House of Representatives
Standing Committee on Employment and Workplace Relations

Inquiry into Aspects of Workers' Compensation

Submission by the
Federal Department of Employment and
Workplace Relations

August 2002

Contents

Executive Summary

1. The Federal Department of Employment and Workplace Relations (DEWR) considers that the incidence and costs of fraud and/or non-compliance by employers and employees is a problem confronting all Australian workers' compensation schemes.

2. The structural arrangements of the various State and Territories (States) schemes contribute to incidence of fraud and the level of non- compliance. The legislative framework underpinning the schemes is complex and inconsistent across the jurisdictions. This creates opportunities and potential confusion that could generate avenues for fraud and/or non-compliance by both employers and employees.

3. A further contributing factor to the level of fraud and non-compliance is the inherent inflexibility and inability of the workers' compensation schemes to respond to changing working arrangements. The workers' compensation schemes have not adapted to the emergence of different forms of employment which reflect the modern Australian economy and the personal choices which Australians want to make about work, lifestyle, family and security. Employers and employees are increasingly entering into non-traditional working arrangements which best suit their individual circumstances. These arrangements are also increasingly falling outside the scope of the traditional coverage under the workers' compensation schemes.

4. The response of the States to date has been to increase the regulatory complexity regarding coverage for workers' compensation. This only compounds the problem as each State seeks its own solution. It is quite clear each State operates in a vacuum, as if its workers and employers are in a cocoon when the evidence is abundantly clear the Australian workforce is highly mobile and more and more employers operate in more than one jurisdiction. The implementation of a single national regulatory framework for coverage under workers' compensation purposes has the obvious potential to remove the volume of the complexity that exists and lessen the potential for fraud and/or non-compliance.

5. The regulatory framework covering workplace safety is also overly complex. Employers find compliance costly. This is primarily because each State has a separate scheme. This contributes to poor occupational health and safety (OHS) outcomes.

6. Like the workers' compensation and OHS legislative framework, the rehabilitation and return to work obligations in place across Australia are diverse and complex. Low return to work rates is a major cost driver in workers' compensation schemes. Employers face different obligations, while injured employees are subject to scheme structures that can leave them to their own resources especially, following receipt of a common law payout or a redemption of their future entitlements.

7. There is considerable interaction between the workers' compensation schemes and the Commonwealth's social welfare system which can lead to "double dipping" due to the structural arrangements of the schemes. There is also evidence to suggest that the Commonwealth social security programme has become a "de facto" workers' compensation system for injured employees who have no coverage or have no longer any access to a State workers' compensation scheme.

8. The overall cost of work-related injury and disease in Australia is substantial. A workplace injury has a potentially significant impact on injured workers and their families, the employer and the community in general. Activities by employers, employees and others that are fraudulent or constitute non compliance add to this costs and impact on the community in general.

9. The full extent of fraud and/or non-compliance is difficult to quantify. However, a recent report in Queensland estimated that employers in one industry alone had underpaid premiums by up to $700m over a five year period.

10. On the other hand, a recent study by the insurance industry estimated that employee and service provider fraud under the privately underwritten workers' compensation schemes had cost the industry over $300m per annum. These schemes represent less than 20 percent of the Australian workers' compensation market. If the same or a similar trend was evident across all schemes, the cost to Australia of fraudulent claims by employees and service providers is likely to be significant.

11. Streamlining workers' compensation and rehabilitation and return to work arrangements under a single framework would facilitate improved compliance. Similarly, a single OHS regulatory framework would lead to improved workplace safety outcomes as existing arrangements hamper improvements in current performance.

1. Introduction

1. This submission is made by the federal Department of Employment and Workplace Relations (DEWR). The purpose of the submission is to assist the House of Representatives Standing Committee of Employment and Workplace Relations (the "Committee") with its Inquiry into

Aspects of Workers' Compensation (the "Inquiry") and to identify areas of interest to the Committee.

2. The Minister for Employment and Workplace Relations, the Hon Tony Abbott MP, has portfolio responsibility for national workers' compensation and occupational health and safety (OHS) arrangements. The Minister also has portfolio responsibility for the Commonwealth's workers' compensation schemes, Comcare and Seacare, and the National Occupational Health and Safety Commission (NOHSC). DEWR provides policy advice to the Minister on these arrangements and actively works with the States and Territories (States) in a number of areas to improve workers' compensation and OHS arrangements.

3.The submission does not seek to address in any detail issues relevant to the Committee's terms of reference in respect of the Commonwealth's workers' compensation schemes; that is a matter more appropriate for the schemes. Comcare has lodged a detailed submission with the Committee. The focus of this submission is on national arrangements, rather then the federal schemes.

4.DEWR notes that the inquiry by the Committee is one of a number of inquiries currently underway or to be undertaken relating to workers' compensation and OHS. The HIH Royal Commission terms of reference include an examination of the adequacy and appropriateness of arrangements for the regulation and prudential supervision of general insurance, including workers' compensation. The Royal Commission into the Building and Construction Industry has identified occupational health and safety in that industry as a key area to be addressed.

5.A further inquiry was announced on 24 July 2002, by Minister Abbott and Senator The Hon. Ian Campbell, Parliamentary Secretary to the Treasurer, with the Federal Government to ask the Productivity Commission to undertake an inquiry aimed at streamlining Australia's various workers' compensation and OHS schemes.

6.DEWR considers that the outcomes of these inquiries, along with the inquiry by the Committee, will inform Government policy considerations of workers' compensation and OHS arrangements.

7.The submission firstly addresses the need for the Inquiry and then provides an overview of existing workers' compensation and related rehabilitation and return to work arrangements along with an outline of occupational health and safety arrangements. The submission then addresses each reference in turn. DEWR relies on the Comcare submission to provide an example of the methods used and costs incurred by a workers' compensation scheme to detect and eliminate fraud and/or non-compliance.

2. Need for the Inquiry

8.The human and economic cost of work-related injury and disease in Australia is substantial. A 1995 report by the Industry Commission[1] estimated the total cost to injured employees, employers and the community at around $20 billion a year. This is the estimated dollar cost and does not take into account the human suffering to workers and their families.

9.More recent information indicates the cost of work-related injury and disease has increased since 1995. The cost to employers of workers' compensation premiums has increased by over six percent of payroll over the last three financial years, even though injury rates have decreased. Australian workers' compensation schemes collected nearly $6 billion in premiums in the financial year 2000/01, up some 30 percent over the amount collected in 1997/98[2].

10. Against this background only three Australian workers' compensation schemes reported a fully funded position for the financial year 2000/01[3]. All schemes are under pressure to control costs. Schemes must balance the expectation of injured employees to be paid adequate benefits if injured against the cost to employers through higher premiums. There is also an obligation on the schemes to ensure that injured workers who have an entitlement to compensation that their employer meets the statutory obligation to provide workers' compensation coverage.

11. A range of factors influence the ability of workers' compensation schemes to meet the expectations of workers and employers. The changing nature of employment arrangements is testing the traditional nature of workers' compensation coverage for workers. Over recent years, there has been a significant increase in the number of casuals, part-time employees, subcontractors and use of labour hire by employers. There has also been a significant growth in self-employment in recent years. The result is that up to 40 percent of the workforce may no longer meet the test applied for coverage under the various workers' compensation schemes.

12. There have been suggestions that some employees obtain workers' compensation benefits fraudulently. Those who provide services to injured employees may also obtain income fraudulently from workers' compensation. There are also suggestions that activities by employers constitute fraud and/or non-compliance by not meeting workers' compensation obligations or by engaging in activities to reduce those obligations. This submission draws to the attention of the

[1] *Work, Health and Safety* Industry Commission, Report No.47, 11 September 1995
[2] *Comparative Performance Monitoring Fourth Report* Workplace Relations Ministers' Council August 2002, page 74. This submission makes extensive use of this report which is a cooperative project under the auspices of the Ministerial Council involving all States and Territories and the Commonwealth and includes the New Zealand schemes.
[3] *Ibid,* page 72

Committee reports on activities by employees, employers and others that fall within the scope of the Committee's terms of reference.

13. The most recent available data on workplace injuries in Australia shows a continuation of the downward trend in the incidence of injuries that results in one week or more off work, but around one quarter of workers who are injured are still off work after three months. Such injuries are high cost both in terms of cost to the employee and the employer. While it is possible a range of factors is influencing this outcome, some of which are identified later in this submission, it is relevant for the Committee to examine this aspect in the context of safety records of different industries and the rehabilitation programmes available to injured workers.

3. Overview of Existing Arrangements

3.1 National workers' compensation arrangements

14. In Australia, each State and Territory (State) has its own compulsory workers' compensation arrangement. Parallel to these are two federal based industry schemes; one for Federal Government employees (the Comcare scheme) and another scheme covering certain seafarers (the Seacare scheme). Employers are required to obtain workers' compensation insurance in each jurisdiction in which they employ workers.

15. The same general structural arrangements apply across all ten schemes in Australia. Each scheme is established under a principal Act of Parliament plus supporting regulations. The various State schemes also operate alongside of third-party accident compensation. There is a degree of interaction between the two types of compensation schemes in a number of jurisdictions as some workers' compensation schemes cover journey claims while in other jurisdictions insurance coverage for these types of claims is under a separate third-party compensation scheme. There is also a degree of interaction, as discussed later in this submission, between the State workers' compensation schemes and the federal social welfare programmes and Medicare.

16. Each State and federal workers' compensation scheme is overseen by a public authority which regulates the activities of the scheme. The regulator is generally responsible for the ongoing viability of the scheme by monitoring performance and evaluation; collecting information and disseminating it to stakeholders; establishing premiums; operation of injury management programmes and fraud control.

17. All Australian schemes are based on the principle of 'no-fault' compensation in which employers are held liable for work-related injury and illness suffered by their employees. This, however, is about the extent of the similarity between the Australian workers' compensation schemes. A number of the essential differences behind the schemes include:

- varying levels of compensation payable to injured employees;
- overlays by a number of the States of the "no-fault" system with access to common law fault based remedies;
- inconsistent legislative provisions for the same category of worker ;
- varying insurance arrangements, with four States having a government controlled central or managed fund (NSW, Victoria, Queensland and South Australia) and four being privately

underwritten by the insurance industry (Western Australia, Tasmania, Northern Territory and ACT). Of the federal schemes, Comcare is effectively a self-insurance arrangement for the Commonwealth's own employees while Seacare is privately underwritten;

- different approaches and legislative provisions relating to rehabilitation/return-to-work of injured employees; and
- different approaches to the management of claims. Queensland and Comcare manage claims in-house, while the other central funded schemes generally operate a panel of claims managers. In the privately underwritten States, the insurer is responsible for claims management. This different structural approach used by the various schemes is particularly relevant to the Committee's consideration of how fraud may occur in respect of claims.

18. An outline of the individual workers' compensation schemes is provided at Attachment A.

3.2 Rehabilitation and return-to-work programmes

19. Workers' compensation arrangements encompass prevention, compensation and rehabilitation – a total injury management approach. All Australian schemes generally use the total injury management approach by using a coordinated and managed process from the time of injury, integrating medical and employment management practices with a focus on the workplace and a return to durable work. By necessity, such an approach requires the involvement of a range of parties from medical practitioners, rehabilitation providers and, importantly, the employer.

20. All jurisdictions provide rehabilitation and return-to work-programmes for injured employees that place obligations on the employer and injured employees. The legislative provisions covering rehabilitation and return-to-work of all Australian workers' compensation schemes vary. For example, under Victorian legislation an employer is required to hold a position open for an injured employee for twelve months, whereas under the ACT legislation there is no obligation placed on employers to keep a position open for an injured employee.

3.3 National occupational health and safety arrangements

21. In Australia, there are 10 principal occupational health and safety (OHS) Acts covering health and safety at the workplace. Each State has its own principal Act with supporting regulations and codes of practice. The Federal Government has responsibility for its own employees (including the military personnel) and also for seafarers. In addition there are a number of industry-specific Acts, regulations and codes that deal with OHS issues, particularly for industries characterised as dangerous or hazardous, such as mining, construction and oil industries.

22. Legislation and other regulations in OHS may cover such matters as general safety, premises or location, plant and equipment, system of work, materials and substances and administration and enforcement.

23. The principal OHS legislation in each jurisdiction provides for a broad general duty of care on every employer to safeguard the health and safety of employees and other persons at the workplace. The employer's general duty of care regulated by OHS legislation is based on the common law duty of care. The duty of care in each Act is essentially a codification of the common law duty of care.

24. Detailed and prescriptive provisions specifying particular requirements, responsibilities, obligations, rights and duties are generally contained in Regulations. These are supported by codes of practice which are intended to provide practical advice and guidance, on certain issues, to employers and others on how to:

- specifically, meet the requirement described in regulations, and
- generally, fulfil the duty of care obligations specified in the principal Act.

25. All States have in place an enforcement policy that underpins their general approach to achieving compliance. The enforcement policies vary from an approach that emphasises the role of prosecution (NSW) to one of gaining improvements through education and industry specific support with resort to prosecution if necessary (South Australia).

26. There is a fragmented approach across the States to the management of OHS activities. In four jurisdictions (NSW, Victoria, Tasmania and Northern Territory) the OHS and workers' compensation activities are combined under one agency. In the other three jurisdictions (Queensland, Western Australia and South Australia) there are separate agencies. South Australian arrangements are even more convoluted with the Workcover Corporation having responsibility for aspects of OHS while OHS compliance responsibility rest with a separate agency. The linkage between workers' compensation and OHS activities is obvious; the workers' compensation system does not come into play unless there has been a failure of the OHS system. The current national arrangements can only add to the confusion for employers and employees and may even dilute efforts to improve workplace safety.

4. Reference One – *The incidence and costs of fraudulent claims and fraudulent conduct by employees, and any structural factors that may encourage such behaviour.*

27. The submission seeks to address this reference by first proposing a definition of fraud. It then examines fraud from the perspective of the employer, of the employee and of the providers of services to injured employees. In doing so, reports of fraud and/or non-compliance across the various workers' compensation schemes are provided. At the same time contributing factors to fraud are examined. Finally, in this section of the submission, structural factors that may be contributing to fraud and/or non compliance are identified.

4.1 What is fraud?

28. NSW is the only workers' compensation jurisdiction that currently defines fraud in its workers' compensation legislation, while Queensland amplifies the criminal code definition of fraud for the purposes of the legislative scheme (**Box 1** below provides details). For the other jurisdictions, the legislation in place does not elaborate on the meaning of "fraud" or "dishonesty" where these words appear in the relevant statute. Consequently, the other jurisdictions rely on their meanings under the general criminal law, whether statutory or common law.

Box 1 – Coverage of fraud in State and Territory Legislative Framework

NSW

In NSW, the Workplace Injury Management and Workers Compensation Act 1998 defines fraud in section 235A. This section creates a general fraud offence for persons who obtain a financial advantage by deception from the workers compensation scheme. The offence is not limited to injured workers. Fraud is defined as "deception". Deception means "any deception by words or conduct, as to fact or as to law, including the making of a statement or production of a document that is false or misleading".

Queensland (Qld)

In Qld's Workcover Queensland Act 1996, the offence of fraud (section 482) also includes "Particular acts taken to be fraud" (section 484). A person is deemed to have defrauded WorkCover or the self-insurer under section 482 if a person lodges an application for compensation and engages in a calling and, without reasonable excuse, does not inform Workcover or the self-insurer, of that engagement in a calling (in contravention of section 163, "Worker must notify return to work or engagement in a calling"). "Fraud" itself is not defined in the Qld Act.

29. Fraud" has been defined as:

- dishonesty, generally in the context of fraudulent misrepresentation (*Butterworths Concise Australian Legal Dictionary*);
- deceit, trickery, sharp practice, or breach of confidence, by which it is sought to gain some unfair or dishonest advantage; someone who makes deceitful pretences *(Macquarie Concise Dictionary)*; and

- deception; the use of false representations to gain an unjust advantage; a dishonest artifice or trick; a person or thing not fulfilling what is claimed or expected of it" (*The Australian Concise Oxford Dictionary*)

30. In workers' compensation context, fraud could therefore be regard as:

- any deceitful or dishonest conduct, involving acts or omissions or the making of false statements orally or in writing, with the object of obtaining money or other benefit from, or evading a liability. In general terms, fraud is the use of deceit to obtain an advantage or avoid an obligation; or
- any intentionally dishonest act or omission done with the purpose of deceiving. Fraud can be committed by workers, employers, lawyers, service providers like medical and health practitioners and interpreters; or
- an intentional act or series of acts resulting in payments or benefits to a person or entity that is not entitled to receive those payments or benefits.

31. This submission also recognises that some acts or omissions by employers/employees or service providers which are unintentional could be considered a fraudulent act by scheme regulators or insurers. While the offence of fraud requires an element of intent, an employer or employee could be left in the invidious position of having to defend themselves against a charge of fraud through their inadvertence. For example, an employer may underestimate wages or record occupations of each worker incorrectly. This may subject the employer to investigation for possible fraud, Depending on the strength of the evidence this could lead to prosecution. In NSW where an attempt to obtain or actually obtaining by deception a financial advantage from the workers' compensation scheme can attract a penalty of $55,000 or 2 years imprisonment, whether or not the matter is prosecuted depends on matters such as:

- whether the matter is a first offence;
- the seriousness of the offence;
- if the breach is clear cut and the actions of the person since commission of the alleged offence.[4]

32. At the lower end of the scale an employer or employee adjudged by an inspector to have breached the provisions of the Act (where the inspector might suspect fraud but be unwilling to proceed to prosecution) may be issued with a penalty notice under the workers' compensation legislation. Such penalty notices can include a fine of around $500. However, if an employer is

[4] (see NSW WorkCover Authority Compliance and Prosecution Policy)

uninsured, all schemes contain provisions to ensure that the employee is not without workers' compensation coverage in the event of an injury. It is also the case that the injured employee who cannot identify the employer may be eligible for assistance under the Commonwealth's social security system.

4.2 Employers

33. Compliance by employers with the legal obligation to have in place insurance coverage for their employees is a central tenet of a workers' compensation system. Non-compliance by an employer can have a direct impact on all employers as it increases the cost of funding the system and may result in transferring the costs of a workplace injury to the employee and the community.

34. Generally speaking, a person who operates a trade or business that employs workers and/or engages contractors who are, or may be deemed workers, has a legal obligation to obtain workers' compensation insurance cover for those persons. Consequently, it is necessary to determine what constitutes an employment relationship that falls within the scope of the employer/employee concept.

34. Traditionally, all Australian workers' compensation jurisdictions have relied upon the simple common law definition of contract of service (employee) to establish who is covered by a scheme. This test generally excludes from coverage under a scheme persons engaged under a contract for services (independent contractor). The determining factor is the employer's control of the manner in which the work was to be performed. While the test of coverage for compulsory workers' compensation has always been an issue, the changing nature of workers' arrangements in recent years is testing the traditional basis of coverage for most schemes.

35. Reliance on the contract of service test does in itself lead to difficulties for a range of employment arrangements. To address this problem, all Australian schemes use "deeming" provisions to provide coverage for a range of employment types that cannot generally be encompassed within the contract of service test, for example taxi drivers, ministers of religion. Most also deem as employees persons who are engaged in activities that are in socially desirable roles such as volunteer fire fighter or volunteer ambulance officer.

36. While using the contract of service does provide a degree of consistency across the schemes, there are still fundamental differences. **Box 2** below illustrates the differences. The use of deeming provisions also adds to the complexity of the regulatory arrangements. Generally the use of deeming provisions is not supported where such provisions interfere in commercial business arrangements and the ability of both the business and the worker to choose to be an independent contractor or an employee.

37. The lack of consistency and complexity of the test applied may of itself contribute to understatement of workers' wages or other remuneration paid by employers. This issue is also relevant when considering the amount of premium an employer should pay.

38. The insurance premium paid by an employer for workers' compensation coverage is established under most schemes by reference to the remuneration paid to employees. It may be that employers experiencing difficulties do not understand the basis as to what constitutes "remuneration" under the various schemes. This is further complicated when an employer operates in more than one jurisdiction. The complexity of establishing remuneration across the jurisdictions is set out in Attachment B.

Box 2 – Examples of differences between coverage under the schemes

Most jurisdictions cover workers using the common law definition "under a contract of service" and exclude from coverage those working under a contract for services. Other workers who may not fall into the general contract of service definition are included in the statutory scheme with the use of deeming provisions.

In Western Australia adherence to the common law concept of employee "contract of service" is not observed. The definition of worker has been widened to also include a person working under a contract **for** services, where that person is paid for personal manual labour or services, and the work is performed for the employer's trade or business.

Further complexity is added by the range of deemed workers and the differences between states as to who is a worker for the purposes of the workers compensation legislation. For example:

Wall or floor tiler: if you are self-employed you are generally not covered by the deemed worker provisions in the South Australian Workers' Rehabilitation and Compensation (claims and registration) Regulations (see the exclusion in Regulation 5, subregulation 1). However if you are bricklayer, plasterer or other associated tradesperson, perhaps working at the same building project as the tiler, then you may well be covered by the South Australian workers compensation insurance scheme.

Further there is no consistent policy approach to the particular exclusions of categories of persons operating under contracts for services or other specific contractual arrangements between jurisdictions. For example:

Qld – share farmers are covered if they are entitled to not more than 30% of the proceeds of the farm AND there is no use of mechanically powered farm machinery.

ACT, NT and WA: specifically exclude workers in a family business, where the worker resides with the employer.

Victoria : includes Judges and jurors in the workers' compensation deeming provisions, while Western Australia covers only Judges, and the Northern Territory covers only jurors.

39. The differences in legislation underpinning Australian workers' compensation schemes may contribute to non-compliance by employers. However, it is the employer who has the obligation to comply. A range of activities or actions by employers can constitute fraud or inadvertent non-compliance. Some that have been reported across the various schemes include:

- the employer not obtaining insurance cover, particularly by "phoenix companies" that have a short existence;

- fragmentation of businesses that have common ownership to reduce overall liabilities for workers' compensation;
- under-insurance by not declaring wages that form part of the definition of remuneration for premium purposes;
- exclusion of deemed workers from wage declarations on the basis that they are 'contractors' (this is, in part, possible because of the uncertainty surrounding who is a 'deemed worker')[5];
- artificially isolating lower risk activities undertaken into separate entities within a group; and
- providing false statements in connection with an application for an insurance policy.

40. There are also reports of other activities by employers that have a direct bearing on their employees in this area. For example:

- deducting monies from wages for the purposes of workers' compensation premiums;
- failing to pass on compensation benefits to workers, or passing on a lesser amount to the employee; and
- employees being informed by employers that they are not covered by the workers' compensation scheme.

41. All Australian schemes have in place a nominal fund to meet the cost of injured workers of uninsured employers. The usage of these funds will vary depending on the level of compliance by employers in a scheme and the extent the injured employee seeks to obtain compensation from a scheme rather than use other sources.

4.2.1 Extent of employer non-compliance

42. The extent of non-compliance by employers is recognised as a problem for all workers' compensation schemes. Some examples of outcomes of non-compliance activities by schemes are set out below.

<u>New South Wales</u>

Financial year 2000/01 (*Annual Report 2000-2001*, Workcover NSW)

- 2200 large-scale audits targeted at employers yielded additional premiums of $3.2 million;
- 93 investigations for employers under-declaring a total of $37.0 million in wages and resulted in the billing of an additional $1.3 million in premiums;

[5] *Workers' Compensation Insurance Compliance Green Paper*, September 2001, page 9 (NSW Green Paper)

- 203 complaints from unions, inspectors, employers, insurers etc were investigated. 76 matters were finalised and identified an under-declaration of $17.6 million in wages and resulted in employers being billed for $977,851 in additional premiums; and
- 500 sites inspections of smaller employers on industrial estates, 13 were identified as being uninsured: 3 have had a $750 penalty notice and 3 have been referred for prosecution.

Victoria (*source*: *On-line Opinion*, Nov/Dec 1999. "Workers Compensation Fraud - Vilifying Workers by Simon Garnett)

- The Victorian Workcover Authority has conducted audits of the remuneration declarations and WorkCover Industry Classifications of Victorian employers from 1995 to 1999. In that time, the total number of audits conducted was approximately 21,000 which showed that 9,821 employers complied, 4,225 over-declared and 6,860 employers under-declared, resulting in an underpayment of premium of some $40m.

Queensland (*Annual Report 2000-2001*, Workcover Queensland)

- In 2000-01, over 11,000 employers across the State were contacted through audits, questionnaires and on-site visits, resulting in the collection of additional penalties of $1.7m and refunds of $2.4m.

South Australia (*Investigation Newsletter* March 2000, Workcover Corporation)

- A sole director of a company was dishonestly claiming reimbursement from Workcover for payments of workers' compensation, payable to one of its employees. The director claimed he was paying an employee $968 a week, instead of the $440 per week the employee was receiving. The director was fined and ordered to repay Workcover over $3000 and required to meet its legal and investigation costs.

Western Australia (*Annual Report 2000/2001*, Workers' Compensation and Rehabilitation Commission)

- In 1999-2000, Workcover undertook 17,223 inspections for employer compliance. Of those inspected, 1,537 were found to be uninsured of whom 21percent were employing workers. This resulted in seven prosecutions. The percentage of employers uninsured has steadily increased in WA from 14 percent in 1994-95 to 21 percent in 1999-2000.
- During the 2000/2001 year six employers were successfully prosecuted for failing to have a current workers' compensation policy under the Act. Total fines awarded during the year amounted to $8,036 and a further $12,513 in avoided premium was ordered to be reimbursed to the General Fund.

4.2.2 Building and Construction industry

43. The building and construction industry has been noted by the various workers' compensation schemes as an industry where compliance by employers with coverage provisions is below that of other industries. It may also be the case that this industry has attracted the attention of regulators because of particular injury rates. There is, however, evidence of activities that appear to be structured for the purpose of avoiding workers' compensation obligations in this industry as noted in the two State reports identified below.

44. A Queensland report claimed "anecdotal evidence from the building and construction industry suggests that the level of compliance in premium collection could be as low as 30 percent". The report went on "Preliminary estimates suggest that if this is the case, over the last five years WorkCover has not collected approximately $700m in premiums. If a more conservative estimate of 70 percent compliance was used, WorkCover did not collect approximately $130m in premium (over the same period)" from this industry[6]. The report identified that possible increased compliance concerning this industry would result in the payment of additional premiums of $50m per annum[7].

45. A Green Paper issued by the NSW Government, while recognising that non-compliance varies across industries, also identified the construction industry "as a poor performer in relation to both under-insurance and non-insurance"[8].

46. Employers who do not comply with their workers compensation obligations create a higher cost burden for other employers. There is also the potential for the various schemes to have to meet the cost of uninsured claims under provisions most schemes have in place to protect injured employees. There is also the potential that the taxpayer may meet the cost of injuries to employees whose employers fail to comply with their obligations.

4.3 Employees

47. A 1996 Insurance Council of Australia study into the cost of fraud in the insurance industry estimated that it cost the industry and its policyholders over $800m per annum. Of this amount the cost of workers' compensation fraud accounted for some $320m - well above the next highest, Domestic Motor Vehicle, at $236m[9]. The identified fraud was not the sole responsibility of employees. In addition, it took into account fraud committed by service providers.

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[6] "*Restoring the Balance* - Queensland Government 1999, page 15. (Qld 1999 Report)
[7] *Ibid – Qld 1999 Report* , Attachment Two
[8] *Opt cit NSW Green Paper,* page 9
[9] *The ICA Fraud Report* – Crime Against Business conference Melbourne 18-19 June 1998, page 7

48. These estimates relate only to the workers' compensation schemes where the insurance industry provides coverage, namely Western Australia, Tasmania, Northern Territory, ACT and Seacare. These five schemes represent less than 20 percent of the Australian workers' compensation market. It excludes the four largest workers' compensation schemes - NSW, Victoria and Queensland and South Australia. If the same or a similar trend was evident among these schemes, the cost to Australia of fraudulent claims by employees and service providers is likely to be significant.

49. Employers are not the only participants disadvantaged by the complexity in workers' compensation arrangements. Complexity in a number of areas may also contribute to employee related fraud. The general principle applied by all Australian schemes for an employee to obtain workers' compensation benefits, either income replacement or medical and related expenses, is that the employee must demonstrate that the injury or illness is work-related. A further test is also applied by most schemes that requires the employment to be a 'significant' or 'substantial' cause of the injury or illness. However, as with most tests applied under the Australian workers' compensation schemes, what constitutes a compensable injury or illness varies - see Attachment C.

50. In the main, Australian workers' compensation legislation prevents the use of claims as a device to obstruct legitimate management action. The intent is to disentitle a claimant to compensation for an injury where the injury has arisen as a result of reasonable disciplinary action or a failure to obtain a promotion, transfer or benefit in connection with his or her employment. However, the schemes apply differing tests as demonstrated in Attachment D.

51. Under some Australian workers' compensation schemes the test of "in the course of employment" has varying conditions as to whether it falls within the boundaries of entitlement to compensation. For example, some schemes only cover injuries that occur while performing work, while others also cover journey and recess injuries. There are also special tests applying to specific injury types such as hearing loss and stress claims.

52. Employees face a highly complex scheme of arrangements to determine whether or not they have suffered compensable injury or illness. This may be one of the reasons over 50 percent of employees who reported having a workplace injury or illness did not lodge a claim for workers' compensation[10].

53. Having accepted liability for a claim, the various workers' compensation schemes monitor the claim to assess the continued entitlements of the injured person. It is during this period when the injured person will be subject to ongoing assessment by medical and other providers which will bear on the period of compensation. It may often be the case that medical and other advice does not

coincide with the injured persons' view as to whether they are fit for work and/or that compensation entitlements should cease.

54. The various workers' compensation schemes have in place sophisticated claims management systems that use risk management techniques to test for liability and ongoing entitlement. The rate of rejection of initial claims across schemes varies from a low of around five percent to as much as twenty percent. It also needs to be recognised that workers' compensation claims are a fertile area for disputation, not only in relation to initial claims but also about ongoing entitlements. The prospect exists that employees may not understand the system or their entitlement to compensation. On the other hand, it may be the material submitted does not justify the claim.

55. Regardless of the complexity of the regulatory arrangements, the employee has a duty to provide information about the initial claim that is not misleading or engage in activities that undermine the entitlement to compensation. While most claims lodged with the various schemes are genuine, the evidence suggests some employees do:

- provide false statements in connection with claims, such as claiming injuries or illnesses that do not exist;
- claim for injuries that are non-work related;
- alter medical certificates or alter the cost of medical and other services;
- embellish an injury or illness to continue receiving compensation; and
- fail to inform the insurer of additional employment and/or income while on benefits.

4.3.1 Types of employee fraud

56. The following list of selected examples is intended to show the types of activities that constitute fraud and the incidence of fraudulent claims:

NSW

- an employee was sentenced to six-months' jail for fraudulently attempting to obtain $1,018 for physiotherapy treatment he had not received in respect of a work-related injury. (*Compensation Week, issue 43, 20 august 2002, page 1)*
- an employee was fined $2,400 and ordered to repay WorkCover $35,699.86 for receiving workers' compensation benefits after returning to work. (*Workcover News*, Spring Edition 2000, Issue 43, Workcover NSW);

[10] *Opt cit* – 4th CPM Report, page 121

- a private workers' compensation fraud investigator was fined for dishonestly claiming a non-work related injury. The investigator injured his ankle at a private function; he then claimed to his doctor that he slipped when getting out of his car at work. When filling out his workers' compensation forms he alleged that the injury took place when moving a filing cabinet in his office. The investigator was fined $2,000 and 100 hours of community service was also ordered to be completed (*Media Release* 13/07/00, "Private Insurance Investigator Fined for Workers' Compensation Fraud", Workcover NSW);
- in the financial year 2000/01, NSW reported 191 referrals of potential claimant fraud; 6 matters being prosecuted and a further 84 matters being investigated (*Annual Report 2000-2001,* Workcover NSW.); and
- NSW has adopted a computer based model for data matching to test for fraud: in 2000/2001, 1520 claims were examined and 20 matters were referred for prosecution while 130 are under investigation. (*Annual Report 2000-2001,* Workcover NSW).

Victoria

- an employee continued to receive workers' compensation payments after returning to work. The employee was convicted and sentenced to 9 months jail, suspended for 2 years, and ordered to repay over $43,000 to WorkCover. (*Media Release* 16/02/01, "Jail Sentence for Workcover Fraud", VIC Workcover.);
- a claimant was jailed for 21 months for defrauding WorkCover of more than $100,000. Compensation payments were stopped when it was discovered that the man had not been injured at work as claimed, but he had fallen over in his front garden two or three days before. (*Media Release* 17/05/00, "Man jailed for Workcover Fraud", VIC Workcover.)

South Australia

- a mushroom picker exaggerated the extent of her injury to a doctor to obtain workers' compensation payments. The worker exaggerated an arm injury but was found to be using the injured arm freely during social outings. The worker was placed on a good behaviour bond for 12 months and ordered to repay $12,000 to WorkCover; (*Investigation Newsletter* March 2000, Workcover Corporation)
- 486 matters were referred to the Workcover Corporations Compliance and Investigations Unit during the period of 2000-2001; seven criminal prosecutions resulted from the investigations. The activities of the Unit resulted in saving of $3.7 million to the scheme (*Annual Report 2000-2001,* Workcover Corporation).

Comcare

- investigations into suspected employee fraud completed in the financial year 2000/01 potentially saved the scheme more than $8m (Comcare Annual Report 2002/01, page 54).

57. Closely linked to an employee entitlement to compensation is the role played by providers. Workers' compensation schemes rely on the expert advice and treatment of injured or ill employees by medical practitioners, psychologists, rehabilitation providers, hospitals and others.

58. The initial medical assessment of the employee is the basis for a scheme accepting liability for a claim. The scheme then relies on the service provider for the ongoing treatment of the employee to obtain a return to work or rehabilitation of the employee. Over-servicing by providers may occur. The New Zealand scheme requires injured employees to make a nominal co-payment for medical and other services which may reduce the amount of over-servicing under its scheme. Some examples of reported fraud by providers are set out below:

Provider Fraud

NSW

- a psychiatric counsellor claimed fees for 109 consultations for workers' compensation when he had only provided 23. Repayment for fraudulent behaviour was $21,595.50 with 450 hours of community service and the offender was placed on a 2 year good behaviour bond (Workcover Issue 48, March-May 2000 Workers' compensation fraud by psychiatric counsellor).

Victoria

- a Wangaratta psychologist was ordered to stand trial after being accused on eight counts of obtaining property by deception in relation to alleged WorkCover claims (Shepparton WIN TV State Television News, 19 July 1999).

South Australia

- a medical practitioner was caught overcharging for medical services provided to workers' compensation claimants. The right to bill WorkCover was suspended following these allegations. Fines and costs totalled $7,630. A 12 month time period was given for repayment, or a jail sentence of 153 days would be enforced. (Fraud Newsletter, Issue 10, April 1999, "Doctor Overcharging Workers".)

4.4 Structural factors which may influence fraudulent claims and/or non-compliance

59. There are two key factors that may give rise to fraudulent claims and/or non compliance in the Australian workers' compensation system. The first concerns the structure of the various schemes while the second relates to the changing nature of work and working arrangements and the capacity of the schemes to adapt.

60. The Australian workers' compensation system is based around eight separate and diverse state based schemes. Each scheme has, since initially established, evolved in isolation from other schemes. The legislators responsible for each scheme have taken the position that perceived local conditions guide the structure and framework of all aspects of their individual scheme. The scheme designers have had little regard to the structure of other schemes that participants necessarily interact with and or the changing nature of the environment in which they operate.

61. The outcome is that Australia has workers' compensation arrangements for fewer than nine million workers that are complex and essentially inconsistent. The divergence in arrangements continues unabated as each attempt to address local issues or bow to local demands from pressure groups, while facing increasing pressure to maintain a viable scheme.

62. This fragmentation of the system leads to increased cost to business and to employees with one dollar in every six collected through premiums spent on administering the schemes. Additional costs are incurred by employers in complying with the various workers' compensation statutes or the costs incurred by injured employees. For employees and employers who cross State borders the system leads to confusion and uncertainty, as demonstrated in **Box 3** below. The existing structure also works against management and control of fraud and/or non compliance as the various schemes have different infrastructure arrangements. These often tend to operate in competition against each other, rather than cooperatively seek to talk through their different computer systems to address the problem.

63. Changes in recent years to the nature of the workforce and working arrangements is also testing the traditional basis on which all schemes are founded. The composition of the workforce has changed; it is also more mobile, with workers often moving to different jurisdictions as part of their employment or to obtain work. Both employers and employees find it difficult to develop, and maintain, an understanding of different workers' compensation systems.

Box 3 Examples of cross–border difficulties

A worker injured in a State in which they do not usually work may encounter difficulties in getting statutory compensation or be entitled to compensation in more than one State. Employers may have to pay premiums for the same worker in one or more States. Despite efforts by the Commonwealth over a number of years to get the agreement of the States to introduce cross-border legislation to address this problem, the cases below demonstrate the difficulty

workers and their families, employers and others confront due to complex and inconsistent workers' compensation arrangements.

Case 1 - WorkCover Corporation South Australia (SA) v Smith [1998] SASC 6878 (unreported, Full Court of the Supreme Court of South Australia, 2 October 1998)

Mr Keating, a truck driver, lived in NSW and was employed by a SA company. His employer paid workers' compensation levies under the SA Act. Keating's employment was primarily hauling goods between Sydney and Adelaide. He died en route at an SA roadhouse from a work-related injury. Keating was "usually employed" in both SA and NSW. Therefore, to be eligible for compensation, his dependants had to establish that he had been "based" in SA. They couldn't because he had resided in NSW; and there was no regular travel to/from his place of employment to an SA port/point of embarkation. The Court described the outcome as "unfair and unjust".

Case 2 - Selamis v WorkCover Corporation SA [1998] SASC 6902 (unreported, Full Court of the Supreme Court of South Australia, 19 November 1998)

Mr Selamis was a truck driver. He drove transcontinental hauls between Perth, Adelaide and Melbourne. He had no fixed address. He lived in his truck. Occasionally, he would lodge with relatives when he stopped in Adelaide. He was employed by a business based in SA. Selamis was injured when his truck rolled in WA. At the time he was a passenger in his truck - he had a relief driver. Salemis established a residence in Adelaide to convalesce. He lodged a claim for workers' compensation.

Selamis's claim for workers comp under the SA Act was rejected because he was unable to satisfy the statutory test for residential base, as required for a worker who was usually employed in 2 or more States. In Selamis's case, his lack of a "usual place of residence" was fatal to his claim, notwithstanding that the bulk of his connections - emotional or otherwise - were to SA over & above any other State.

Case3 - Paul Godford v Oil Drilling & Exploration Pty Ltd [2001] QDC 355 (unreported, District Court of Queensland, 19 November 2001)

Mr Godford was a resident of Qld. His contract of employment was formed in Qld. His employer sent him to do a job in SA for 14 days. He was injured on-site in SA after 5 days. Godford applied for and received workers comp under the Qld Act. Godford then sued in Qld courts for compensation at common law for negligence and breach of contract. His employer denied any common law liability with reference to section 54 of the SA Act which bars common law claims if a claim is available under the statute - the employer submitted that a statutory claim under the SA Act was available because Godford was "usually employed" in SA.

The Court agreed that Godford was "usually employed" in SA. However, the Court partially disagreed that the common law claims were statute barred as a resultWhile the negligence claim was statute barred (per the High Court decision in John Pfieffer Pty Ltd v Rogerson (2000) 203 CLR 503 which established that applicable choice of law rules for tortious claims are determined with reference to the location in which the injury was sustained (ie, SA)), the claim for breach of the contract of employment was not. In the absence of an express contracting-out of the laws of Qld (and contracting-in of the laws of SA), the contract of employment had its closest and most real connexion with the laws of Queensland (place of formation) - and so was subject to the laws of Qld.

4.4.1 Types of Schemes

64. Workers' compensation premiums are a significant business cost for many employers, particularly small employers. Often, employers find that the premiums applied to their organisation bear little or no relationship to the activities their workers undertake or to the workplace safety performance of their business. This is because of the rating system used in most States that assesses individual employer liability partly by reference to an industry classification that sets a premium for all employers classified within that group. As a consequence, the premium setting systems can encourage employers to seek to arrange their businesses in such a way as to minimise their premiums.

65. A recent review in NSW of employer compliance recognised one of the most significant sources of workers' compensation premium non-compliance emerge from "the complex legislation used to define workers subject to workers compensation cover"[11]. There is every likelihood employers in other jurisdictions would experience the same problem.

66. This is, however, not to say employers have not attempted, or do not attempt, to avoid premium obligations. The review in NSW also found evidence of a "recent surge in the fragmenting of businesses that have common ownership with the intention to reduce their overall liabilities for workers' compensation"[12]. The report claimed that this can be achieved by reducing the impact of bad claims experience on premiums. Under the NSW system, for example, by reducing annual premiums below $3,000 pa, no adjustment is made for safety experience. The report also claimed that by reducing the overall quantum of wages paid by each entity, the employer can determine the level of reliance on experience when premiums are calculated.

67. While such activity might be considered as an avoidance of the appropriate amount of premium payable to reflect claims experience, the issue is whether this constitutes non-compliance or even fraudulent activity by the business. One view may be that the business is engaging in fraudulent activity by attempting to obtain or actually obtaining by deception a financial advantage from the scheme. However, it could also be argued that the premium setting system in place in that State encourages employers to engage in premium minimisation. This may not be surprising, as businesses continue to face increasing premiums.

68. Most Australian schemes allow access to common law damages where an employee can demonstrate fault on the part of the employer for the injury or illness they have suffered. The rules governing common law access vary from jurisdiction to jurisdiction, with one scheme (Queensland) allowing unfettered access to common law remedies. The existence of access to common law remedies may encourage employees to engage in activities that might increase the size of the lump sum settlement. It also has the potential to invite employees to engage in "forum shopping", ie looking to obtain the highest level of return for their injury by claiming compensation in a more favourable scheme (refer to **Box 3** above, **Case 3** which illustrates this point).

69. The adversarial nature of the common law system creates an atmosphere of poor employment relations. The employee must prove fault on the part of the employer for the injury and the delays inherent in the common law system are unlikely to enhance trust relations between the two parties. In these circumstances, both employees and employers are less likely to cooperate in any

[11] *Review of Employers' Compliance with Workers' Compensation Premiums and Pay-roll Tax in NSW* – Interim Report, 22 March 2002, page 27-28. (NSW March 2002 Report)
[12] *Ibid, page* 28.

rehabilitation and return to work arrangements. Employees may not wish to participate in these arrangements for fear of diminishing the potential "lottery-type" payment available under common law which only delays the rehabilitation process and adds to the cost to the employee, the employer and the community[13].

4.4.2 Changing nature of work

70. The past 10-15 years have seen significant changes in working arrangements and the emergence of different forms of employment as a reflection of the modern Australian economy and the personal choices which Australians want to make about work, lifestyle, family and security.

71. These changes have coincided with a move from the labour intensive manufacturing industry to the service sector; an increase in new workplace technology; a rapid growth in female employment; an ageing of the workforce; and a shift to a less centralised system of wage fixing and bargaining. For example, between 1996 to 2001, the number of jobs held by females rose by 13.6%, or almost twice the rate of growth in male employment (7.2%)[14].

72. Developments such as these have generated demands for more flexible and non-traditional working arrangements. Examples of such arrangements include more flexible working hours; a strong growth in casual, part-time and fixed term employment; a rapidly expanding use of contractors and outsourcing; an increase in the number of owner-managers; and moves to home based work and tele-working. The number of persons in part-time employment, for example, which grew by 21.2% between 1996 and 2001, illustrates this trend. While full-time employment also grew during this period, the rate of growth was significantly lower at 5.7%. A similar trend was evident with the number of persons in jobs considered to be non-permanent, which grew by 15% over the five years to 2001, while the number of permanent jobs rose by 8.3%[15]. In May 2002, 74.3 per cent of all part-time workers indicated that they did not want to work any more hours. In addition, only 9.1 per cent of all part-time workers reported that they wanted to work more hours and were actively looking for a job with more hours. These proportions suggest that the vast majority of part-time workers are quite happy working part-time and are not taking steps to get more hours[16].

73. Recent inquiries into workers' compensation (Tas. 1998[17], and Qld 1999[18]), have highlighted the changing nature of the Australian workforce and the opportunities this has created for employers

[13] The 1994 Industry Commission inquiry into Workers' Compensation in Australia received a number of submissions on this issue
[14] ABS Labour Force survey – Cat. 6202
[15] ABS Employee earnings, benefits and trade union membership – Cat 6301
[16] ABS Labour Force survey final – Cat. 6203
[17] *Tasmanian Joint Select Committee of Inquiry, Tasmanian Workers' Compensation System, 1998*

and workers to enter varying employment arrangements in a changing labour market. The Tasmanian report noted claims that employers have entered into new arrangements to avoid on-costs imposed by the traditional employer/employee relationship, notwithstanding that the substance of the relationship may remain unchanged[19]. According to these inquiries, employers and employees now choose to enter into different types of mutually beneficial contractual arrangements. These more flexible and efficient working arrangements have, however, increased the level of uncertainty about workers' compensation coverage and entitlements. The State schemes have demonstrated an inability, or possible unwillingness, to adapt to the new arrangements that are in the best interest of the employee and the employer.

74. It is clear the increasingly flexible modes of work will continue to grow as it is in the interest of the employee, the employer and the overall community. The difficulty for the State workers' compensation schemes is their inherent inflexibility and inability to respond to changing working arrangements. The approach adopted to date appears to be focussed on increased attempts to reincorporate within the system those under new arrangements, rather than recognise that employers and employees are making legitimate choices – including alternative injury risk assumptions and insurance arrangements.

75. The NSW review[20] this year suggests a three-step process when identifying workers/employees which serves to illustrate the potential for an excessive regulatory response to the challenges facing the workers' compensation system. The steps are:

Step 1 If an employer is required to withhold income tax from a payment under the PAYG withholding system, provides fringe benefits or make superannuation contributions then the recipient is to be treated as a worker/employee otherwise.

Step 2 Identify any contractor deemed to be a worker. The labour content of payments made to these contractors is also treated as wages paid to a worker/employee.

Step 3 Identify those categories of individuals deemed to be workers but for whom there may or may not be payments made or contracts recognising their work[21].

76. While the NSW review offers a possible solution for workers' compensation schemes, the solution is complex and gets even more complex when the Report acknowledges there would need to be at least four exclusions to Step 2[22]. The critical issue is, however, this is one State, albeit the

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[18] *Opt cit – Qld 1999 Report*
[19] *Opt cit – NSW March 2002 Report,* , page 21
[20] *Opt cit – NSW March 2002*
[21] *Opt cit – NSW March 2002, page 43*
[22] *Opt cit – NSW March 2002, page 44*

largest State, seeking to identify a possible resolution in isolation and a resolution that involves potentially further layers of complexity and the further attenuation of the common law test of employment.

77. Even if the NSW resolution does go some way towards confronting the issue, there is every likelihood the other States will seek another variation and implement a different regulatory solution. It is quite clear each State, in effect, operates in isolation, as if its workers and employers are in a cocoon when the evidence is abundantly clear the Australian workforce is highly mobile and more and more employers and employees operate across jurisdictions. The implementation of a single national regulatory framework for coverage under workers' compensation purposes has the obvious potential to remove the volume of the complexity that currently exists.

4.5 Workers' compensation schemes' interaction with Commonwealth programmes

78. There is extensive interaction between workers' compensation systems and the Commonwealth's social welfare system which has the potential to result in 'double dipping'. That is, an injured employee may seek to gain income support from both systems at the same time. This could be a result of the complexity and uncertainty facing injured employees who enter the workers' compensation system. It may also be the case that an injured employee is seeking to 'top up' income from the compensation benefits, particularly after a scheme applies the "step down"[23] provisions.

79. A number of Commonwealth policies and programmes interact with the various workers' compensation schemes. They include:

(a) social security income support programmes;

(b) Medicare and Commonwealth residential aged care subsidies;

(c) taxation policy; and

(d) superannuation policy

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80. In general, compensation recipients are ineligible for most 'mainstream' Commonwealth employment assistance services, even if the recipients have no connection to their former employer or the workers' compensation scheme following receipt of a lump sum payment.

81. The workers' compensation schemes in Australia pre-date the more broadly based, community funded social welfare programmes. There has been no attempt to define and rationalise the scope of

[23] "Step down"- all workers' compensation apply a step down in benefit payments after a defined period as an incentive to return the injured person to work and in recognition income requirements have reduced as not incurring normal

each type of system. The workers' compensation systems may bear the costs of an injury which only has a minimal connection to work. On the other hand, the Commonwealth social welfare schemes bear the costs of many genuinely work-related injuries in an ad hoc fashion depending on the form of benefits paid in a particular workers' compensation scheme and the access rules for social welfare entitlement.

82. The fact that each State's structure and framework for workers' compensation differs means that the impact of the Commonwealth system on compensation recipients varies across the jurisdictions. An employee who is injured and has no coverage for workers' compensation either has to rely on their own resources or seek assistance from Centrelink for income and Medicare for medical expenses. This results in cost–shifting to the individual and the community.

83. Where an individual is able to attribute responsibility for an injury or illness, State and federal compensation schemes are responsible for their support from the time of injury or onset of the illness until either rehabilitated or returned to work. However, current estimates indicate that approximately 45,000 Centrelink customers have their social security payments affected by compensation in any given year. Other Centrelink customers who may seek assistance as a result of a work-related injury or disease as they are not bound to declare such information.

84. There is a potential for double dipping and cost shifting involving payment of Medicare benefits for medical services which are, or should be, covered by workers' compensation. However, the *Health and Other Services (Compensation) Act 1995* (HOSCA) does allow the Commonwealth to recover Medicare benefits and residential aged care subsidies where the medical and aged care expenses are the subject of compensation arrangements. Further, for those matters that are outside the workers' compensation arrangements, such as private contractors, the HOSCA captures any judgement or settlement and requires the parties to notify the Health Insurance Commission and sets out arrangements to obtain repayment of Medicare and residential care/aged care costs. The extent to which the Medicare system is utilised for workplace injuries by persons that do not enter the workers' compensation system is unknown.

85. As to cost shifting or fraud by employers by not notifying an accident and having the employee seek their short term care through Medicare, the HOSCA review in 1999-2000 did streamline the Act to be more cost efficient and less administratively burdensome to all parties. Part of the streamlining arrangements enabled all settlement or judgements of under $5,000 to be excluded from the requirement to be notified. The window for cost shifting/fraud through Medicare and aged

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expenses of working. The rate and timing of step down varies – under Comcare benefits reduce to 75% after 45 weeks, while Victoria reduces benefits to 75% after 13 weeks and benefits cease after 104 weeks.

care costs for the two exempted categories as listed above is small and not cost efficient to recover.

5. **Reference Two –** ***The methods used and costs incurred by workers' compensation schemes to detect and eliminate (a) fraudulent claims; and (b) the failure of employers to pay the required workers' compensation premiums or otherwise fail to comply with their obligations.***

86. DEWR relies on the Comcare submission to provide the Committee with details on how a workers' compensation scheme detects and eliminates fraud and/or non compliance. The attention of the Committee is, however, drawn to a number of steps various schemes have taken and identifies some options that were canvassed in a recent NSW inquiry into employer compliance.

5.1 Methods and Costs

87. Australian workers' compensation schemes adopt a legislative and operational approach to the management of fraud and non-compliance by employees and employers. The penalty regimes of the various schemes underpin the legislative approach to manage potential fraud and non compliance activities. Employers face penalties for a range of fraud and/or non compliance activities ranging from non-insurance to failure to maintain or provide access to wage records. In recent times NSW, for example, has made over 15 legislative amendments to reinforce deterrence. In the year 2000, a general offence of fraud with a penalty of $55,000 and/or up to two years imprisonment was introduced. Workcover is able to prosecute service providers, accountants, lawyers, brokers and any other party involved in fraud against the scheme.

88. Just as there is no unified approach to entitlements, obligation and benefits, the schemes also vary in respect of the application of penalties. For example, in WA the legislation provides for a penalty of $5,000 per week for each employee that is not properly insured (WA Act s170) while in Tasmania the penalty of $50,000 is prescribed where the employer does not effect an insurance policy (Tas. Act s97).

89. The various schemes support the legislative provisions with education and communications strategies to inform employers and employees of their obligations. These types of activities often have a particular industry focus aimed at improving compliance. The effectiveness of these activities is difficult to assess as material is not readily available on the evaluation of the programmes undertaken. The programmes are, however, generally supported by audit programmes related to the type of non compliance activities identified.

90. Another type of activity undertaken by the schemes relates to 'data matching'. Some schemes have in place reciprocal legislative powers to disclose information with other statutory bodies within their jurisdiction. For example, the Queensland scheme has a legislative arrangement with

the Office of State Revenue (Payroll Tax)[24] so that a comparison of wages declared to each body can be compared and inconsistencies investigated. Most schemes also have in place the legal authority to obtain information from a claimant's employer.

91. There have been calls over the years for an increase in the use of data matching, particularly with the Australian Tax Office. The schemes recognise that investigations into taxation fraud may also involve workers' compensation fraud. Data matching however raises considerable privacy issues which would need to be addressed, notwithstanding the capacity of using data matching resources to assist in detecting fraud and facilitating improved workers' compensation compliance arrangements.

92. The claims management systems in most schemes play a primary role in detecting fraud. In the main, the insurance industry performs claims management for all schemes except Queensland and Comcare. Queensland and Comcare perform claims management in-house. It could be expected that the insurance industry is able to draw on experience in other areas of insurance claims management to support its workers' compensation claims management .

5.2 Options

93. Some possible options for improving employer compliance were canvassed in the Green Paper issued by the NSW Government in September 2001[25]:

- requiring principal contractors to have responsibility for ensuring their sub-contractors are correctly insured under the correct tariff and declared correct wages;
- requiring the employees' pay slip to contain details of the lawful employers' full legal name and workers' compensation insurer. This option may have the potential to also improve management of employee non-compliance and also assist with claims made against the Commonwealth's social welfare scheme; and
- introduction of grouping provisions to enable assessment of premiums at the group level to overcome restructuring of groups aimed at minimising premiums or avoidance of premiums.

94. DEWR has not attempted to assess the merits of the recommendations of the NSW Green Paper.

[24] Section 520, *WorkCover Queensland Act 1996*
[25] For further detail and other options refer to *Workers Compensation Insurance Compliance Green Paper* – September 1991, NSW Workcover

6.0 Reference Three – Factors that lead to different safety records and claims profiles from industry to industry, and the adequacy, appropriateness and practicability of rehabilitation programs and their benefits.

95. In addressing this reference DEWR firstly draws to the attention of the Committee current information of Australia's workplace safety performance. We identify for the Committee some doubt about relying on available published data to draw firm conclusions about improving workplace safety performance. To assist the Committee we provide an analysis of workplace outcomes in certain industries and seek to identify factors that may be contributing to those outcomes. Finally, we turn our attention to rehabilitation and return to work programmes and provide an insight into current performance and factors affecting performance.

6.1 Overall workplace safety

96. In Australia over six million working days are lost each year from workplace injuries. This is despite a downward trend in the incidence of workplace injuries resulting in five or more days on compensation for a workplace injury or illness.

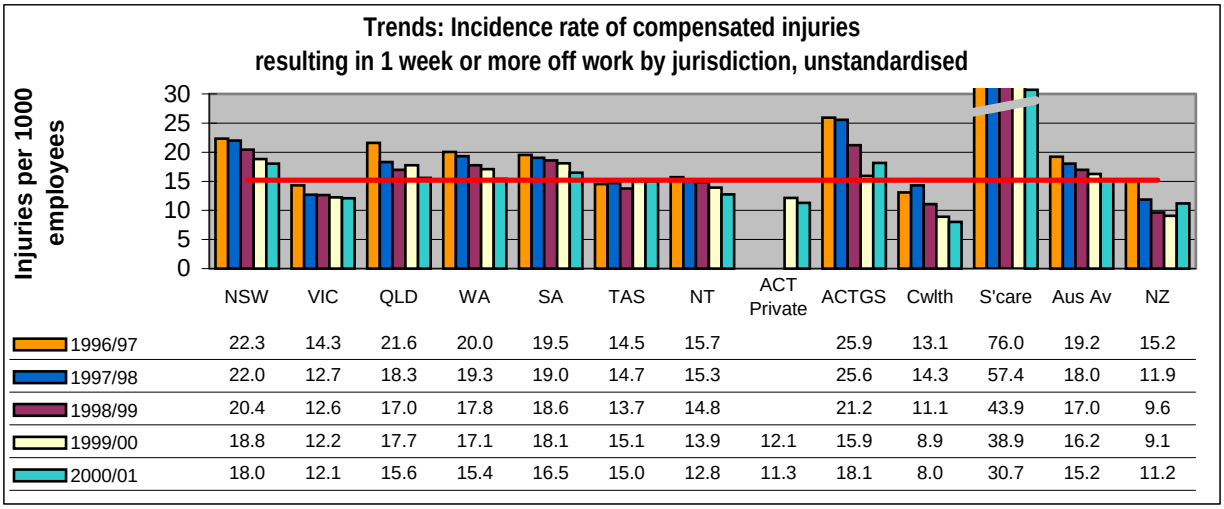
97. Based on information for the financial year 2000-01, the incidence of injury that resulted in 5 days or more on compensation per 1000 employees was 15.2[26]. While this represents a reduction of more than six percent over the previous year and 21 percent since 1996/97, the figure only represents compensated injuries (injuries accepted and reported by the various workers' compensation schemes across Australia). 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 various workers' compensation schemes.

98. **Figure 1** below shows the trend in workplace injuries across the various schemes and includes New Zealand for comparative purposes. The frequency of injuries per million hours worked shows a similar trend over the same period.

99. The overall injury rate in Australia is well above the reported rate for New Zealand. This outcome also holds if the Australian rate and New Zealand rate are standardised for industry mix (ie to compare the outcome if both had the same mix of industries). Using a standardised rate, in 2000-01 the Australian average per 1000 employees was 15.2 compared to the New Zealand rate of 10.5 per 1000 employees.

[26] *Opt cit* - 4th CPM Report page12.

Figure 1 cidence of Injuries resulting in 1 week or more Compensation.



	NSW	VIC	QLD	WA	SA	TAS	NT	ACT Private	ACTGS	Cwlth	S'care	Aus Av	NZ
1996/97	22.3	14.3	21.6	20.0	19.5	14.5	15.7		25.9	13.1	76.0	19.2	15.2
1997/98	22.0	12.7	18.3	19.3	19.0	14.7	15.3		25.6	14.3	57.4	18.0	11.9
1998/99	20.4	12.6	17.0	17.8	18.6	13.7	14.8		21.2	11.1	43.9	17.0	9.6
1999/00	18.8	12.2	17.7	17.1	18.1	15.1	13.9	12.1	15.9	8.9	38.9	16.2	9.1
2000/01	18.0	12.1	15.6	15.4	16.5	15.0	12.8	11.3	18.1	8.0	30.7	15.2	11.2

Source: 4th CPM Report page 13

100. While it is an encouraging to observe the decrease in the incidence of compensated injuries, there may be a number of factors influencing this outcome. These 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 movement in numbers from high risk industries to industries of lower risk.

101. The underreporting of injuries may be a significant factor. A survey by the ABS in 2000 found the incidence of injury per 1000 workers to be 49.3[27]. As noted above in paragraph 97, the rate reported to the workers' compensation schemes was 15.2 per 1000 workers. It is recognised that many of the injuries identified in the ABS survey were reported as being of a minor nature (49 percent), but the overall rate is still significantly higher than compensated by the schemes. Injuries reported and compensated by the various workers' compensation schemes is the only reliable data available on an annual basis to measure workplace safety performance in Australia. The data is collected annually from the various schemes and managed by the National Occupational Health and Safety Commission under its *National Data Set for Compensation-based Statistics.*

102. The difficulty with relying on injuries reported to workers' compensation schemes is that if a scheme makes a structural change to its coverage or entitlement to benefits it can have a major bearing on the reported injury rates for that jurisdiction. One example of this possible outcome relates to injury rates reported under the Victorian scheme as compared to those reported by NSW scheme which can be demonstrated by using a comparison of injury rates collected from both schemes and injury rates reported by the ABS survey. **Table 1** below provides details.

Table 1

Injuries per 1000 workers

State	Scheme Rates Five days or more on compensation [28]	ABS Survey[29]
NSW	18.1	45.0
Vic	11.8	41.8

103. Relying on scheme data would indicate that workplace injury rates in Victoria are much lower than in NSW. The ABS data on the other hand indicates that overall injury rates are much the same in the two States. It is possible that structural changes made to the Victorian scheme in recent years have influenced reported injury rates in that State. Victoria applies an employer excess of the first 10 days, ie the employer is responsible for the employee's lost income for the first 10 days before the scheme will accept liability. NSW has no excess. Victoria also holds employers responsible for the first $466 of an injured employee's medical costs, while NSW applies a varying amount depending on the level of the employer's premium.

104. The Victorian scheme is unable to report on the incidence of injuries resulting in five days or more on compensation. To report a comparable rate with NSW and other States under the CPM project, a statistical growth factor has been applied to the Victorian data. Even applying the growth factor, compensable injuries under the Victorian scheme are still significantly lower than other States.

6.2 Workplace safety across industries

105. The previous discussion seeks to identify for the Committee areas of caution that should be exercised in considering reported injury rates across schemes. The same reservations apply when considering workplace safety across industries. However, the data available does provide a useful basis to compare performance across the schemes and across industries.

6.2.1 Fatalities

106. The definitive measure of workplace safety in an industry is obviously the number of fatalities reported. Overall in Australia in 2000/01, there were 206 compensated fatalities. Compensated fatalities are those resulting from traumatic injuries, excluding commuting claims and fatalities that result from diseases. **Table 2** below provides an overview of the number of fatalities by industry.

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[27] *Work-Related Injuries Australia* Australian Bureau of Statistics, September 2000 (ABS ref 6324.0)

[28] *Opt cit* 4th CPM Report page 12 (as noted in the CPM report, rates for Victoria are adjusted using a growth factors determine by an actuary and acceptable for comparative purposes to all schemes participating in the CPM project).

Table 2

Industry Fatalities by year in Australia - injuries only, excluding commuting claims[30]

Industry Sector	1996-97	1997-98	1998-99	1999-00	2000-01
Transport & Storage	35	29	37	25	34
Agriculture, Forestry & Fishing	27	26	21	23	24
Construction	30	24	30	26	21
Mining	24	17	14	10	19
Manufacturing	35	35	14	23	13
Property & Business Services	16	10	13	11	10
Retail Trade	7	6	13	8	9
Government Administration	6	3	3	7	8
Personal & Other Services	6	7	3	5	7
Wholesale Trade	13	10	2	7	6
Education	2	1	2	4	4
Health & Community Services	4	2	1	2	4
Cultural & Recreational Services	3	4	4	3	2
Electricity, Gas & Water Supply	0	2	2	4	2
Accommodation, Cafes & Restaurants	5	16	3	1	1
Communication Services	1	1	2	2	1
Finance & Insurance	4	0	2	1	1
Not stated	61	74	72	58	40
Total	**279**	**267**	**238**	**220**	**206**

107. Compensated fatalities by industry have remained generally consistent over recent years. Given the overall numbers of fatalities reported, 'one-off-events' can, and do, result in substantial year-to-year movements in some industries. This variation may be more evident in the generally recognised hazardous industries[31] where there is potential for multiple deaths in each incident due to the risk associated with the nature of the work.

108. The changing nature of working arrangements can also have an impact on the number of reported fatalities on an industry basis. The inclusion or exclusion of contractors can have a significant impact on the numbers and rates reported. Since there has been an increasing move to using contractors over the period shown in the above table, the downward trend observed in certain industries may be the result of changing working arrangements.

109. The industries generally recognised as hazardous account for the greatest number of fatalities. **Table 3** below provides an analysis of the claims profiles for the five industries with the highest number of reported fatalities.

110. One of the features of the above analysis is the outcomes by age, in particular the high number of fatalities in the over 50 age group. The incident of fatalities in the over 50 age group in these industries may be due to older people being more likely to be injured or to die from a given injury

[29] *Opt cit* 4th CPM Report page 121
[30] *Opt cit* 4th CPM Report, page 35
[31] Industries that pose a significant risk of fatal injury, non-fatal injury or disease and/ or significant absolute number of such occurrences.

than younger workers. Looking at the overall incidence of injuries in these industries also reveals the same pattern with the over 50 age group reporting a consistently high incident of injuries.

Table 3

Selected Industries – Fatalities Claims Profile[32]

Industry Highest reported	Age Group	Occupation	Mechanism of injury
Transport and Storage	30-40 42% >50 21%	Plant & Machine Operators and Drivers - 78%	Unspecified mechanism of injury – 62%
Agriculture, Forestry & Fishing	>50 25% <20 15%	Labourers and related workers - 65%	Being hit by a moving object – 50%
Construction.	>50 35%	Labourers and related workers - 33% Tradespersons – 28%	Heat, radiation and electricity – 28%
Mining	30-40 38%	Plant & Machine Operators and Drivers - 38%	Unspecified mechanism of injury – 53%
Manufacturing	>50 35% 40-50 32%	Tradespersons – 30%	Unspecified mechanism of injury – 33%

6.2.2 Injuries

111. The incidence of injuries resulting in five or more days on compensation across industries reflects, for all industries, the downward national trend. **Figure 2** below provides outcomes at the ANZSIC[33] Division 1 level over the last four years.

112. The outcomes by industries for 2000-01 show that the maritime industry continues to report the highest incidence of injury with a rate of 30.7 injuries per 1000 employees. The maritime industry has shown significant improvement in recent years. There appears to be a combination of factors that have lead to this improvement in safety performance, including an increased focus by the industry, employers and employees, and the scheme administrator on workplace safety. One of the driving factors for this increased focus appears to have been the abolition of the seafarers engagement scheme in 1998. This resulted in a greater level of responsibility being placed on employers and employees for workplace safety.

113. Across the other industry sectors, improvements have been achieved in the generally recognised hazardous industries, eg mining, transport and storage and agriculture, forestry and fishing, while improvement in the construction industry appears to have stalled with outcomes at the same level over the last two years. The construction industry has, however, experienced

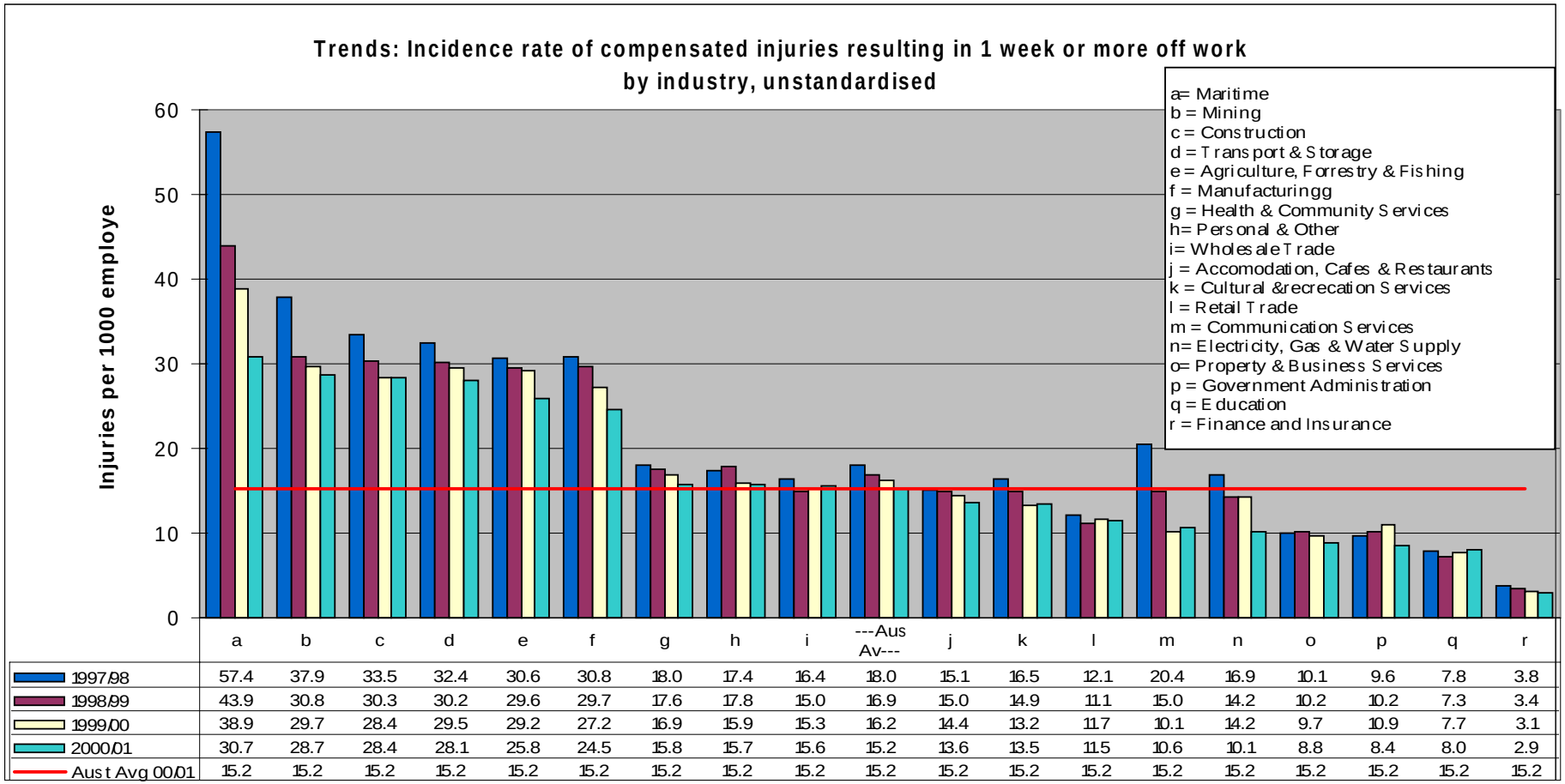
[32] Source: www.nohsc.gov.au – NOSIE database using 1999/00 data

[33] ANZSIC – Australian and New Zealand Standard Industrial Classification – is a standard classification used to group industries at various levels. Rates reported are generally at the Division 1 level, eg Mining, which includes at Division 2 level Coal Mining, Oil and Gas Extraction, Metal Ore Mining, Other Mining and Services to Mining. The Division 2 level is broken down further with Division 3 level which for Coal Mining includes Black Coal Mining and Brown Coal Mining.

employment growth in recent years and the incidence of injuries in this industry may be a reflection of this growth.

Industry Trends - Incidence– 1 week or more Compensation[34]

Figure 2 Incidence



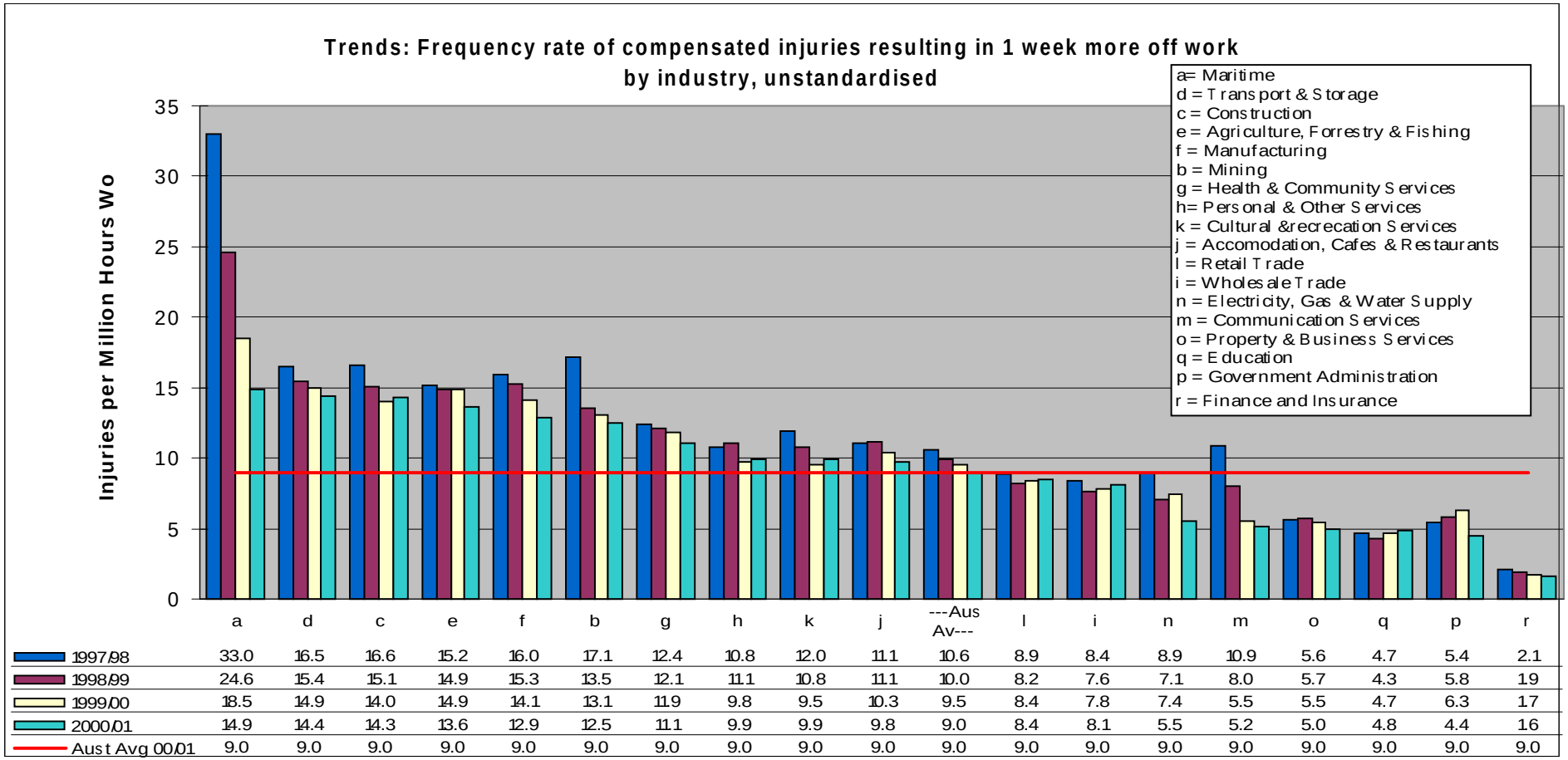
	a	b	c	d	e	f	g	h	i	---Aus Av---	j	k	l	m	n	o	p	q	r
1997/98	57.4	37.9	33.5	32.4	30.6	30.8	18.0	17.4	16.4	18.0	15.1	16.5	12.1	20.4	16.9	10.1	9.6	7.8	3.8
1998/99	43.9	30.8	30.3	30.2	29.6	29.7	17.6	17.8	15.0	16.9	15.0	14.9	11.1	15.0	14.2	10.2	10.2	7.3	3.4
1999/00	38.9	29.7	28.4	29.5	29.2	27.2	16.9	15.9	15.3	16.2	14.4	13.2	11.7	10.1	14.2	9.7	10.9	7.7	3.1
2000/01	30.7	28.7	28.4	28.1	25.8	24.5	15.8	15.7	15.6	15.2	13.6	13.5	11.5	10.6	10.1	8.8	8.4	8.0	2.9
Aust Avg 00/01	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2	15.2

of Injuri

[34] *Opt cit* 4th CPM Report, page 16

Figure 3 Industry Trends – Frequency - -1 week or[35]

Frequency of Injuries resulting in 1 week or more Compensation.



	a	d	c	e	f	b	g	h	k	j	---Aus Av---	l	i	n	m	o	q	p	r
1997/98	33.0	16.5	16.6	15.2	16.0	17.1	12.4	10.8	12.0	11.1	10.6	8.9	8.4	8.9	10.9	5.6	4.7	5.4	2.1
1998/99	24.6	15.4	15.1	14.9	15.3	13.5	12.1	11.1	10.8	11.1	10.0	8.2	7.6	7.1	8.0	5.7	4.3	5.8	19
1999/00	18.5	14.9	14.0	14.9	14.1	13.1	11.9	9.8	9.5	10.3	9.5	8.4	7.8	7.4	5.5	5.5	4.7	6.3	17
2000/01	14.9	14.4	14.3	13.6	12.9	12.5	11.1	9.9	9.9	9.8	9.0	8.4	8.1	5.5	5.2	5.0	4.8	4.4	16
Aust Avg 00/01	9.0	9.0	9.0	9.0	9.0	9.0	9.0	9.0	9.0	9.0	9.0	9.0	9.0	9.0	9.0	9.0	9.0	9.0	9.0

[35] *Opt cit* 4th CPM Report, page 17

114. The outcomes for frequency of injuries following the same general trend as incidence of injuries. There is no evidence to suggest that hours worked is a particular issue in any industries.

6.2.3 Comparison of industries by State

115. The safety performance of different industry sectors can be considered on a State by State basis. This comparison can be enhanced by standardising for sub-industry mix across States. The following figures provide the outcomes for two industries and also look at outcomes over different periods off work. (The 4th CPM Report provides a similar analysis for a number of other industries, refer pages 19- 26).

Figure 4 Construction: Incidence of Injuries resulting in 1 week or more Compensation.

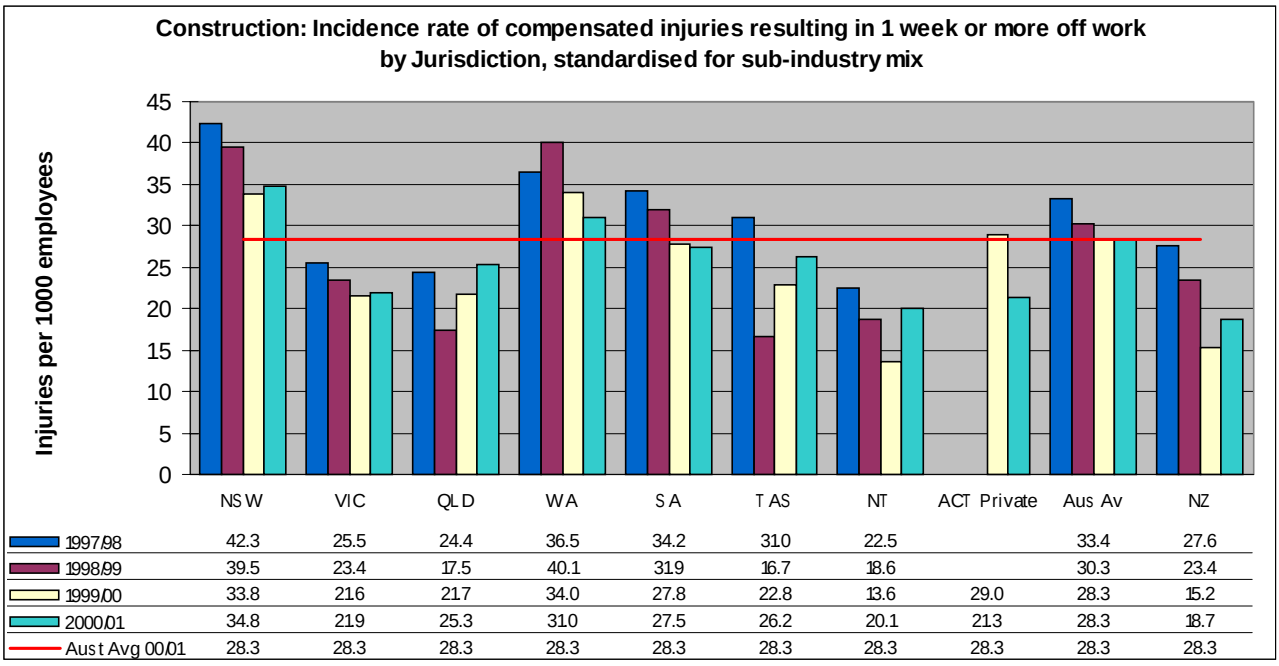
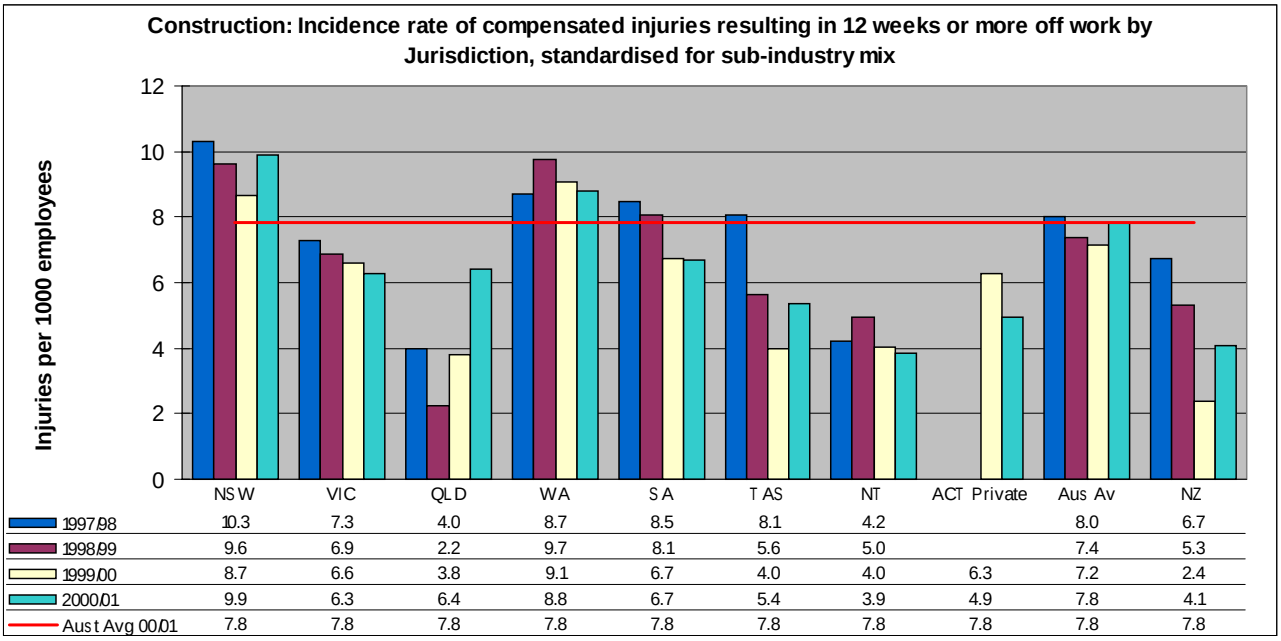
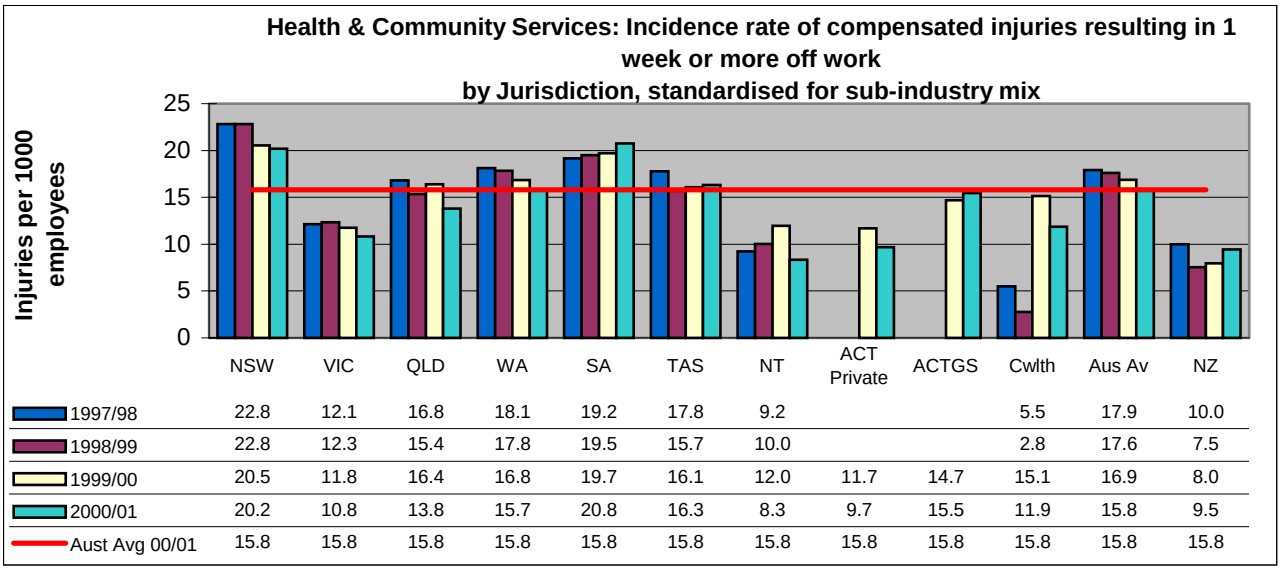


Figure 5 Construction: Incidence of Injuries resulting in 12 Weeks or more off Work.



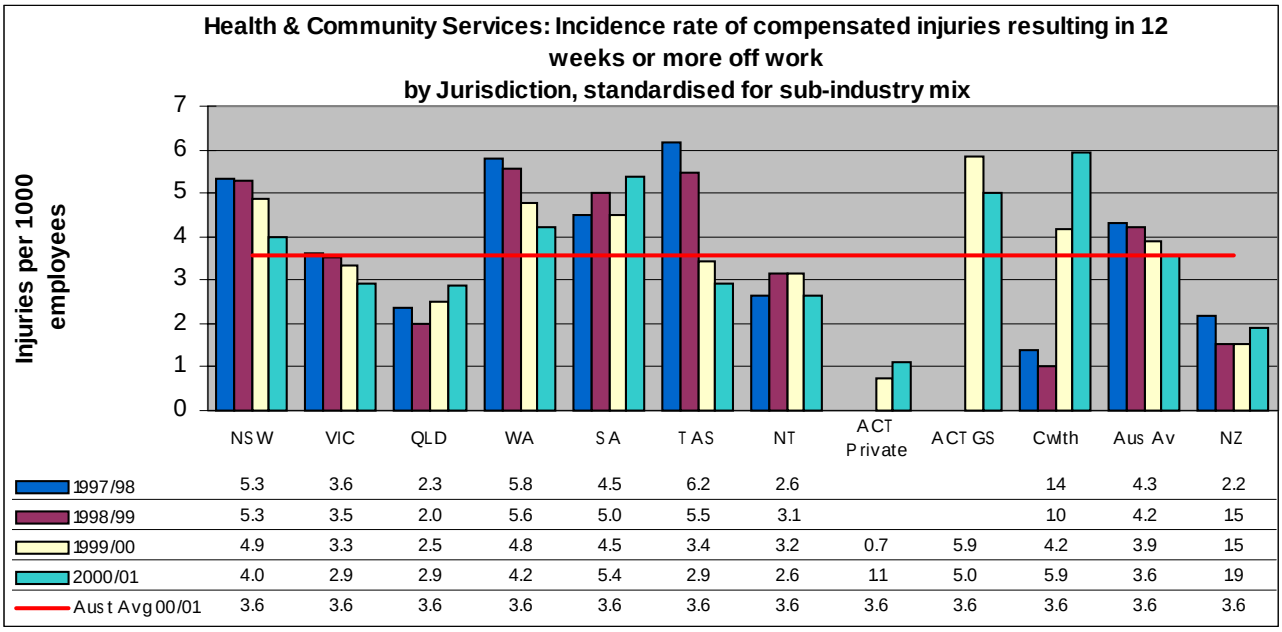
	NSW	VIC	QLD	WA	SA	TAS	NT	ACT	Private	Aus Av	NZ
1997/98	10.3	7.3	4.0	8.7	8.5	8.1	4.2			8.0	6.7
1998/99	9.6	6.9	2.2	9.7	8.1	5.6	5.0			7.4	5.3
1999/00	8.7	6.6	3.8	9.1	6.7	4.0	4.0		6.3	7.2	2.4
2000/01	9.9	6.3	6.4	8.8	6.7	5.4	3.9		4.9	7.8	4.1
Aust Avg 00/01	7.8	7.8	7.8	7.8	7.8	7.8	7.8		7.8	7.8	7.8

Figure 6 Health & Community Services: Incidence of Injuries resulting in 1 week or more Compensation



	NSW	VIC	QLD	WA	SA	TAS	NT	ACT Private	ACTGS	Cwlth	Aus Av	NZ
1997/98	22.8	12.1	16.8	18.1	19.2	17.8	9.2			5.5	17.9	10.0
1998/99	22.8	12.3	15.4	17.8	19.5	15.7	10.0			2.8	17.6	7.5
1999/00	20.5	11.8	16.4	16.8	19.7	16.1	12.0	11.7	14.7	15.1	16.9	8.0
2000/01	20.2	10.8	13.8	15.7	20.8	16.3	8.3	9.7	15.5	11.9	15.8	9.5
Aust Avg 00/01	15.8	15.8	15.8	15.8	15.8	15.8	15.8	15.8	15.8	15.8	15.8	15.8

Figure 7 Health & Community Services: Incidence of Injuries with 12 weeks or more Compensation.



	NSW	VIC	QLD	WA	SA	TAS	NT	ACT Private	ACT GS	Cwlth	Aus Av	NZ
1997/98	5.3	3.6	2.3	5.8	4.5	6.2	2.6			14	4.3	2.2
1998/99	5.3	3.5	2.0	5.6	5.0	5.5	3.1			10	4.2	15
1999/00	4.9	3.3	2.5	4.8	4.5	3.4	3.2	0.7	5.9	4.2	3.9	15
2000/01	4.0	2.9	2.9	4.2	5.4	2.9	2.6	11	5.0	5.9	3.6	19
Aust Avg 00/01	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6	3.6

116. The safety performance of these two key industries varies considerably across the States. While this is not unusual when looking at particular industries across States, it does provide an insight into the effectiveness of health and safety activities undertaken by the respective States. For example, the outcomes for the construction industry for five or more days on compensation show NSW and WA rates are well above the Australian average, yet both of these States have in recent times undertaken activities aimed at improving workplace safety outcomes.

117. The charts comparing outcomes for incidence of injuries resulting in 12 weeks or more on compensation for both of these industries are also indicative of an overall trend observed across all industries- that injured persons are spending longer periods off work. Nationally, some 25 percent of injured persons who have five or more days on compensation are still on compensation after 12 weeks. This rate raises a number of significant issues, particularly in respect of the human and economic cost.

118. It has been observed that the average cost of workers' compensation claims are increasing. This appears to be a driving factor in increased premium rates across schemes in recent years[36].

119. The trend in workplace injuries of 12 weeks or more duration raises two key issues. Firstly, whether the regulatory framework covering workplace safety contributes to the outcomes. The States and Territories have primary responsibility for the OHS regulatory framework and the evidence suggests the complexity and inconsistency in this framework across the country may be hindering workplace safety. Of course, the employer also has a major role to play in achieving good OHS outcomes, but if the overarching framework in place by the State regulators inhibits the employer as the evidence suggests, it is not in the best interest of the employee, the employer or the community in general.

120. The second issue relates to whether the workers' compensation schemes and employers are using effective return-to-work and rehabilitation policies and practices. Again, the evidence raises some doubt. This issue is addressed later in this submission under Part 7.

6.2.4 Claims Profiles of long term injuries

121. It may be beneficial to the Committee to consider the claim profiles of injuries resulting in 12 weeks or more off work. This may enable the Committee to identify those types of injuries which are primary cost drivers of workers' compensation schemes and also result in high cost in human and economic terms to the injured employee. The **Table 4** below identifies the four highest

[36] *Opt cit* 4th CPM Report, page 54

percentage mechanisms of injury that incur 12 weeks or more of compensation payments. The table also shows the associated secondary sub-grouping of these mechanisms of injury[37].

Table 4 Four Highest Mechanism-of-Injury Categories resulting in 12 weeks or more of compensation

Body stressing	Falls, trips & slips of a person	Being hit by moving objects	Other & Unspecified Mechanisms
• Strain: lift/carry/put down • Strain: push/pull/kick objects • Strain: no objects handled • Repetitive movement/low muscle	• Falls from a height • Falls on the same level • Step/kneel/sitting on objects	• Being hit by falling objects • Being bitten by an animal • Being hit by an animal • Being hit by a person • Trapped by moving machinery • Trapped between stationary and moving objects • Exposure to mechanical vibration • Being hit by moving objects	• Slide or cave-in • Vehicle accident • Other & .multiple mechanisms of injury • Unspecified mechanism of injury

122. Nationally, these four mechanisms of injury make-up around 95 percent of all injuries that result in 12 weeks or more on compensation, with body stressing making up around half of these injuries.

123. A comparison of the outcomes by mechanisms of injuries across industries is provided in **Figure 8** below. "Body stressing" is the highest reported claim for all industries. **Figure 9** below breaks down this mechanism of injury. Importantly, the sub-category "repetitive movement/low muscle injuries" may be understated in these outcomes as many of these mechanisms are coded as diseases. As mentioned earlier, no reliable data is available on diseases. At this stage, however, work is underway to improve the quality of such data to enable comparisons to be made.

124. The purpose of this comparison is to provide the Committee with an overview of the claims profile across industry sectors. On an industry basis, the health and community services sector experiences the highest percentage of body stressing injuries and the highest rate of repetitive

[37] *Opt cit* 4th CPM Report, page 30

movement injuries, which are often high cost injuries. The safety outcomes of part of the health and community services sector have been the subject of a separate study to identify factors influencing performance. This is discussed later in this submission in Part *6.3.3*, paragraph 138.

Figure 8 Most prevalent Mechanisms of Injury: Highest Percentage of Injuries resulting in 12 weeks off Work.

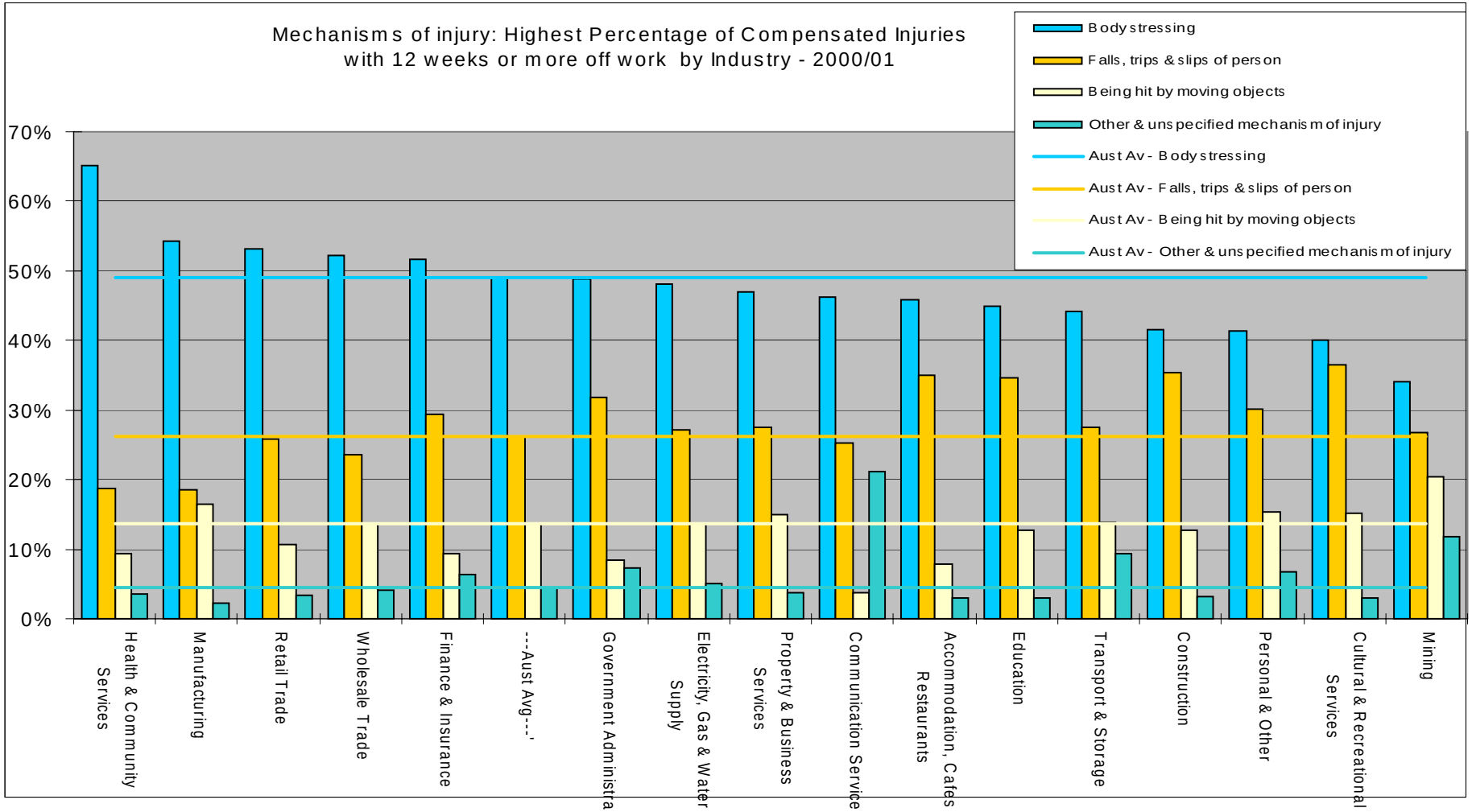
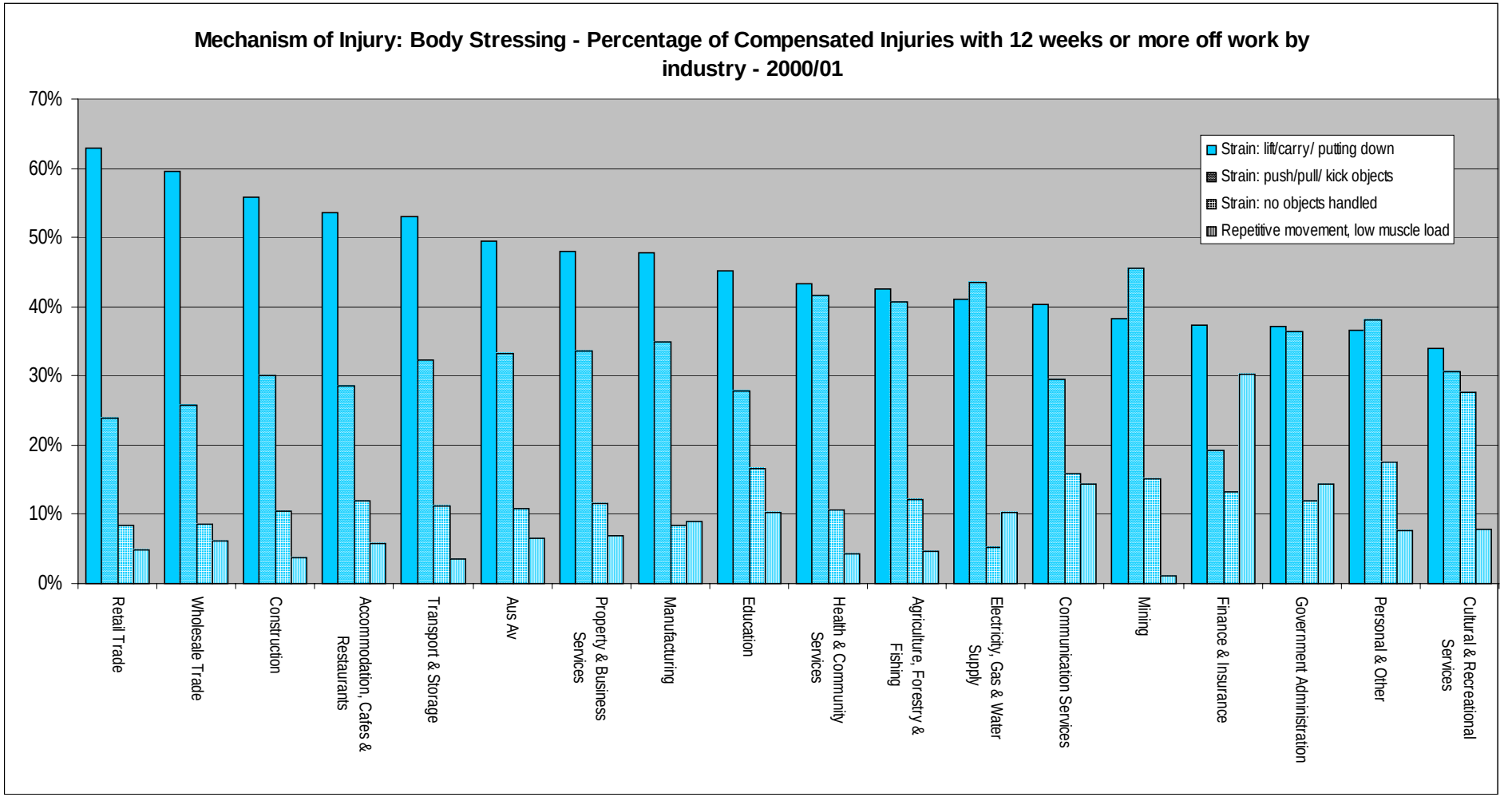


Figure 9 Body Stressing: Incidence resulting in 12 weeks or more lost time by Industry



6.3 Factors influencing safety outcomes across industries

125. There are many factors that may influence workplace safety outcomes. Furthermore, differences in these factors between industries may, although not necessarily, contribute to the differences in incidence rates observed across industries. The same can be said in respect of differences in safety outcomes across jurisdictions.

6.3.1 Regulatory framework

126. In the previous section, we discussed how the OHS regulatory framework may be influencing workplace safety outcomes. This aspect is particularly relevant when considering industry outcomes. A large national employer recently informed DEWR that in its industry it must comply with some 250 to 300 OHS regulatory instruments. Aside from the administrative costs to the employer, the employer faces an unenviable task in attempting to put in place the optimum workplace safety regime for its employees.

127. Over-regulation by all Australian jurisdictions influences workplace safety across industries. Despite a number of jurisdictions claiming to have reduced the regulatory burden over recent years, the facts do not support this claim. For example, in 1995, a hotel operator in Victoria had to comply with up to 12 Statutes and 6 Codes of Practice. An examination of the position today reveals there has been no reduction in the legislative instruments that apply to the same employer. In 2001, a hotel operator in Victoria is required to comply with up to 11 statues and 7 Codes of Practice.

128. NSW recently amended its principal OHS Act and enacted a new OHS Regulation 2001 to consolidate and simplify its multiplicity of OHS regulations. While this is a step in the right direction, the new provisions are unnecessarily complex and prescriptive. For example, Section 13 of the *Occupational Health and Safety Act 2000 (NSW)* creates a new criminal offence of failing to consult with employees *'to enable the employees to contribute to the making of decisions affecting their health, safety and welfare at work'*. Other sections spell out what amounts to appropriate consultation, when consultation is required, and how consultation will be undertaken. The regulations are unnecessarily prescriptive – employers and employees should be able to develop their own consultative arrangements reflecting the needs of the business.

129. The new NSW OHS Regulation emphasises a risk management approach that appropriately provides workplaces with the ability to focus on risk management issues and to incorporate them in day to day decision making. But the problem is that there is an overload of prescription attached to

the NSW Regulations. At 280 pages they are indigestible. In essence, there appears to be very little reduction in the overall amount of regulation by NSW.

130. This suggests that the focus of regulators continues to be on the detailed prescription and duplication when establishing a risk management approach to meeting duty of care obligations. It is in the interest of employees and the employers for a business to be managed efficiently. Regulators need to recognise requirements they establish for risk assessment are balanced and do not overload the operator, particularly the operators of small business.

131. In short, it is difficult to see how small business can cope with the complexity and volume of OHS legislation. This view was supported by a survey conducted in South Australia in 1998 which found that "the majority of small employers…did not know which (OHS) Regulations applied to them". 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"[38].

132. DEWR considers the impact of the current regulatory framework to be a major factor that the Committee should recognise as contributing to workplace safety outcomes. There is a need to shift away from the focus on regulation that prescribes process and imposes solutions to strike a balance between giving employers and employees the freedom to determine how to make their own workplace safer while at the same time ensuring that primary legal obligations are being discharged. This approach would be consistent with the Robens model which all Australian jurisdictions respectively have claimed to have adopted[39].

133. The Robens report proposed a model that focussed on a more effectively self-regulating system at the firm and industry level with greater involvement of workers. This approach was supported by Industry Commission in its 1995 Report:

The aims should be to promote best practice by encouraging those in the workplace to take greater responsibility for management of the risk to health and safety. This means changing the focus of legislation and the government programs that support them. They have to shift from direct imposition of the workplace solutions towards facilitating an informed choice by those at the workplace.[40]

134. The shifting the onus of achieving good safety outcomes to the workplace should be the direction for OHS regulators, while at the same time ensuring that the regulators provide the appropriate "safety-net" for employees and others at risk in the workplace.

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[38] *suggestions for the South Australian Occupational Health and Safety Regulatory System* 1998, page 3
[39] *Safety and Health at Work, Report of the Committee* - 1972 (Roben Report)
[40] *Op cit* IC Report 1995, page 49

6.3.2 Structural factors

135. Injury rates in an industry may be influenced by the level of economic activity in that industry at a given point in time. Support for this claim can be obtained from a study which provides a comparison of injury rates in the NSW construction industry and the level of economic activity in that industry in NSW. The evidence suggests that when economic activity is low, incidence of workplace injuries are high and only decrease when economic activity increases. The study shows injury rates reached their peak in 1996 (at a rate of 58.0 per 1000 employees) when economic activity was at the lowest point over the ten year period 1990 to 2000. However, when economic activity was at its peak in 2000, injury rates were at their lowest point over the ten year period (39.9 per 1000 employees)[41].

136. While economic conditions may be a key driver of workplace safety performance there are a range of other structural factors that can bear on performance. The Workplace Relations Ministers' Council (a body of all Australian Ministers responsible for OHS) endorsed a framework for the analysis of high level outcomes under its CPM project that took into account the structural factors that may influence OHS outcomes. Ministers also considered the framework should incorporate the policy and activities of the OHS administrator/regulator.

137. Ministers decided this framework should be used to analyse outcomes in the aged care sector.

6.3.3 Aged Care Industry Study[42]

138. The study was based on comparative performance trends in the aged care sector (1997/98 – 1999/00). The study identified structural factors and policy interventions that it considered influence outcomes in this industry (the table below provides an overview). The structural factors identified were:

- Facility size and ownership and location;
- Labour force – a comparison of outcomes between nurses and other staff;
- Care profile – the influence on outcomes due to level of care, high versus low.

139. The policy interventions related to:

- The OHS agencies initiatives;
- Industry initiatives for example the "No lift' policy;

[41] *Safely Building* – Report 2001 Workcover NSW OHS Construction Industry Evaluation Report, page 71
[42] *Case Study on performance outcomes in the Aged Care Sector* - Workplace Relations Ministers Council, Comparative Performance Monitoring, to be published.

- Compliance with OHS legislation; and
- Influence of aged care accreditation and funding

140. The key findings of the study were:

- the "No Lift" policy introduced into the industry is considered to have been a factor in the sustained reduction in lifting claims found in the study;
- the aged care accreditation process that require some basic OHS measures to be in place appears to have been a reasonable predictor of future performance;
- the changed method of subsidising workers' compensation costs in aged care facilities by the Commonwealth shows that many facilities have been able to improve their performance and keep premium costs below the industry average;
- smaller facilities have better claims rates than larger facilities;
- metropolitan locations have higher claims rates than rural locations;
- charitable, private and to a lesser extent religious owned facilities are associated with higher claims rates while local government, state government and community owned facilities are associated with lower claims rates.

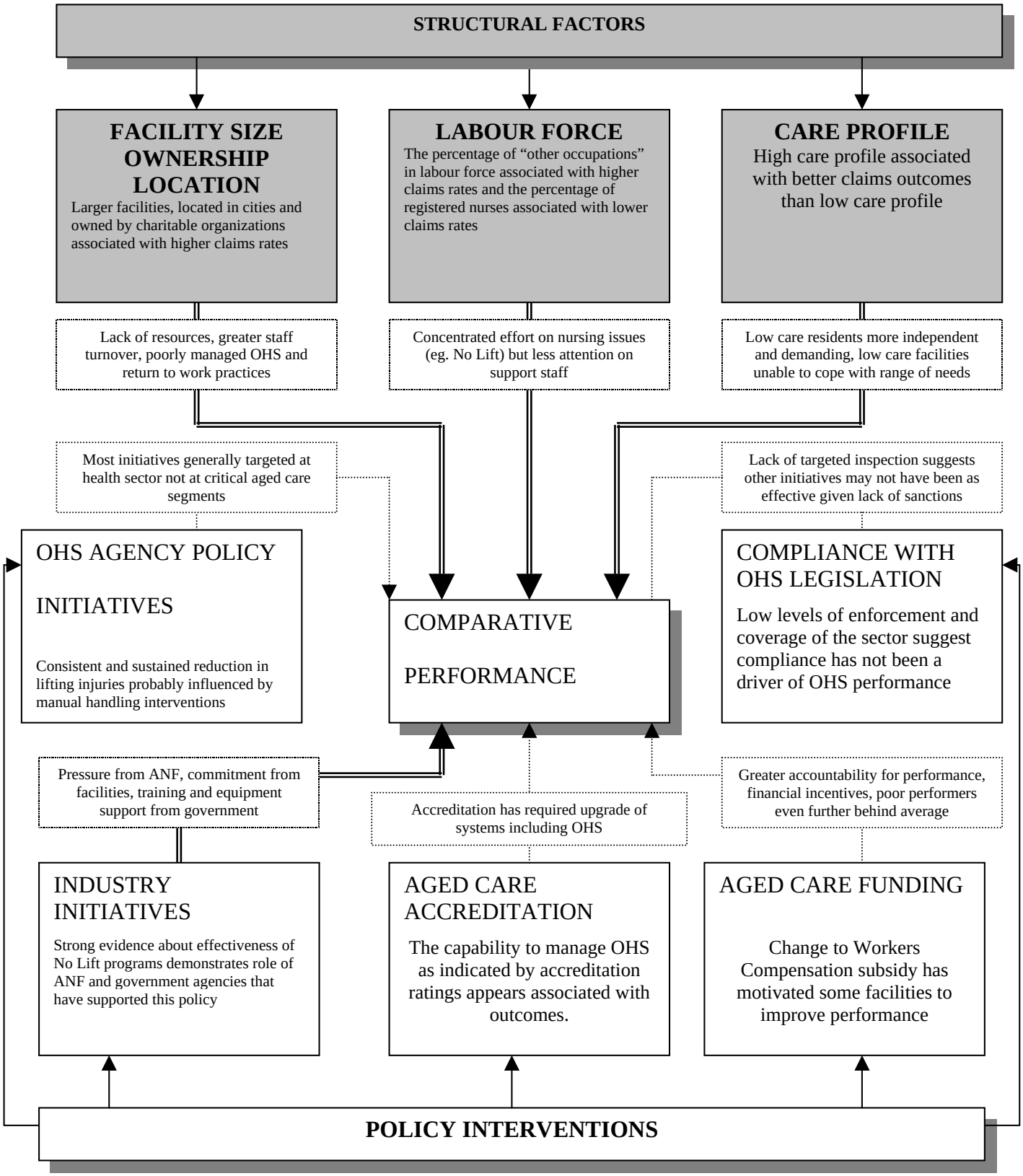
141. A similar study is underway into the construction industry and is expected to be completed by December 2002.

6.3.4 Other industries

142. While the aged care sector study provides an analysis of the factors influencing safety outcomes in that industry in recent years, it is worth comparing the way two other industries have sought to influence workplace safety. The examples are the mining industry and the farming sector.

143. The industry group representing the mining sector, the Minerals Council, has taken a lead role along with its members to improve workplace safety in the industry. In the late1990s, the industry reached a collective agreement to make safety and health its highest priorities. One of the key initiatives of the industry was to obtain CEO commitment to improving workplace safety. This is now effectively embedded within and across the industry. The aim is to use a top down approach to gain commitment to workplace safety that is reflected in all levels of management across the industry.

Model for interpreting comparative performance in the aged care sector



144. To support the top down approach, the industry has an ongoing commitment to sharing workplace safety information and the adoption of best practice and innovation across the industry. The industry is currently developing national minerals industry risk assessment guidelines to assist with raising awareness, understanding and adoption of a comprehensive approach to risk management. The essential component of the mining industry approach to influencing workplace safety is the commitment by management.

145. On the other hand, the farming sector adopts a wider community-based approach. The industry recognises that primary producers and farm workers are known to be one of the highest risk groups for occupational injury and disease. The nature of the industry gives rise to a set of factors that varying to a general workplace like a mine which may have hundreds of employees, whereas a farm may be a single person workplace but at the same time have children and visitors on the worksite exposed to risk from machinery or chemicals.

146. The industry took a major step by the establishment of Farmsafe Australia in the late 1980s to address workplace safety. Prior to this time the industry knew little about or how to control risks on the farm. The programmes and activities of Farmsafe, and other industry associations, are based on the premise that key responsibility for farm safety rests primarily with individual farmers, their families and farm workers. The industry now has available accredited training programmes in farm health and safety for owners or managers, OHS management resource packages for on-farm use and opportunities for training of employees in farm safety.

147. However, the industry also recognises that rural communities need improved education and training in farm health and safety management to reduce risk or injury and illness associated with agricultural production. In this regard, the industry has developed and implemented a primary schools resource kit for rural schools in farm safety. The aim is to build farm hazard identification and risk management skills in children, in the context of the schools' existing curricula. The rural media has also adopted a supportive role in coverage of health and safety.

6.3.5 Summary

148. The above discussion is intended to demonstrate to the Committee the range of factors that can influence outcomes across industries and result in varying claims profiles. It is not intended that the discussion comprehensively identifies all factors or isolate a single factor as a major contributor.

149. There have also been recent developments at the national level that are aimed at improving workplace health and safety across industries and, in particular, in the Commonwealth employment sector. The National Occupational Health and Safety Commission which comprises representatives of all States and Territories and two peak industry parties, the ACTU and ACCI, developed an national strategy aimed at improving Australia's OHS performance. In May 2002, the Workplace Relations Ministers' Council endorsed the National OHS Strategy (NOS). The NOS establishes, for the first time, national targets and identifies five national priorities for improving OHS. The national targets are:

- a significant reduction in the incidence of work-related fatalities, with a reduction of 10 per cent by mid 2007 and at least 20 per cent by July 2012; and

- a reduction in the incidence of workplace injury of 20 per cent by mid 2007 and at least 40 per cent by July 2012.

150. There are five initial national priority areas for action to achieve short-term and longer-term improvements. They recognise that cooperation among OHS stakeholders will lead to more efficient and effective prevention efforts. The priorities are:

- reduce high incidence/severity risks;
- improve the capacity of business operators and workers to manage OHS effectively;
- prevent occupational disease more effectively;
- eliminate hazards at the design stage; and
- strengthen the capacity of government to influence OHS outcomes.

151. While a number of corporations, particularly larger corporations, set targets for OHS performance, the establishment of national targets provides an opportunity for individual corporations and all employers to benchmark their individual performance. The success of the NOS will, to a large degree, depend on a commitment by industries to commit to achieving the targets or preferably exceed the targets.

152. At the Commonwealth level, Minister Abbott introduced into Parliament on 26 June 2002 the *Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002*. One of the main aims of the Bill is to focus on improving employee involvement in OHS. The Bill provides for a more direct relationship between employers and

employees about OHS, so that workplaces can develop arrangements that take account of the specific needs of their enterprise. The Bill also proposes new compliance measures such as enforceable undertakings and extending the potential application of civil penalties to all Commonwealth employers.

7. Rehabilitation and Return-to-Work Programmes

153. Australian workers' compensation schemes embrace the concept of "total injury management" to rehabilitate and achieve return-to-work. The then Heads of Workers' Compensation Authorities (HWCA) in a report to Ministers defined total injury management as "a co-ordinated and managed process from the time of injury, integrating medical and employment practices with a focus on the workplace and return to safe employment"[43].

154. DEWR endorses the concept of total injury management as identified by HWCA and agrees with the general objectives of early intervention. DEWR, however, does not accept the general principle underlining the HWCA model that the cost of an injury to an employee should be shared between the employer, the worker and the community through social welfare programmes[44].

155. DEWR considers that the primary responsibility for the cost of a workplace injury, including rehabilitation, rests with the employer (via the insurance coverage an employer is required to have with a scheme) and not taxpayer funded social welfare programmes.

7.1 Overview of Scheme arrangements

156. All Australian workers' compensation schemes have in place rehabilitation and return-to-work programmes. The programmes are generally integrated with the schemes' claims management systems. Like other features of the workers' compensation system in Australia there are significant differences in the arrangements across the jurisdictions. This naturally leads to inequities to injured employees. An outline of the current arrangements across the schemes is provided at Attachment E.

157. To varying degrees, Australian workers' compensation systems encourage employers to implement best practice workplace rehabilitation. While employers will be influenced by the overall system design in each jurisdiction, there are two primary drivers of employer behaviour in relation to workplace rehabilitation. Firstly, each system incorporates statutory rehabilitation obligations for employers (which may be supported by financial penalties for non-compliance). Secondly, the responsiveness of insurance costs to employer claim experience and return to work performance will be a key consideration for employers planning to devote resources to workplace rehabilitation initiatives.

158. Attachment E gives an indication of the variation across jurisdictions for key rehabilitation obligations for employers. The complexity and diverse requirements of a fractured national

[43] *Promoting Excellence- National Consistency in Australian Workers' Compensation* – Heads of Workers' Compensation Authorities, May 1977, page 72.
[44] *Ibid* – page 3

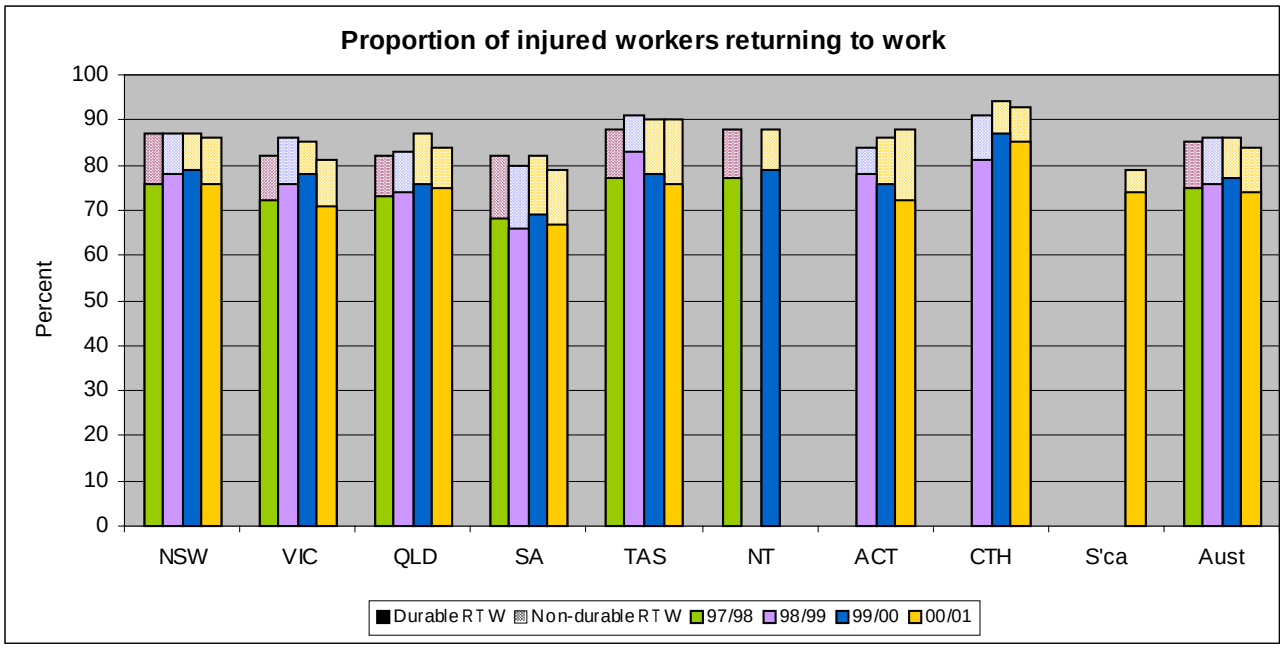
framework discourages employers from designing a workplace rehabilitation system across their workforce to meet the needs of their workers and workplaces. Rather, the current arrangements tend to encourage employers to adopt 'off the shelf' solutions in each jurisdiction, reducing prospects for optimal organisational fit and maximum return to work outcomes.

159. As mentioned earlier in this submission, there is considerable interaction between the workers' compensation systems and the Commonwealth social welfare programmes. The varying provisions of the schemes when linked with other aspects of the structure of the schemes may have resulted in the social welfare system becoming a 'de-facto' compensation system. The Commonwealth provides income support to compensation recipients unable to return to work while they wait for their compensation claim to be accepted, and to those who have not returned to work after their injury and/or compensation preclusion period. It also provides support (including rehabilitation) to those who have been unable to attribute their illness or injury to a workers' compensation scheme.

7.2 Return-to Work (RTW) Outcomes

160. **Figure 10** below provides durable return-to-work [45] outcomes across the various Australian workers' compensation schemes for the 2000/01 financial year.

Figure 10 Proportion Of Injured Workers Returning To Work



[45] Durable return to work in this context means the employee had a paid job at the time of the survey.

161. The outcomes provided in the above chart are based on a survey of workers who had submitted a claim eight to nine months previously and had more than 10 days compensation paid. A feature of the survey results is the consistency over the years in each scheme and the consistency across the scheme.

162. There is little reliable evidence on how effective the various schemes are at achieving durable RTW for injured workers under their schemes. The schemes rely heavily on measuring the effectiveness of their rehabilitation and RTW programmes on "discontinuance rates". This is a measure of the number of closed claims in a period. This means the claimant has no longer any attachment to the scheme because benefits and medical/rehabilitation entitlements have ceased.

163. From the scheme's perspective it has achieved an outcome in that it has ended its obligations to the claimant. The outcome for the claimant, however, is unknown. The claimant may have returned-to work or may be relying on a lump sum settlement or have been left to their devices to obtain income support and meet the cost of medical and other services. If the latter is the case, it is highly likely the claimant will need the support of the taxpayer funded social welfare system. This may also be the case for any claimant who has received a lump sum, either by way of a common law settlement or a redemption of their benefits. Most schemes have legislative provisions that enable the claimant to receive a lump sum to redeem their future entitlements. Some schemes actively encourage the claimants to opt for a redemption as a mechanism to remove the claimant from the scheme. This may or may not be in the best interest of the claimant.

164. Common law access is readily available under six of the workers' compensation schemes. Allowing access to common law for a workplace injury breaks the connection of the injured worker with a scheme, thus inhibiting rehabilitation and return-to-work programmes. If an injured worker chooses the common law option rather than statutory benefits – a pathway which is actively encouraged under certain schemes such as Queensland, then the prospect of durable return-to-work diminishes. The same position exists when an injured worker opts for a redemption and in schemes like South Australia (which in recent times has had a proactive redemption policy), the long–term outcome for an injured worker is uncertain.

165. A positive step taken by some schemes in recent times concerns the implementation of job placement or a retraining scheme to assist long-term compensation claimants to re enter the workforce. For example, NSW Workcover Authority operates a JobCover Placement Program to encourage employers to employ partially incapacitated workers. A range of financial and other incentives are offered to employers to take on the injured worker. Other States have similar

schemes. However, while all schemes share the same goals of rehabilitating injured workers and getting the worker back to durable employment, the diversity in the arrangements across the different schemes hinders the achievement of these goals.

166. National employers, or even employers who operate in more one jurisdiction, face a myriad of different obligations that make it virtually impossible to establish consistent and effective workplace rehabilitation policies. Attachment E sets out the different requirements employers face in this area across the States. This adds costs to the employer and must bear on the outcomes achieved for their injured employees. Injured workers who have the same injury in different jurisdictions often have different services available, with different time and costs limits applying.

167. The States are best placed to implement and manage rehabilitation and return-to-work programmes. However, it is in the interest of all employees, employers and the general community to have a consistent national framework that embraces a total injury management approach to injured employees. The national framework would ideally establish consistent entitlements to rehabilitation services and return-to-work assistance that offer the best prospect of allowing injured person the opportunity to rejoin the workforce and make an effective social and economic contribution to the community. Such a framework would also allow the development of protocols which provide a clear delineation of responsibilities between the workers' compensation systems and the Federal Government's social welfare programmes.

168. All workers' compensation schemes and the Commonwealth through its programmes recognise the importance of early intervention following a workplace injury. The longer a person is on compensation or other forms of assistance the more costly it is for the schemes and the more difficult it is for the injured person to re-enter. In considering this aspect of Reference Three the Committee may wish to pursue options for achieving early intervention. DEWR considers that one option to achieve this is to put more emphasis on resolving the issue at the workplace. While the need would still exist to have overarching obligations on the employer and the injured person, there needs to be a greater focus placed on the injured person and the employer being able to work together without being unduly restrained by the regulatory framework.

Federal Department of Employment and Workplace Relations Submission

List of Attachments

Types of Schemes **ATTACHMENT A**

STATE	AUTHORITY	LEGISLATION	TYPE OF FUND	BENEFITS	COMMON LAW	INSURANCE & PREMIUMS
New South Wales	WorkCover Authority of New South Wales	*Workers' Compensation Act 1987*	Managed Fund	• • **26 weeks** current weekly wage rate OR 80% WAWE not including overtime, shift work, penalties • > **26 weeks** 90% AWE with additional for spouse or dependents • >**52 weeks** Partially incapacitated - basic award up until 26 weeks which then decreases to 80% up until 52 weeks • >**104 weeks** payments can be discontinued • Medical & hospital benefits have a limit • Lump sums available for permanent impairment	• 1987 Act abolished common law but it was reintroduced and remodified in 1989. • Common law and statutory law used.	• Employers are categorised into industries, with some employers having their premiums adjusted according to their claims history.
Victoria	Victorian WorkCover Authority	*Accident Compensation (WorkCover Insurance) Act 1992* and the *Accident Compensation (WorkCover Insurance) Act 1993*.	Central Fund	• • **13 weeks** 95% of PIAWE less notional earnings • > **13 weeks** 75% of PIAWE if no work capacity. Other arrangements if capacble of working • > **104 weeks** Weekly benefits cease unless there are special circumstances agreed upon by WorkCover • Medical & hospital benefits cease after 52 weeks after weekly payments cease OR if no time lost, 52 weeks after first entitlement • Limited lump sum payment	• Common law claims are only available to the seriously injured workers	• No private underwriting of the scheme, and the Vic WorkCover Authority bears the ultimate risk. • Premiums are based on the previous year's premium, which is adjusted to take into account recent experience.
Queensland	Queensland Workers' Compensation Board (WCB)	*Workers' Compensation Act 1990*	Central Fund	• • **26 weeks** 85% of the workers NWE OR amount payable under worker's award or agreement (If under and award or agreement) • • **26 weeks** 85% of NWE OR 70 % or QOTE (if not under an award or agreement) • > **26 weeks** (all workers) 65 % of NWE OR 60 % of QOTE • > **104 weeks to 5 years** (Workers with WRI more than 15%) 65% of NWE OR 60% of QOTE • > **104 weeks to 5 years** (Workers with WRI less than 15%) receive an amount equal to social security pension • Medical benefits no limit. Hospital benefit limits • Lump sum payment available	• Unlimited. • No maximum amount of damages. • Actions limited by the Limitations of Actions Act 1974	• Compulsory. • Premiums are determined on an industry basis. There is also a merit/bonus option for 'good' employers.

South Australia	Workers Rehabilitation and Compensation Corporation (WorkCover)	*Workers' Rehabilitation and Compensation Act 1986*	Central Fund	• • **52 weeks** WAWE • > **52 weeks** 80 % of WAWE (total incapacity) • >**52 weeks** 80% of difference between worker's adjusted notional weekly earnings and earnings from employment (partially incapacity) • > **104 weeks** if partiall y incapacitated & not suitable for employment, 80% of difference between notional weekly earnings and what worker is deemed capable of earning. Otherwise same as for > 52 weeks • No limit on medical and hospital benefits • Lump sum payments available	• Common law was abolished in December 1992. • Common law against third parties may exist.	• Compulsory. • All employers must be registered. • Premiums are linked to safety performance which may lead to reduction in their premiums

WAWE - Workers average weekly earnings **PIAWE** - Pre-injury average weekly earnings **NWE** - Nominal weekly earnings

QOTE - Queensland ordinary time earnings

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Types of Schemes (cont)

ATTACHMENT A

STATE	AUTHORITY	LEGISLATION	TYPE OF FUND	BENEFITS	COMMON LAW	INSURANCE & PREMIUMS
Western Australia	Workers' Compensation and Rehabilitation Commission	*Workers' Compensation and Rehabilitation Act 1981*	Approved Insurers	• Cap on weekly payments for all claims • Workers under award - **First 4 weeks** WAWE plus any overtime or bonuses; **5th week onward** weekly earnings under award excluding any overtime or bonuses • Workers not under an award - **First 4 weeks** WAWE including overtime and bonuses; **5th week onward** 85% of WAWE • Medical and hospital benefits limits apply • Lump sum payments available	• Workers have the right to sue for damages at common law if they suffer a serious disability	• Compulsory for statutory liabilities • The premiums rates committee fixes the categories of business & recommends what the premium should be
Tasmania	Department of State Development and Resources and the Workers' Compensation Board	*Workers' Rehabilitation and Compensation Act 1988*	Approved Insurers	• • **13 weeks** 1000% of weekly payment • > **13 weeks** 85% of weekly payment • > **52 weeks** 70% of weekly payment • Entitlement to weekly payments ceases on expiration of 10 years after the date of incapacity • No limit on medical and hospital benefits • Lump sum payments available	• Workers have unrestricted rights to common law actions, and are able to accept both workers' compensation payments and damages	• Compulsory to self-insure or insure with approved insurer • Premiums are set by licensed insurers. Merit bonus rebates are encouraged. Premiums monitoring committee assists the Board
Australian Capital Territory	WorkCover	*Workers' Compensation Act 1951 (updated 21 December 2000)*	Approved Insurers	• • **26 weeks** NWE • > **26 weeks** Worker: $295.02 Spouse: $77.64 Dependents (per child): $36.23 (all indexed in line with CPI) • No limit on medical and hospital benefits • Lump sum payment available	• Common law actions are unlimited, but any compensation paid must be repaid	• Compulsory for full and unlimited liability • Premium rates are recommended by the Insurance Council of Australia.

Northern Territory	Work Health Authority	*Work Health Act 1988*	Approved Insurers	• • **26 weeks** NWE • **> 26 weeks** Either 75% of NWE OR $400.05 (whichever is greater)	• Common law actions are abolished under the Act	• Compulsory • Premiums are set by individual insurance companies and are subject to market forces
Commonwealth	Comcare OR Seacare	**Comcare:** *Safety, Rehabilitation and Compensation Act 1988;* **Seacare:** *Seafarers' Rehabilitation and Compensation Act 1992*	**Comcare**: Central Fund **Seacare:** Authorised Insurers	• • **45 weeks** NWE • **> 45 weeks** 75% of NWE (additional for dependent spouse and children) • No limits on medical and hospital benefits • Both Comcare and Seacare have lump sum payments available	• Common law claims have been abolished for econimic loss, but a worker may sue for non-economic loss for up to $110,000 if he or she makes a decision to take common law instead os statutory compensation for permanent impairment and non-economic loss	• Different classes in insurance and premiums within Commonwealth • Departments & Authorities contribute to a fund, based on claims history

WAWE - Workers average weekly earnings **PIAWE** - Pre-injury average weekly earnings **NWE** - Nominal weekly earnings

QOTE - Queensland ordinary time earnings

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ATTACHMENT B

DEFINITION OF 'REMUNERATION' FOR THE PURPOSE OF DEFINING PREMIUM

COMMONWEALTH*	VICTORIA	NEW SOUTH WALES	SOUTH AUSTRALIA
Includes gross wages/salaries (including condition of service payments normally covered by gross wages e.g. sick leave, annual leave, maternity leave, long service leave); overtime; over-award payments; penalty rates; piece work payments; public holidays payments; statutory officers' salaries; allowances for reward of merit; holiday leave loading (if absorbed into wages/salaries); generally, any taxable allowances It does not include superannuation payments; workers' compensation benefits; district and remote locality allowances; any payments made on termination of employment (e.g. accrued long service leave/annual leave); payments for special expenses; performance pay; tool allowance; fringe benefit allowances and administration costs; holiday leave loading (if paid separately from wages/salaries); generally, any non-taxable allowances	Gross wages; salaries (including overtime and all pay loadings); bonuses; commissions; allowances; items included as part of employment package; any other fringe benefits and any superannuation benefits The following are exempt: apprentice & trainee remuneration; workers' compensation payments; shareholder dividends; partners' drawings; payments for Construction Industry Long Service Leave Board and Redundancy Payments Central Fund (only if not taxable as fringe benefits); termination payments; and exempt benefits under the Fringe Benefits Tax Assessment Act 1986	Includes salary; overtime; shift and other allowances; over award payments; bonuses; commissions; payments to working directors; payments for public and annual holiday (including loadings); sick leave payments; value of board and lodgings provided by employer for worker; any other consideration in money or money's worth given to the worker under a contract of service or apprenticeship It does not include: any sum that the employer has been accustomed to pay the worker because of the nature of the employment; any allowance to reimburse costs arising out of any obligation incurred under a contract; any amount expended on behalf of the worker; director's fees; compensation under the Act; any payment for long service leave or any payment under the Building and Construction Industry Long Service Payments Act 1986	As a guideline: Payments made to or for the benefit of a worker (quantified in monetary terms) but excluding: workers' compensation payments; termination payments or severance payments; payments as a reimbursement for a specific expenditure by worker on behalf of employer; motor vehicle allowance for use of worker's own vehicle in the course of employment which is less than 56 cents per kilometre travelled; accommodation allowance which is less than $127.60 per day

DEFINITION OF 'REMUNERATION' FOR THE PURPOSE OF DEFINING PREMIUM

WESTERN AUSTRALIA	QUEENSLAND	TASMANIA	NORTHERN TERRITORY	A.C.T.	NEW ZEALAND
All gross wages; salaries; remuneration; commissions; bonuses; overtime; allowances and the like; directors' fees and all other benefits paid (whether at piece work rates or otherwise, and whether paid in cash or in kind) to, or in relation to, a worker before the deduction of income tax Termination payments; retirement pay; retrenchment pay in lieu of notice; superannuation payment(s); pensions; 'golden handshakes' or weekly payments of compensation do not have to be declared	Wages; salary; other earnings by way of money or entitlements having monetary value, but does not include: allowances for travelling; car; removal; meal; education; living away from home or in the country; clothing; tools; vehicle expenses; employer contributions to superannuation; lump sum payments on termination; an amount payable under section 70 of the WorkCover *Queensland* Act 1996 - employer's liability for excess period Any benefits and allowance, such as additional superannuation, motor vehicle usage, etc., provided under salary sacrifice arrangements are declarable	The Workers Rehabilitation and *Compensation* Act 1988 refers to 'wages' for the purpose of defining premium. Wages includes the monetary value of all payments made to a worker, whether in cash or in kind, in return for the worker's labour and includes: • Any amount paid or payable by way of remuneration to a person holding office under, or in the service of, the Crown; • Any amount paid or payable to a person or class of persons taken to be a worker under this Act to the extent to which that payment is attributable to labour; • Any amount paid or payable by a company by way of remuneration to a director or member of the governing body of that company; • The value of the provision by the employer of meals or sustenance or of the use of premises or quarters as consideration or part consideration for the worker's services; • The value of fringe benefits within the meaning of the *Fringe Benefits* Tax Assessment Act 1986 of the Commonwealth; •All superannuation contributions forming part of the worker's salary package, made by the employer in respect of the worker The following are specifically excluded from the definition of wages: • Any allowance for travelling or accommodation; • Any workers compensation payment; • Any redundancy, severance or termination payment	Gross wages; salaries (including overtime); bonuses; allowances; commission and all other remuneration paid; including pay in respect of holidays; sickness and long service leave	Salary; overtime; shift and other allowances; bonuses; commissions; payments to working directors; public and annual holiday payments (including loadings); sick leave payments; value of board and lodging for worker; and any other money or money's worth given to the worker under a contract of service or apprenticeship Also includes: payment (whether commission, fee, reward otherwise) under a contract (whether termed a contract, agreement, arrangement or engagement) to a person deemed to be a worker Does not include any payments for special expenses incurred by the worker because of the nature of the employment; reimbursement allowances for costs arising from obligations incurred under a contract; amount expended on behalf of the worker; directors' fees, compensation under the Workers *Compensation* Act 1951; or payment for long service leave; a lump sum payment instead of long service leave or any payment under the Long Service Leave (Building & Construction Industry)	The Accident Insuranc Act defines 'earnings' according to the following three categories: Earnings as an employee means all gross source deduction payments (i.e. taxable wages) of the person, but does no include social security benefit, student allowance, redundancy payment, retiring allowance or superannuation scheme pension. Earning as a self-employed person is defined as their annual assessable income, after expenses are deducted, that results from personal exertions. This definition includes Private Domestic Workers. Earnings as a shareholder employee is defined as any earnings as an employee, and/or any further salary representing payment for services provided as an employee or director of the

ATTACHMENT C

DEFINITIONS OF "INJURY" AND "DISEASE"

STATE/TERRITORY PROVISIONS

State/Territory	Connection with employment
New South Wales *Workers Compensation Act, 1987*	▪ No compensation is payable in respect of an injury unless the employment concerned was a substantial contributing factor [s.9A(1)] ▪ Examples of matters to be taken into account in determining whether a worker's employment was a substantial contributing factor to an injury • Time and place of injury • Nature of the work performed and the particular tasks of that work • Duration of the employment • The probability that the injury or a similar injury would have happened anyway • The worker's state of health before the injury and the existence of any hereditary risks • The worker's lifestyle and his or her activities outside the workplace [s.9A(2)]
Victoria *Accident Compensation Act, 1985*	▪ "Injury" means any physical or mental injury and without limiting the generality of the foregoing includes- (a) . . . (b) a disease contracted by a worker in the course of the worker's employment whether at or away from the place of employment and to which the employment was a significant contributing factor; (c) the recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease where the worker's employment was a significant contributing factor to that recurrence, aggravation, acceleration, exacerbation or deterioration. [s.5(1)]
Queensland *Workcover Queensland Act 1996*	▪ An "injury" is personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury. [Sub-section 34(1)] ▪ "Injury" includes the following: (a) a disease contracted in the course of employment, whether at or away from the place of employment, if the employment is a significant contributing factor to the disease;

	[s.34(3)(a)] ▪ NB - Amendments in 1999 amended the test from "**the** major significant factor" to "**a** significant contributing factor" under section 34(1) of the Act.
South Australia *Workers Rehabilitation and Compensation Act 1986*	▪ A disability is compensable if it arises from employment [s.30(1)] ▪ A disability which is a disease arises from employment if it arises in the course of employment and the employment contributed to the disability [s.30(2)] ▪ In the case of psychiatric disabilities, the employment must be a substantial cause of the disability (s.30A)
Western Australia *Workers' Compensation and Rehabilitation Act, 1981*	▪ Employment must be a contributing factor to a disease and must contribute to a significant degree [s.5(1)]
Tasmania *Workers Rehabilitation and Compensation Act 1988*	▪ Compensation is payable in relation to a disease arising out of and in the course of employment and to which the worker's employment contributed to a substantial degree [s.25(1)] ▪ Employment is taken to have contributed to a disease to a substantial degree if it is the major or most significant factor [s.3(2A)]
Northern Territory *Work Health Act 1996*	▪ A disease shall be taken not to have been contracted by a worker or to have not been aggravated, accelerated or exacerbated in the course of the worker's employment unless the employment in which the worker is or was employed materially contributed to the worker's contraction of the disease or to its aggravation, acceleration or exacerbation [s.4(6A)] ▪ The employment of a worker shall not be taken to have materially contributed to an injury or disease … unless the employment was a real, proximate or effective cause of the injury or disease … [s.4(8)]
Australian Capital Territory	▪ Employment must be a contributing factor to the contraction or aggravation of a disease [s.9(1)]

ATTACHMENT D

STATE/TERRITORY EXCLUSIONARY PROVISIONS

State/Territory	Exclusionary Provision
New South Wales *Workers Compensation Act, 1987*	▪ No compensation is payable in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers [s.11A(1)]
Victoria *Accident Compensation Act, 1985*	▪ Compensation is not payable in respect of an injury consisting of an illness or disorder of the mind caused by stress unless the stress did not arise wholly or predominantly from: (a) Reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, redeploy, retrench or dismiss the worker; (b) A decision of the employer on reasonable grounds not to award or to provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the employment, to the worker; or (c) An expectation of the taking of such action or making of such a decision. [s.82(2A)]
Queensland *Workcover Queensland Act 1996*	▪ "Injury" does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances: (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment; (b) the worker's expectation or perception of reasonable management action being taken against the worker; (c) action by Workcover or a self-insurer in connection with the worker's application for compensation. [s.34(5)] The subsection goes on to provide examples of actions that may be reasonable management actions taken in a reasonable way –

	– action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker; – a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment.
South Australia *Workers Rehabilitation and Compensation Act 1986*	▪ A disability consisting of an illness or disorder of the mind is compensable if and only if (a) The employment was a substantial cause of the disability; and (b) The disability did not arise wholly or predominantly from (i) Reasonable action taken in a reasonable manner by the employer to transfer, demote, discipline, counsel, retrench or dismiss the worker; or (ii) A decision of the employer, based on reasonable grounds, not to award or provide a promotion, transfer, or benefit in connection with the worker's employment; or (iii) Reasonable administrative action taken in a reasonable manner by the employer in connection with the worker's employment; or (iv) Reasonable action taken in a reasonable manner under this Act affecting the worker. (s.30A)
Western Australia *Workers' Compensation and Rehabilitation Act, 1981*	▪ A disability does not include a disease caused by stress if the stress wholly or predominantly arises from a matter mentioned in subsection (4) unless the matter is mentioned in paragraph (a) or (b) of that subsection and is unreasonable and harsh on the part of the employer. [s.5(1)] ▪ s.5(4) provides that for the purposes of the definition of "disability", the matters are as follows: (a) The worker's dismissal, retrenchment, demotion, discipline, transfer or redeployment; (b) The worker's not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to the employment; and (c) The worker's expectation of: (i) A matter; or (ii) A decision by the employer in relation to a matter, referred to in paras (a) or (b).
Tasmania *Workers Rehabilitation and Compensation Act 1988*	▪ Compensation is not payable in respect of a disease which arises substantially from – (a) Reasonable action taken in a reasonable manner by an employer to transfer, demote, discipline or counsel a worker or to bring about the cessation of a worker's employment; or (b) A decision of an employer, based on reasonable grounds, not to award or provide a promotion, transfer or benefit in connection with a worker's employment; or (c) Reasonable administrative action taken in a reasonable manner by an employer in connection with a worker's employment; or (d) The failure of an employer to take action of a type referred to in

	paragraph (a), (b) or (c) in relation to a worker in connection with the worker's employment if there are reasonable grounds for not taking that action; or (e) Reasonable action under the Act taken in a reasonable manner affecting a worker [s.25(1A)
Northern Territory *Work Health Act 1996*	▪ "Injury" does not include an injury or disease suffered by a worker as a result of reasonable disciplinary action taken against the worker or failure by the worker to obtain a promotion, transfer or benefit in connection with the worker's employment or as a result of reasonable administrative action taken in connection with the worker's employment [s.3(1)]
Australian Capital Territory	▪ In the definition of "injury" a reference to mental injury or stress shall not be taken to include a mental injury or stress wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of an employer with respect to the transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of a worker or the provision of an employment benefit to a worker [s.6(1A)]

ATTACHMENT E

COMPARISON OF REHABILITATION AND RETURN TO WORK PROVISIONS

	Appoint a RTW / Rehabilitation Coordinator	Develop rehabilitation policy / program	Develop Return to Work Plan for injured worker	Provide suitable duties/ employment for injured worker	Keep position open for injured worker
New South Wales	yes*	yes*	no#	yes	6 months
Victoria	yes*	yes*	yes*	yes	12 months
Queenslan	yes*	yes*	yes*	yes	6 months

d					
South Australia	yes	yes	yes	yes	indefinitely *
Western Australia	no	no	no	yes	12 months
Tasmania	no	yes*	yes	yes	12 months
Northern Territory	no	no	no	yes	no
A.C.T.	yes	yes	yes	no	no
Comcare	yes	yes	yes	yes	yes

* *depends on size of employer*

however as well as strict injury reporting guidelines, employers must comply with their insurer's injury management program and injury management plan. Employers or rehabilitation providers can develop a RTW Plan.