to balance the needs and expectations of workers, other employers and the self-insurers operating the system. a

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<sup>2</sup>A group self-insurer license covers a holding company and all of its wholly-owned subsidiaries, which are employers in NSW.

<sup>3</sup> Approximately 30% of the NSW workforce is covered by these arrangements.

<sup>4</sup>Licensing Policies (3) for Self-Insurers, Group Self-Insurers, and Specialised Insurers, including industry schemes, under the Workers Compensation Act 1987 (NSW).

Arrangements for national self-insurance should be designed to ensure that self-insurers:

- are financially viable and strong in order to minimise the possibility of their insolvency (which would adversely impact on workers);
- are covered by reinsurance arrangements that are appropriate for their workers compensation risks;
- lodge securities that cover their outstanding liabilities in the event of their insolvency;
- are able to demonstrate that they have an appropriate OHS management system that is operating at a satisfactory performance level;
- able to demonstrate that they have a capacity to undertake injury and claims management and subject to the above:
  - unable to manipulate the system by exiting and / or entering selfinsurance arrangements in order to avoid their liabilities; and
  - able to conduct their business and operations with minimal restrictions.

#### 4. The OHS model

During the late 1970's and 1980's all Australian States and Territories introduced performance based, OHS regimes based on Roben's principles that:

- a general duty of care approach that covers all workers and industries;
- health, safety and welfare at work should not be regulated by an ever expanding body of legal prescriptive instruments (ie outcomes focused rather than process focused);
- primary responsibility for ensuring health and safety should lie with those who create risks and those who work with them; and
- the law should provide a statement of principles and definitions of duties of general application, with regulations setting more specific goals and standards. s

In line with Roben's principles, the *NSW OHS Act 2001* and the *OHS Regulation 2002* rationalised and modernised the NSW OHS legislative regime by consolidating 3 Acts and 35 Regulations and moving towards an outcomes based system. The new OHS regime gives effect to the National Uniformity Framework for common hazards such as hazardous substances, carcinogenic substances, manual handling, noise and plant.

The new system requires employers to adopt a risk management approach for the management of OHS and introduces a range of obligations that are recognised nationally and internationally as fundamental to improving workplace safety. The system balances the need for:

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<sup>5</sup> British Committee of Inquiry on Safety and Health at Work - 1972.

- a performance-based approach that allows industry the greatest possible flexibility in achieving safe working environments; and
- some limited prescription to establish minimum standards for high-risk areas.

The advantages of performance-based regulation over prescriptive regulation include:

- currency - by specifying outcomes the Regulation does not date with technological change;
- flexibility and innovation - provides businesses with the flexibility needed to innovate and manage risks in a way which best suits their particular environment;
- simplicity - reduction in the amount of regulation thus requiring less frequent change;
- equitable treatment - through adopting the same outcomes for all workplaces;
- consistency - through a risk management approach;
- inclusiveness - engages all parties involved and responsible for OHS outcomes;
- completeness - covers all possible hazards, outcomes and workplaces; and
- efficiency - enables businesses to meet their obligations in the most efficient and cost effective manner.

## 5. Reducing the Regulatory Burden and Compliance Costs

For the past decade State and Commonwealth Governments have recognised that excessive or poorly designed regulation can impose costs on society that are greater than the benefits it was designed to achieve. Workers Compensation and OHS Schemes should therefore be based on accepted principles of good regulation including:

- more attention to regulatory design, with a presumption against traditional 'command and control' forms of regulation and in favour of commercial incentives, where these are feasible and effective;
- clarity of objectives with a focus on fixing identified problems;
- integration of regulation in one area with other regulatory systems in a logical and coherent way;
- the promotion of certainty;
- simplicity of understanding and administration and ease of enforcement;
- objective analysis of the costs and benefits;
- reduction of the cost of regulation for business, while maintaining appropriate levels of community protection.

The NSW Government has recognised the significance of regulations on business costs and the need to ensure that costs are minimised wherever possible. The NSW Government review of government regulation *From Red Tape to Results (1995)* recognises that regulation needs to give "the public the protection and certainty it expects but at an acceptable cost, while eliminating ineffective and unnecessary burdensome regulation".<sup>6</sup>

Consistent with this approach, the NSW OHS system conforms to the best practice Robens-style principles adopted in many other countries, notably UK, North America and the EEC. International experience shows that an important part of the establishment of a duty of care regime is to help businesses, employers and workers meet their obligations.

WorkCover has introduced a number of initiatives in this regard including:

- Premium Discount Scheme to provide employers with a financial incentive to improve their OHS and injury management performance. Participants can earn discounts on their workers compensation premiums (up to 15% in the first year) by making their workplaces safer. As at December 2002 the scheme had delivered over \$45 million in premium rebates to approximately 2000 employers;
- WorkCover Assist Program to provide employer and worker organisations with financial support to enable them to help their members understand their OHS and workers compensation responsibilities. The 2002 program provided \$5 million to over 50 organisations and reached more than 4,250 different workplaces through industry specific strategies including workshops, training presentations and guides, web based information and video packages. The program has been rolled out for 2003;
- Small Business Assistance Strategy to help small businesses understand their responsibilities and give them practical advice and support. After Hours Clinics and seminars are being held throughout NSW to help small businesses get information and receive advice direct from WorkCover staff;
- Workplace Safety Summit to develop OHS strategies in consultation with employers and workers. The Summit was held in July 2002 and attended by over 200 delegates including leaders from NSW businesses, employer groups, trade unions and government. The Summit recommended ways to improve the safety of workers and the productivity of business. The Government's \$13 million three year program to address the recommendations focuses on practical solutions to prevent injuries in high risk areas; and
- Transitional provisions under the OHS legislation. While the new Act and Regulation took effect from 1 September 2001, there was a transitional period of 12 months to implement the new provisions of the Regulation for all businesses. Small employers (with no more than 20 employees) have a two-year period to implement the risk management requirements of the Regulation.

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NSW Government (1995) "From red tape to results - Government regulation: a guide to best practice", page 2



NSW is also currently conducting a significant review of the design of its workers compensation scheme, including an assessment of optimum underwriting of insurance arrangements in accordance with the principles under the Competition Principles Agreement. The review is being conducted by McKinsey & Company, and is being overseen by a Steering Committee including The Cabinet Office, Treasury, WorkCover NSW and the Independent Pricing and Regulatory Tribunal and is due to report shortly.

## **6. Access and Coverage**

One of the most difficult decisions facing policy makers is who should be covered by a workers compensation scheme.

Important considerations that should be taken into account in deciding on coverage include:

- all workers are entitled to return home from work, free of injury and illness;
- compliance and the prevention of premium avoidance;
- the need for consistency and certainty through the alignment of coverage with established taxation and industrial laws; and
- the view that certain categories of work organisation (eg sole traders) should bear responsibility for their own income protection insurance.

Examples of workers that have been excluded from the coverage of different workers compensation schemes include:

- self-employed (usually excluded or with separate scheme, e.g. UK);
- workers with short term employment in a particular country (Norway);
- agricultural workers (often excluded in countries with a high proportion of subsistence farming, such as South America);
- domestic workers (separate schemes e.g. Italy);
- small employers (e.g. in South Korea). Difficulty in administration is often cited as the reason for exclusion;
- trainees participating in government training schemes (UK);
- artists, entertainers and performers (Saskatchewan, Canada). Perception that cost to industry outweighs benefit;
- foreign citizens paid by a foreign state (e.g. Norway);
- reduced benefits if only employed for a short period of time (e.g. Ecuador, Honduras and Nicaragua);
- workers in "low risk" occupations (e.g. Italy);

- students (e.g. Chile);
- migrant workers (e.g. Israel);
- volunteers working for non-monetary benefits (e.g. California); and
- high-wage workers. Coverage may be excluded (e.g. Malaysia) or optional (e.g. medical benefits in the Netherlands). The argument is that these employees are able to better look after themselves and have the option to purchase their own insurance.

In some countries there are also special systems for specific industries. For example, in Australia, there are discrete schemes for seamen and military employees.

The Heads of Workers Compensation Authorities (HWCA) 1997 Report on Promoting Excellence considered that the 3 basic options for worker coverage are:

- the PAYE approach;
- a broader definition, which might include unincorporated contractors or selfemployed persons; and
- the common law concept of employment.'

The HWCA concluded that the PAYE approach and the broad coverage test both have difficulties. The main difficulty of the broad coverage test is that it may encourage various strategies by participants to avoid their responsibilities or "game the system".

On balance, having considered these alternative approaches to coverage, the HWCA recommended that:

- the common law concept of employment should be the fundamental determinant of coverage as a worker under the workers' compensation system, and that coverage should not be extended to the self-employed;
- the boundaries of eligibility should be broadened to include contractors who are incorporated, but who operate as a sole proprietor or in a partnership, in circumstances where they are deriving a personal service income from predominantly one organisation; and
- there should be standardised categories through which deemed coverage could be granted to certain classes of worker while deeming other categories of worker not to be workers. Jurisdictions should also have the ability to add marginally to this list in the light of local conditions.

NSW uses the common law test of employment (as recommended by the HCWA) subject to certain classes of workers who are deemed to be employees because of local conditions.

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<sup>7</sup> HWCA *Promoting Excellence: National Consistency in Australian Workers' Compensation May 1997* at p 32.

A key part of the NSW Government's workers compensation reform agenda is to help improve employer compliance with workers compensation insurance obligations. As part of a broader review of workers compensation and payroll tax, two specialist advisers on compliance were appointed to undertake a review of strategies to reduce premium evasion and improve employer compliance with workers compensation insurance requirements.<sup>8</sup>

Legislation giving effect to the major recommendations of the special advisers' final report was enacted in late 2002. The legislation reduces red-tape and aligns the definition of wages for workers compensation insurance and payroll tax purposes and requires principals to be concerned with the workers compensation insurance of their contractors.<sup>9</sup>

## **7. Benefits structures and access to common law**

There are a variety of benefit designs and compensation levels throughout Australia and the world. Benefit types available can be broadly classified into three categories:

1. Income replacement (economic loss) compensation;
2. Medical re-imburement; and
3. Non-economic loss (pain and suffering, general damages) compensation.

There are also a variety of benefit delivery mechanisms available. Broadly, benefits can be delivered to claimants through:

1. Lump sums; or
2. Periodic payments.

In light of these options the challenge for policy makers is to ensure that:

- benefits are targeted to the most seriously injured;
- that injured workers are adequately compensated for their injuries and lost earning capacity; and
- delivery mechanisms provide stakeholders with incentives to return injured workers to sustainable employment as quickly and safely as possible.

<sup>8</sup> Penny Le Couteur & Neil Warren *Review of Employers' Compliance with Workers Compensation Premiums and Payroll Tax in NSW* September 2002.

<sup>9</sup> Recommendation 130 of the Final Report of the Royal Commission into the Building and Construction Industry endorsed these provisions and recommended that other States and Territories adopt similar provisions.

These issues were addressed in part by Justice Sheahan's recent inquiry into workers compensation common law matters, which concluded among other things that that:

- it is unarguable that the objective of obtaining from the NSW compensation Scheme the maximum possible award of common law damages conflicts with the statutory objectives of the Scheme. Swift and effective treatment, rehabilitation, and early return to work at maximum earning capacity, do not sit comfortably with a tax-free lump sum based upon an extended period of provable past economic loss, and estimated likely future losses and costs, and better account of the intangible consequences of injury, such as pain and suffering, loss of "amenity of life" and so on; and
- the increasing focus on gaining a maximum lump sum, especially one offering the prospect of recovering large common law damages for economic loss, is seen to encourage "illness behaviour" rather than "wellness behaviour", and transforms the expected focus on support, recovery and an early return to safe productive work into an adversarial relationship which is costly, in terms of money, time and Scheme objectives, and eats into the funds available for the assistance of all injured workers.<sup>10</sup>

Some jurisdictions provide a right to common law access while others do not. In states where common law access is available, notably Queensland, NSW, Western Australia and the ACT, statutory benefits are also provided until a common law claim is settled.

Commentators generally agree that whichever delivery mechanism is used, it is critical that the vast bulk of Scheme revenue is directed towards injured workers (and their dependants) and their return to work as safely and quickly as possible. The amount of revenue required to achieve this objective will in turn determine employer premium levels.

The primary challenge for policy makers is to ensure that workers compensation schemes provide stability and the 'right' balance between fair benefits for workers and affordable premiums for employers.

## **8. Cost sharing and cost shifting**

The NSW workers compensation scheme provides financial assistance for workers who suffer an injury or contract a disease in the course of their employment where the employment is a substantial contributing factor. Financial assistance includes:

- Weekly payments that are made while workers are unable to perform their normal duties because of their injury or illness;
- Reasonable legal, medical and hospital expenses arising from the injury or illness;
- Travel expenses in attending appointments for medical and other treatment;
- Rehabilitation services to help injured workers return to work; and

<sup>tD</sup> *Commission of Inquiry into Workers Compensation Common Law Matters at p18*

- Lump sum payment for permanent impairment, and in more serious cases a lump sum payment for the pain, distress and anxiety suffered.

In order to discourage inappropriate cost shifting, the NSW Scheme is designed to interface, where appropriate, with Commonwealth health and social welfare schemes. A recent example is the implementation of structured settlement arrangements that are designed to encourage workers to convert their lump sum payments into an annuity and provide them with longer-term income and support.

## 9. Early intervention, rehabilitation and return to work

The Heads of Workers Compensation Authorities *Promoting Excellence* report identified seven elements of best practice scheme design in relation to rehabilitation and return to work arrangements, often described as total injury management. These total injury management elements are:

- In a workers' compensation system, early return to work is the expected outcome of occupational rehabilitation intervention. Occupational rehabilitation should be workplace based with services aimed at the maintenance or restoration of a worker to appropriate employment;
- The employer should be responsible for assisting in the occupational rehabilitation of injured workers, as well as keeping the job available for a reasonable period;
- Occupational rehabilitation services are not required for all injured workers, but where necessary to achieve a return to work, services are most effective when delivered as soon as possible after injury, and subject to regular assessment for relevance, effectiveness and results;
- Workers' compensation systems should provide an environment where an early return to work is seen by the injured worker as the most appropriate outcome. This involves an obligation on the injured workers to participate positively in the occupational rehabilitation program and return to work plan;
- Insurers and managed fund agents should ensure that there is a clear focus on occupational rehabilitation and return to work as part of the workers' compensation claims management process;
- Occupational rehabilitation is most effective when the employee, workers, medical and rehabilitation providers (where involved) jointly develop, implement and show a commitment to return to work programs; and
- The workers' compensation system regulator should have a responsibility to develop and foster a culture that supports and reinforces the expectation of return to work as the normal outcome for any work related injury or disease. The regulator's role should be to develop, communicate, promote and enforce the legislative framework required to achieve a return to work and the provision of occupational rehabilitation.

As its name suggests the *NSW Workplace Injury Management and Workers Compensation Act 1998* is consistent with these best practice scheme design principles,

and underpins a scheme that focuses on the prompt treatment of injuries, including the necessary medical and vocational rehabilitation services, in order to enable injured workers to return to work as quickly and safely as possible.

## **10. Dispute resolution**

The major areas subject to disputes under different workers' compensation schemes include:

- acceptance of liability;
- eligibility to benefits; and
- quantum of benefits received.

These disputes potentially undermine return to work initiatives and can have an adverse impact on any Scheme's performance. NSW reforms introduced in 2001 aim to prevent unnecessary disputes arising in the first place and provide a simpler, fairer and faster system for resolving them when they do occur.

The legislative changes establish a new Workers Compensation Commission (started 1 January 2002) with the objectives of:

- providing a fair and cost effective system for the resolution of disputes;
- reducing administrative costs across the workers compensation system;
- providing a timely service ensuring that worker's entitlements are paid promptly;
- creating a registry and dispute resolution service that meets worker and employer expectations in relation to accessibility, approachability and professionalism;
- providing an independent dispute resolution service that is effective in settling matters and leads to durable agreements between the parties; and
- establishing effective communication and liaison with interested parties concerning the role of the Commission.

The new arrangements also changed the way advice and assistance is given to injured workers and employers, and improved claims management processes. Other initiatives in this regard include:

- a new Claims Assistance Service which provides a hotline and on-line advice and referrals to help injured workers and employers 'navigate the system'; and
- a new program, WorkCover Assist which provides funding for employer and worker groups to provide training, advice and information services for their members.

Additional reforms also provide for streamlined injury notification and insurer claims management processes. Insurers are to accept 'provisional liability' and commence payments of weekly compensation prior to determining liability. Provisional liability can

also be accepted for medical expenses (up to \$5000). Increased incentives for improved service delivery by insurers, and increased penalties for delay in decisionmaking have also been introduced.

## 11. Premium setting

In theory, premiums are meant to serve two objectives. Premiums are meant to cover employer (scheme) costs, and provide employers with a financial incentive for reducing the incidence, severity and duration of workplace injuries.

Premiums can cover employer (scheme) costs on a 'pay-as-you-go' (PAYG) basis, or on a 'fully-funded basis'. PAYG schemes generally fund payments when they fall due, whereas fully funded schemes retain assets at a level that is sufficient to fund future payments.

The main arguments for PAYG schemes are that costs are lower in the short term. The main arguments for full funding are that it prevents inter-generational cross-subsidisation and imposes a discipline to develop a benefit structure that is sustainable in the long term.'

Workers compensation insurance is a long tail business (claims may be paid over a period of up to 50 years). Governments universally recognise that workers compensation schemes take time to mature and stabilise, and may accrue surpluses or unfunded liabilities over the life of a scheme.

For premiums to work effectively as a prevention mechanism, they should be closely aligned to true risk, and fully cover employer (scheme) costs. In practice it is very difficult to objectively assess an employer's 'true' risk. Market signals given to employers are therefore inherently imperfect. Other imperfections arise because policymakers and legislators try to strike a balance between:

- sharing the risk across a pool of employers (this is the concept of insurance);
- determining an employer's actual risk by evaluating the probability and frequency of the risk event occurring (in its more extreme form this would simply require employers to fully bear their own costs); and
- spreading the cost of claims over time to reflect the long tail nature of workers compensation claims.

Markets balance these competing risks differently depending on whether they are deregulated and privately underwritten, regulated and publicly underwritten, or somewhere in between. While underwriters try to assess an employer's premium based on risk, other factors can also distort price. Other factors include the:

- level of competition in the market;
- availability and cost of capital;
- total amount of business with that client; and

" WinLi Toh and Daniel Tess Workers Compensation Schemes - The Best Policy? Supra at p 199.

- size of the client and the perceived desirability of obtaining or retaining that client's business including other lines of insurance.

Under these circumstances, in an unregulated market, small employers and high-risk employers are often disadvantaged. Most schemes therefore include mechanisms to ensure that there is a balance between 'true risk premiums' and 'risk pooling'. In practice this assumes that there is an objectively correct premium for every employer, when in reality employer risk can only be assessed subjectively and often many years in arrears.

The challenge for policy makers is to design these mechanisms in order to:

- provide the 'right' balance;
- limit the opportunity for employers to manipulate the system in order to minimise their premiums;
- limit the opportunity for insurers to manipulate the system in order to achieve their own objectives (increased market share, higher/lower premiums for a particular class of employer); and
- minimise restrictions and maximise incentives to encourage employers to provide safe workplaces and return injured workers back to the workplace as quickly and safely as possible; and
- ensure sufficient pool of funds is created to meet the benefits of injured workers from current employers without impacting intergenerational equity.

The current NSW Scheme has only been in operation since 1987 and is therefore structured as a trust-like arrangement to protect employers from volatile short-term increases in costs, and enable them to remain competitive, but ensure that they ultimately accept responsibility for the long-term viability of the Scheme. The Scheme is also designed to ensure that the Government cannot appropriate any surpluses, and that deficiencies must be funded by employers or by targeting Scheme inefficiencies.

Since 1997/98, to ensure that NSW employers can remain competitive, the NSW Government has set the average premium rate at 2.8% of wages (net of GST). For some time this was less than the actuarially estimated "breakeven" premium rate. The Scheme is now earning more than it spends and this surplus will be used to retire the deficit.

## **12. The role of private insurers in workers compensation**

The role of insurers in workers compensation schemes largely depends on whether they are acting as an underwriter or a claims administrator, or somewhere in between. From an underwriting perspective, there are five main options for underwriting workers compensation insurance. There are also variations within these options. Briefly, the options are:



- (I) public or central underwriting: where the Government bears the insurance risk, determines premiums and provides insurance arrangements either through a public monopoly or through licensed insurers/administrators (eg Queensland);
  - (ii) managed fund: where a statutory trust bears the insurance risk and funds are not included on Government accounts, Government determines premiums and licenses private insurers or administrators to manage scheme funds and claims (eg NSW);
- (iii) industry based scheme: where a specific insurer bears the insurance risk for a certain industry sector, premiums are determined by the insurer on the basis of industry risk, insurer invests and manages funds and claims for that industry (eg Germany);
- (iv) mixed underwriting: Government and private insurers bear the insurance risk in a competitive environment and are selected according to policy holders' preference; and
- (v) private underwriting: private insurers assume the insurance risk, set premium rates either without restriction or with premium setting structures subject to Government regulation, manage funds and claims (eg Western Australia).

Regardless of the underwriting model used, all workers compensations schemes make some use of third party 'expert' providers in the delivery of services. There are also a number of different administrative arrangements that can operate under each underwriting model. For example in a publicly underwritten model the Government scheme administrator can undertake insurance functions such as claims management and funds management in addition to more general administrative tasks such as premium regulation, information collection and dissemination etc. Alternatively these functions can be performed by licensed private insurers or claims agents/administrators on a fee basis.

The full private underwriting model is represented by an unregulated free market with no licensing restrictions, insurer freedom to price premiums, and with no limits on the number of insurers operating in the market. Within a privately underwritten system there are different levels of regulation that can apply. These variations include regulated private underwriting where the Government regulates and monitors premium-setting structures as in a 'file and write'<sup>12</sup> system. Variations also include limited private underwriting whereby the Government strictly limits, through licensing provisions, the number of insurers operating in the workers compensation market.

Views on whether privately underwritten or publicly managed workers compensation schemes are better usually come down to philosophical differences as does the criteria for assessing performance. North American researchers have for many years attempted to determine whether competitive or monopolistic systems are more cost effective.

One study concluded that "private and competitive systems have been able to maintain benefit levels while placing a lighter burden on employers through lower average premiums per employee."<sup>3</sup>

<sup>12</sup> This is a system where insurers 'file' premium rates/methodology with the regulator and the regulator can approve/disapprove these rates prior to 'writing' by the insurer.

<sup>3</sup> " *Unfolding Change: Workers' Compensation in Canada Vol 4*, Commissioned by Liberty International. Canada 1995.

Another suggested that "cost reductions need not occur - indeed costs may increase - by shifting from monopoly provision to a US model of private insurance".<sup>14</sup>

The research studies find it difficult to compare the different systems and often draw inconsistent conclusions. What is notable is that protagonists on either side of the debate seem to select specific aspects from comparative studies that support their particular argument.

In Australia reports from both the Industry Commission and the Heads of Workers Compensation Authorities (HWCA) indicate that there is no particular scheme structure that is critical to good scheme performance. A range of factors affecting the system dynamics have been identified as important to effective performance, including reinforcement of the relationship between prevention, compensation, return to work and claims administration.<sup>15</sup>

NSW will persist in continuously improving its workers compensation and OHS systems to meet the needs of NSW workers and employers. At the same time NSW will continue to demonstrate its commitment to ensuring that unnecessary barriers and costs are removed for workers and employers operating across Australian jurisdictions.

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<sup>14</sup> Thomason, Terry, and Burton, John F. Jnr. *The Cost of Workers' Compensation in Ontario and British Columbia*.

"The 1994 *Industry Commission Report Workers Compensation in Australia* states that "...The Industry Commission found that the most successful systems have developed an overall culture which is oriented to practical and applied approaches to returning disabled workers back to employment while, in the interim, providing benefits..., expeditiously and with a minimum of friction and litigation."