

General Purpose Standing Committee No.1

NSW Workers Compensation Scheme

Third Interim Report

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Terms of Reference

1. *That General Purpose Standing Committee No. 1, have the following functions:*
 - a) *to monitor the financial position of the workers compensation scheme under the Workers Compensation Act 1987 and the Workplace Injury Management and Workers Compensation Act 1998, and*
 - b) *to monitor and review the implementation and operation of the Workers Compensation Legislation Amendment Bill 2001 (No. 2), as finally passed by the Parliament,*
 - c) *to investigate and report on the efficiency of the operation of the workers compensation system and the administration of the WorkCover Authority,*
 - d) *to monitor the impact on premiums of the Bill.*
2. *That the Committee be authorised to engage the services of:*
 - a) *an actuary, who is a member of the Institute of Actuaries of Australia, and*
 - b) *an accountant, who is a member of the Institute of Chartered Accountants in Australia or the Australian Society of Certified Practising Accountants,*
 - c) *for the purpose of advising and assisting the Committee, as the Committee thinks fit, in relation to the Committee's functions.*
3. *That the Committee:*
 - a) *provide interim reports to the House each 3 months, and*
 - b) *finally report to the House by 30 June 2002.*
4. *Nothing in this resolution authorises the Committee to investigate a particular compensation claim—put and passed.*

(Minutes of Proceedings No. 111, 28 June 2001, Item No. 21 and Minutes of Proceedings No. 134, 29 November 2001, Item No. 23)

These terms of reference were referred to the Committee by the House.

Committee Membership

The Revd the Hon Fred Nile MLC Christian Democratic Party (*Chairman*)

The Hon Tony Kelly MLC Australian Labor Party (*Deputy Chairman*)

The Hon Michael Gallacher MLC Liberal Party^{1,2}

The Hon Greg Pearce MLC Liberal party³

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¹ Correspondence received 6 July 2001, the Hon Richard Colless MLC will replace the Hon Patricia Forsythe MLC for the duration of this inquiry.

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Chairman's Foreword

This is the third of four reports from the Committee's inquiry into the NSW Workers Compensation Scheme. The report focuses on the Scheme management by WorkCover and insurers, whilst continuing to investigate the financial situation of the Scheme. In this report the Committee draws conclusions regarding the information received during the inquiry to date. The Committee will make its recommendations in the fourth and final report to be tabled by 3 September 2002.

An important event in preparing this report was the public forum titled "The way forward for Scheme ownership and design" held on 15 March 2002. Fifteen delegates, representing a diverse range of stakeholder experience, attend and discussed their thoughts and ideas for the future direction of the Scheme. The forum was very successful in broadening the Committee's understanding of issues affecting the Scheme and promoting a spirit of cooperation between all stakeholders in the reform process.

One of the issues raised at the Forum was the adequacy of WorkCover's information technology. I am concerned that WorkCover's data and information management systems may not be adequate for the authority to fully fulfil its role as a regulator. Relative ease of access to data on the performance of the Scheme and in particular, the performance of insurers is vital to successful regulation. Improving information technology systems should be a priority for WorkCover in the near future. The availability of data is particularly important given the lack of transparency surrounding insurer performance. In relation to this issue the Committee believes that it would be beneficial if WorkCover was able to legally disclose information about insurer performance.

The Committee was disturbed to discover that most occupational injury is preventable. Generally, when OH&S practices are improved, the incidences of occupational injury and disease reduce, and less people enter the Scheme. I consider this the best outcome for employees, employers and the Scheme financially. Ultimately, it is most important that injury is prevented wherever possible.

The Committee is concerned by the apparent level of dissent with regards to the appropriateness of the PIRS method for assessing permanent psychological and psychiatric impairment and the role of psychologists in the assessment. The Committee considers that there is a need for a working party comprised of the various interest groups to resolve these issues.

During the course of the inquiry the Committee received conflicting evidence about the extent to which the 2001 legislative reforms would improve the financial position of the Scheme. As reported in its second interim report, at the time of reporting, the Committee had had insufficient time to properly review further actuarial advice received from Tillinghast-Towers Perrin in early January 2002. As part of its inquiries for this report the Committee reviewed this information and all evidence received regarding the Scheme's finances, during public hearings with the Minister, WorkCover representatives and Tillinghast-Towers Perrin. The evidence raised in these hearings did not fully clarify the conflicts in the evidence received previously. Consequently, the Committee will look to the 31 December 2001 Scheme evaluation for an indication of the one-off impact on the deficit of the 2001 reforms.

The Committee recognises the assistance of the Hon John Della Bosca Special Minister of State and Minister for Industrial Relations and the officers of WorkCover and Tillinghast Towers-Perrin for their continued assistance and consideration in working to achieve successful workers compensation outcomes for New South Wales.

Finally, I take this opportunity to thank my fellow Committee Members and the Committee secretariat for their tireless work on this demanding inquiry. In particular, Senior Project Officer Ms Rachel Simpson and Project Officer Ms Emma Lawson who shared in the drafting of this comprehensive and balanced report and in organising the public hearings and Forum. I am also very appreciative of the work undertaken by the Committee Officers Ms Ashley Nguyen and Ms Natasha O'Connor in formatting the report, assisting in the administration of all aspects of the inquiry and in particular for their work in organising the Forum. Acknowledgment must also be given to the assistance and general counsel of Mr Warren Cahill, Clerk Assistant – Committees and Ms Tanya Bosch, Director, Law and Justice Committee who acted as Director of this Committee. Thanks also goes to Mr Peter McCarthy from Ernst & Young for his actuarial advice and guidance.

Rev Hon Fred Nile MLC
Chairman

Summary of Conclusions

Conclusion 1 *Page 8*

On 8 April, 2002 WorkCover provided an updated report on the status of the legislative reforms, which the Committee has not had time to review in depth.

It is too early to determine whether or not the projects are successful in implementing the legislative reforms until they are fully operational. Under terms of reference 1(b), the Committee will continue to monitor the completion of projects identified by WorkCover against the key dates specified in their Implementation Plan during the remainder of the Committee's inquiry, and will report on WorkCover's progress in its fourth and final report.

Conclusion 2 *Page 11*

The Committee concludes that actuarial costings are inherently uncertain. The one-off impact on the Scheme's deficit should be evident later this year while the impact on an annual basis may not be fully evident for as many as three to five years and will be subject to revision.

Conclusion 3 *Page 12*

The Committee will look to the 31 December 2001 Scheme evaluation for an indication of the one-off impact on the deficit of the 2001 reforms in light of the estimated, optimistic, \$1.33 billion one-off impact and the more realistic estimate of \$810 million one-off impact.

Conclusion 4 *Page 16*

The Committee concludes that the Auditor General's opinion that the Scheme's deficit or profit should be consolidated in the total State accounts should be considered by the independent Review of Scheme Design as reported by the Minister in his letter to the Committee dated 5 April, 2002.

Conclusion 5 *Page 23*

The Committee concludes that the issue of whether there is merit in adopting the APRA prudential requirements should be considered by the independent Review of Scheme Design as reported by the Minister in his letter to the Committee dated 5 April, 2002.

Conclusion 6 *Page 34*

The Committee agrees that a majority of workplace deaths and injuries are preventable. This further reinforces the importance of good OH&S practices in NSW.

Conclusion 7 *Page 39*

The PDS has potential for substantial savings to the Scheme. The PDS should continue to be promoted to targeted employers where relevant to increase the take up rate.

Conclusion 8 *Page 48*

Irrespective of whether the remuneration arrangements will have the desired impact that WorkCover hopes, there is still scope for the possible separation of the functions performed by insurers.

Conclusion 9 *Page 51*

The adequacy of insurer performance is not transparent under the current legislative and regulatory framework. The legislation should be amended to make it clear that WorkCover can legally disclose publicly details of insurers performance.

Current licensing arrangements do not address management of insurers in their agency role and do not provide for WorkCover to direct the focus of insurers' management of injuries and claims.

The Committee considers that this issue should be addressed by the independent Review of Scheme Design as reported by the Minister in his letter to the Committee dated 5 April, 2002

Conclusion 10 *Page 55*

The implementation of the new remuneration arrangements should improve insurers' outcomes.

Conclusion 11 *Page 59*

It is important that WorkCover's IT and data management systems are adequate.

The Committee is concerned that WorkCover's data and information management systems are currently inadequate for WorkCover to properly fulfil one of its primary roles as regulator of the workers compensation scheme.

The Committee notes that WorkCover has announced the development of a new IT strategy to address these concerns.

Data management and accessibility by all stakeholders is an area of great concern to the Committee and options to improve WorkCover's data management will be further explored in the Committee's fourth and final report.

Conclusion 12 *Page 67*

The role of self insurers in the scheme is important.

The Committee is concerned that a zero employee requirement may allow organisations to become self insured without the necessary infrastructure to guarantee their workforce's workers compensation benefits.

In light of the evidence received by the Committee in preparation for the third report, the Committee considers that the use of commutations generally needs to be reviewed.

Conclusion 13 *Page 68*

Insurers are not the only service providers in the Scheme. All participants need to be subject to sufficient regulation to ensure the objectives of the Scheme are met and that participants are committed to the Scheme.

Conclusion 14 *Page 88*

Irrespective of how well injury management is being undertaken in NSW currently, it is clear from the evidence received that there is room for improvement (with prompt action immediately when an injury occurs not six weeks later). The Committee notes that the introduction of provisional liability should significantly improve injury management.

Conclusion 15 *Page 103*

The Committee is concerned at the level of dissent with regards to the appropriateness of the PIRS method for assessing permanent psychological and psychiatric impairment. The Committee also notes the PIRS scheme has just been introduced and needs time to become established and be assessed.

Glossary & Abbreviations

Glossary

The following definitions of key terms and concepts was provided to the Committee by the Committee's consultant actuaries, Ernst & Young ABC.

Actuarial report	Is simply a report by an actuary. The scope of the actuarial report can cover many aspects. WorkCover obtain actuarial reports on a regular basis for the actuarial estimate of the outstanding claims liabilities and the estimated premium rate to fund the cost of claims and related expenses in a year. Less regular reports are obtained on such matters as costings of changes to the scheme (e.g. common law), remuneration for insurers, review of the premium rating system and industry premium rate relativities.
Claims management	The effective co-ordination of all tasks (e.g. medical management, legal management, rehabilitation management, payment of entitlements, claim strategy, co-ordination of claim management with the employer, injury management, etc) associated with the just and economic resolution of a claimant's rights pursuant to the <i>Workers Compensation Act</i> .
Commutations	Workers compensation pays ongoing weekly, medical and related benefits. Under the Act an insurer, with the consent of the worker and approval of the court, can commute all future weekly and other regular payments and receive the lump sum equivalent. After the commutation all ongoing payments cease. In theory the worker still retains the right to sue at common law but normally when negotiating the level of the commutation the worker signs a common law deed of release and gives up the right to common law action. The S66/67 lump sums are usually settled at the same time as the commutation. In many ways commutations could be viewed as an out of court settlement of a common law action.
Deficit	The deficit of the scheme is the difference between the value of its assets and liabilities. If the value of assets exceeds the value of liabilities the scheme is in surplus and if the value of liabilities exceed the value of assets the scheme is in deficit. The funding ratio is the value of assets divided by the value of liabilities. The largest asset are investments including cash and the next largest item are unpaid premiums. The largest liability item is the estimate of the value of outstanding claims liabilities as estimated by the actuary including the value of the claims handling expenses.
Injury management	Restoration of workers pre-injury physical condition, or alternatively to provide assistance to attain optimal recovery (i.e. return to work). Also to co-ordinate and support workers' attempts to mitigate secondary economic loss through effective rehabilitation.
Premium leakage	Is a subset of system leakage .
Provisional Liability	Provisional liability allows an insurer to make weekly and medical expenses payments without admitting liability. This enables an insurer to make early payments to the worker without delay.

Recoveries	Under workers compensation in NSW an insurer is entitled to seek recovery from another party where the other party contributed to the injury of the worker. Examples include recoveries from a CTP insurer where the worker was involved in a car accident while working, recoveries from a product liability insurance policy where a product the worker was faulty and caused an injury to the worker (a good example is asbestos) and recoveries off other workers compensation insurers which insured the employer over different periods over which the injury occurred (a good example is deafness which may have arisen over a period of 30 years from 1971 to 2001 and the employer was insured by 5 different insurers over that period).
Redemptions	Under the <i>NSW 1926 Workers Compensation Act</i> commutations were known as redemptions. Redemptions became known as commutations under the 1987 Act.
Risk free rate of return	In the actuarial valuation of the scheme's outstanding claims liabilities the future liability cash flow (i.e. future claims payments) are discounted using an appropriate interest rate. The interest rate normally used is the risk free rate of return being the market interest rate on Government bonds for the length of the liability cash flows. APRA (Australian Prudential Regulation Authority) in the amendments recently pasted to the <i>Insurance Act</i> require the use of the risk free rate of return for discounting all insurers claims liabilities (note APRA does not apply to the NSW workers compensation scheme liabilities under the managed fund).
Section 66 benefit	Is compensation for permanent injury (e.g. loss of an eye, loss of an ear) and is sometimes referred to as a Table of Maims. The benefit paid is calculated as a percent of the maximum amount of \$100,000 with the percent depending on the nature and extent of the injury.
Section 67 benefit	Is compensation for Pain and Suffering and is equivalent to the non-economic loss benefits paid under common law. Like Section 66 the loss is based on a table and is a percent of the maximum amount of \$50,000 with the percent depending on the extent of the pain and suffering. Claimants can only gain access to Section 67 compensation if they pass a threshold being the ability to receive compensation of at least 10% of the maximum amount under Section 66. <i>Section 66 and Section 67 benefits are referred to as Statutory lump sum payments.</i>
Sufficiency Level	Refers to the extent to which the organisation's capital reserves are sufficient to cover outstanding claims.
Significant Injury	A workplace injury that is likely to result in the worker being incapacitated for a continuous period of more than 7 days, whether or not any of those days are work days and whether or not the incapacity is total or partial or a combination of both.
System leakage	Leakage is a vague term and can refer to a variety of different matters and have different interpretations. In its simplest form it can refer to employees receiving compensation that they strictly should not have received and to employers that strictly have under paid premiums. Both situations adversely impact the financial status of the scheme and there are many, many examples. Leakage occurs from the actions of many stakeholders in the scheme including

employers, employees, WorkCover, insurers, doctors, lawyers, and all others. Leakage can refer to direct fraud or to avoidance or to malingering and other views. Employer and employee fraud is one form of leakage. Examples of direct fraud include a worker claiming compensation for an injury that did not occur and an employer under declaring wages or not insuring for workers compensation or an employer deliberating using the wrong industry classification for premium calculation. Other examples of leakage include workers staying on compensation when they are strictly well enough to return to work using doctors medical certificates to substantiate the injury, employer splitting the company into smaller legal entities to reduce premiums paid, putting pressure on insurers to reduce case estimates to reduce the employers premium, incorrect classification of employer industry classification by insurers. Insurer's poor management is the cause of leakage and can include poor claims management, not undertaking wage audits of employers, not following WorkCover guidelines on case estimating. WorkCover poor management of insurers and stakeholders is a form of leakage. An example is not taking action to improve insurer management of claims.

Abbreviations

1987 Act	<i>Workers Compensation Act 1987</i>
1998 Act	<i>Workplace Injury Management and Workers Compensation Act 1998</i>
2001 Act	<i>Workers Compensation Amendment Act 2001</i>
AIG	Australian Industry Group
AMA	American Medical Association
AMA Guides	AMA Guides to the Evaluation of Permanent Impairment, 5 th ed.
ANZIC	Australian New Zealand Industry Classification
APLA	Australian Plaintiff Lawyers Association
APRA	Australian Prudential Regulation Authority
APS	Australian Psychological Society
CFMEU	Construction, Forestry, Mining and Energy Union
Commission	Workers Compensation Commission
Ernst & Young	Ernst & Young ABC, the Committee Consultant Actuaries
Further 2001 Act	Workers Compensation Legislation Further Amendment Act 2001
GAF	Global Assessment of Functioning
Grellman Report	Report of the Inquiry into Workers Compensation System in NSW 1997
ICA	Insurance Council of Australia
Insurance Act	<i>Insurance Act 1973 (Cth)</i>
IRG	Industry Reference Group
IT	Information Technology
MCR	Minimum capital requirements

MGA	Managing General Agents
OH&S	Occupational health and safety
OH&S Act	<i>Occupational Health and Safety Act 2000</i>
OH&S Reg	Occupational Health and Safety Regulation 2001
PAC	Public Accounts Committee
PDS	Premium Discount Scheme
PIRS	Psychological Injury Rating Scale
PWC	Pricewaterhouse Coopers
RANZCP	Royal Australian and New Zealand College of Psychiatrists
Scheme	NSW Statutory Workers Compensation Scheme
Sheahan Report	Report of the Commission of Inquiry into Workers Compensation Common Law Matters, August 2001
Tillinghast	Tillinghast Towers-Perrin (Scheme actuaries)
WCRS	Worker Compensation Resolution Service
WIMS	Workplace Injury Management Services
WorkCover	WorkCover Authority of NSW
WorkCover Guides	WorkCover Guides for the Evaluation of Permanent Impairment, 1 st ed, December 2001

Chapter 1 Introduction ⁵

Structure of the Committee's third interim report

- 1.1** The body of this report consists of 7 chapters. Chapter 2 continues the Committee's monitoring role by evaluating the implementation of the 2001 legislative reform program to date. The chapter updates and further explains the financial position of the Scheme, drawing on evidence received by the Committee from the NSW workers compensation scheme ("the Scheme") actuaries, Tillinghast-Towers Perrin ("Tillinghast"), representatives of WorkCover NSW ("WorkCover") and the NSW Auditor-General Mr Bob Sendt and Assistant Auditor-General Mr Lee White, and discusses the applicability of Australian Prudential Regulation Authority ("APRA") guidelines to WorkCover.
- 1.2** Chapter 3 focuses on injury prevention and occupational health and safety ("OH&S"). A statistical picture of the incidence of workplace injury is drawn to highlight the importance of injury prevention. Key features of the new OH&S legislation, which commenced in September 2001 are briefly described and the Premium Discount Scheme ("PDS"), one of WorkCover's primary means for encouraging employers to focus on OH&S, is examined.
- 1.3** Chapter 4 outlines insurers' role in the workers compensation scheme in NSW. The Chapter examines insurers' performance and asks the question, what role should insurers play in the Scheme?
- 1.4** Chapter 5 follows by exploring WorkCover's role as a regulator. More specifically, WorkCover's role in regulating the insurers is considered. In particular the licensing and remuneration policies of WorkCover are explored in some depth. The regulation of self insurers is briefly explored as is WorkCover's regulation of other parties.
- 1.5** Chapter 6 outlines the current injury management system, as utilised by WorkCover, as well as recent reforms undertaken by WorkCover and the Government in relation to injury and claims management. It explores the importance of early reporting and presents a variety of views on the success of early injury management processes in the NSW Scheme.
- 1.6** Chapter 7 explores the assessment of both physical and psychological permanent impairment. It provides a brief summary of how the assessment of permanent impairment has changed under recent legislation, as well as a summary of permanent impairment guidelines. The Committee has received extensive evidence during its inquiries on the appropriateness of the assessment scales, as well as whether non medical professionals should be allowed to undertake the assessments.
- 1.7** Chapter 8 identifies some options for further reform of the Scheme. These options have been developed with the assistance of the Committee's consultant actuaries, Ernst & Young ABC ("Ernst & Young"). The options included in Chapter 8 are not exhaustive, nor is it suggested that the Committee will necessarily make a recommendation based on all the

⁵ The background to the Inquiry and progress of the Inquiry as far as the tabling of the Committee's second interim report on 17 January 2002, is summarised as Appendix 1.

options identified. These options, and others including those identified in the Committee's second interim report, will be evaluated in the fourth and final report.

1.8 No recommendations are made in this report. The Committee draws conclusions at the end of each section where relevant and appropriate. Recommendations will be made in the fourth and final report.

1.9 The Committee welcomes comments by stakeholders in relation to the options identified in Chapter 8. Comments may be forwarded to the Committee using the contact details listed on page iii of this report.

Conduct of the Inquiry

Additional submissions

1.10 The Committee received 2 additional submissions to the inquiry since the date of the second interim report. A full list of submissions is presented as Appendix 11.

Public hearings and Questions on Notice

1.11 The Committee conducted three public hearings in preparation for its third interim report. The first hearing conducted on 14 February 2002 involved a presentation by the Hon John Della Bosca MLC, Special Minister of State, Assistant Treasurer and Minister for Industrial Relations. The hearing presented an opportunity for the Committee to question the Minister and representatives of WorkCover about the final costings of the 2001 legislative reforms, as foreshadowed in Chapter 2 of the Committee's second interim report. The Scheme's actuaries, Tillinghast-Towers Perrin ("Tillinghast"), gave evidence in this regard before the Committee at its second day of hearings, on 6 March 2002.

1.12 The second and third days of hearings, on 6 and 7 March 2002, focussed on Scheme management issues, particularly WorkCover's relationship with insurers, claims and injury management and OH&S and injury prevention, and involved representatives of the medical and legal professions as well as insurance industry representatives and WorkCover representatives. A full list of witnesses appears as Appendix 12.

1.13 A list of documents tabled by witnesses during the public hearings appears as Appendix 13.

1.14 Witnesses at the Committee's hearings agreed to take a number of questions on notice providing further information to the Committee than what was possible at the time of their appearance. The Committee found this process useful in obtaining additional and more technical information that may not normally be presentable orally. Answers to questions on notice are included in the text of this report where relevant. Questions on notice to the Minister arising out of the public hearings on 14 February and 6 and 7 March and responses received to date, are presented as Appendix 10.

Workers compensation forum – “The way forward on Scheme ownership and design”

1.15 On 15 March 2002, the Committee conducted a public forum into workers compensation in NSW, titled “The way forward for Scheme ownership and design”. Fifteen delegates, representing a diverse range of stakeholder experience in the Scheme, were invited to attend. The Forum was facilitated by Sir Laurence Street. Delegates were invited to submit papers focussing Scheme design, with particular reference to the issues of stakeholder ownership, financial ownership and incentive structures/measures.

1.16 The Chairman of the Committee, the Rev Hon Fred Nile MLC, explained the purpose of the Forum during his opening remarks:

The Committee is presently preparing its third interim report, which is due to be tabled on 17 April this year. This report will focus on elements of scheme management, including injury prevention, claims management and the relationship between WorkCover and insurers. Our third interim report will also outline a number of options for future reforms of the scheme which will form the basis for the Committee's recommendations, to be contained in the Committee's final report that we propose to table on 3 September this year. This forum is an important part of this process, particularly with respect to developing options and hopefully recommendations for Parliament. The Committee welcomes feedback on any of the options contained within its third interim report.

The backdrop to the inquiry is a decade of deterioration in the scheme's financial position. The Government has introduced significant reforms over the past year in an attempt to redress the scheme's financial problems. The full effects of these reforms will not be evident for some time. The Government remains committed to a third phase of reform to deal with further scheme design issues. Forums such as this one provide stakeholders with an opportunity to have an input into those reforms.⁶

1.17 The Forum was divided into two sessions. The morning session was open to the public. In that session, delegates were invited to make presentations addressing their papers and highlighting areas of particular concern to them. Ten delegates accepted the Committee's invitation and made public presentations. The afternoon session was for delegates only. In this session, a wide ranging discussion on various elements of the Scheme took place. The afternoon session was then summarised by Sir Laurence Street, who stated that:

...the overarching element that seemed to pervade almost every topic [was] the need for greater education which will then generate a greater awareness of the ownership by employers and workers of this very important aspect of our social structure.⁷

1.18 The delegate list, related documents and transcripts from the Forum are presented at Appendix 6.

⁶ Rev Hon Fred Nile, 15 March 2002, p 1.

⁷ Summary of Forum by Sir Laurence Street, March 15, 2002, p 38.

Minutes of the proceedings of the Committee

- 1.19** The Committee considered the Chairman's draft third interim report at its meeting on 8 April 2002. The Minutes of the Proceedings of the Committee, since the second interim report was tabled on 17 January 2002, are presented as Appendix 14, and detail relevant resolutions and activities of the Committee over the course of preparing its third interim report.

Clarification

- 1.20** On page 25 of the Committee's second interim report, reference was made to a paper presented to the 8th Institute of Actuaries Accident Compensation Seminar 2000. The Committee cited the paper as being co-authored by Ms Win-Li Toh and Mr Daniel Tess from PricewaterhouseCoopers, based on information received from the Institute of Actuaries. Subsequent to tabling the second interim report, the Committee was informed that the paper was in fact authored by Ms Toh, Mr Michael Playford and Ms Jenni Neary.

Chapter 2 **Current state of the NSW Workers Compensation Scheme**

Implementation of 2001 legislative reforms

2.1 The Minister, the Hon John Della Bosca MLC outlined to the Committee the objectives of the recent legislative reform program, and stated that he is confident that many of the objectives have been met:

I am confident ... that we have achieved many of our objectives of scheme reform. Since I have been the Minister we have been underlining that a critical series of initiatives for us was to get a better scheme in terms of dispute resolution so that people did not have to wait substantial lengths of time to resolve issues; to get a scheme which concentrated on injury management and concentrated on the victims of industrial accidents and so on being able to return to work as soon as they were able; to focus on claims management, injury management and other issues rather than disputation; and to focus on a dispute settlement procedure which was much less formalistic and able to deliver its results much more quickly than had been the case in the old scheme.⁸

2.2 In its second interim report, the Committee outlined details of WorkCover's legislative reform implementation plan for 2001-2002. The plan identifies 16 discrete projects that WorkCover will undertake during 2001-2002 to implement the 2001 workers compensation legislative reform program, and establishes target dates for their completion. The plan was included in its entirety as Appendix 5 of the Committee's second interim report.

2.3 The Committee concluded that it would monitor the completion of projects identified by WorkCover against key dates specified in their plan. The legislative implementation plan was not specifically raised during hearings in preparation for the third interim report. To assist the Committee, WorkCover was requested to provide details of projects completed against target dates specified in their plan. The material was received on Monday 8 April, 2002 after the draft report had been finalised. The Committee is therefore not in a position to make definitive conclusions regarding the successful implementation of legislative reform projects.

2.4 The information provided by WorkCover regarding the implementation of the Scheme reforms is inserted in full as Appendix 4. Further analysis of the implementation of Scheme reforms will occur in the Committee's fourth and final report.

2.5 The Committee has drawn conclusions relating to WorkCover's implementation of the programs from general evidence and other documents received.

⁸ Evidence of the Hon John Della Bosca MLC, Special Minister of State, Assistant Treasurer and Minister for Industrial Relation, 14 February 2002, pp 5-6.

Establishment of the Workers Compensation Commission

- 2.6** The target date for establishment of the Workers Compensation Commission (“the Commission”) was January 2002. In response to a question from the Committee regarding the operation of the Commission in the first month after its establishment, Ms Kate McKenzie, General Manager, WorkCover NSW, stated:

I think the real truth is that it is far too early to say. It is only the middle of February; not much happened in January, unsurprisingly. I think the last figures we got suggested that there had only been three or four matters go to the commission. The early signs are encouraging in terms of the IT system being up and the aims that we set of trying to have a paperless system that could be run as efficiently as possible. That seems to be going okay, but I think it is too early to say. We need to wait at least another six or seven months before we have a clear picture of how that is travelling.⁹

- 2.7** The Committee will continue to monitor the operation of the Commission as it becomes fully operational.

Claims Assistance Service fully operational

- 2.8** The target date for the claims assistance service to be fully operational was 1 January 2002. Ms McKenzie explained the operation of the service to the Committee:

Our claims assistance service that we as established on 1 January is beginning to gather data about how this is going. We do reviews with providers of these services to see how they are going ... some of it is anecdotal type evidence and there are some inconsistencies in what you hear back about how these things are going. So until we get into the business of doing the more formal work, we really do not have too much objective evidence about how it is going.¹⁰

Agreements entered into for WorkCover Assist

- 2.9** WorkCover Assist is a program that provides targeted assistance to trade unions and employer groups to assist in the development and implementation of effective and practical industry specific strategies that are directly related to the reform initiatives contained in the 2001 legislative reform package.¹¹ To be eligible for funding under the program, the organisation must be able to clearly demonstrate that the funding will directly assist organisation members in meeting the objectives of the new legislation.¹²

⁹ Evidence of Ms Kate McKenzie, General Manger, WorkCover NSW, 14 February 2002, p 30.

¹⁰ Evidence of Ms Kate McKenzie, General Manger, WorkCover NSW, 6 March 2002, p 27.

¹¹ For the purposes of the WorkCover Assist program, the reform package includes the recent OH & S legislation as well as the workers compensation legislation.

¹² Information on the WorkCover assist program is obtained from WorkCover NSW's website: www.workcover.nsw.gov.au/html/wap_about.asp, 24 March 2002.

2.10 Ms McKenzie explained to the Committee the purpose of the WorkCover Assist program:

[The] WorkCover Assist program, ... is a special funding program providing financial assistance to employer associations and employee associations to work through the legislative reforms that have been introduced. It provides direct assistance with respect to understanding the principles of risk management and adopting those principles in the workplace.¹³

2.11 The target date for entering into agreements for the WorkCover Assist program was January 2002.

2.12 In response to a question regarding the distribution of the program's funding, Ms McKenzie told the Committee:

Because we had more applicants than we had money, we went through a merit-based process to pick those applicants that seemed to have the best ideas of what they were going to do. I must say that we got some very good quality applications, which is quite encouraging. Hopefully this will mean that we can roll out across employer groups and the unions a lot of information about how the new scheme is intended to operate. We are hoping that that will really help with the smooth implementation of it because there will be a greater understanding over time as these programs roll out about what is supposed to be happening under the new regime. As members of the committee would know, it involves the occupational health and safety regime as well as the workers compensation regime, so we have got a good cross-section of propositions put to us by various groups. That is all being rolled out now.¹⁴

2.13 Five million dollars has been allocated to the WorkCover Assist program, which is initially intended to run for a period of 12 months. Forty seven grants were made under the program, with the successful organisations being announced in the *NSW Government Gazette* on 19 December 2001.¹⁵

Provisional Liability performance monitoring system operational

2.14 The merits of provisional liability was discussed at length during the hearings. (see para 6.61 of this report for further detail). The target date for the provisional liability performance monitoring system being fully operational was February 2002.

¹³ Evidence of Ms Kate McKenzie, General Manger, WorkCover NSW, 6 March 2002, p 46.

¹⁴ Evidence of Ms Kate McKenzie, General Manger, WorkCover NSW, 14 February 2002, p 51.

¹⁵ *WorkCover News*, vol 48, March-May 2002, p 6.

Report and recommendations on outcome of Injury Management Pilots to Minister

2.15 The target date for the report and recommendations on the outcome of Injury Management Pilots to be given to the Minister was March 2002. In evidence to the Committee in relation to the report on the pilots Ms McKenzie stated:

They are gathering all the data that came out of that pilot with a view to providing us with a report in April that tells us what lessons there are to be learned from it.

and

As I say, the data from all those pilots is currently being looked at by Monash University and we are hopeful that when we get the report back we will have some conclusions to draw about which of those things appear to have contributed to improvements, from the point of view of injury management and outcomes for injured workers.¹⁶

Conclusion 1

On 8 April, 2002 WorkCover provided an updated report on the status of the legislative reforms, which the Committee has not had time to review in depth.

It is too early to determine whether or not the projects are successful in implementing the legislative reforms until they are fully operational. Under terms of reference 1(b), the Committee will continue to monitor the completion of projects identified by WorkCover against the key dates specified in their Implementation Plan during the remainder of the Committee's inquiry, and will report on WorkCover's progress in its fourth and final report.

Financial impact of 2001 legislative reforms

2.16 The level of Scheme savings to be achieved by the 2001 legislative reforms was discussed in public hearings held in November 2001 in preparation for the Committee's second interim report. Following the hearings Tillinghast provided the Committee with three additional documents examining the impact of the reforms on the Scheme. The Committee was concerned that the estimated savings to be achieved by the reforms varied considerably between the evidence given by Mr Finnis on 21 November 2001, the draft report dated 26 November 2001 and the final report dated 14 January 2001. There was further concern expressed regarding the appropriate level of estimated savings to be adopted – the actuaries' 'low' level or a more optimistic 'high' level. The latter level was adopted by the Minister and WorkCover in relation to the estimated financial impact of the reforms.

2.17 The final report received by the Committee from Tillinghast dated 14 January 2002 provided the Committee with insufficient time to evaluate its contents or test the figures contained within it before the second interim report was due to be tabled on 17 January

¹⁶ Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, 6 March 2002, p 27.

2002. As foreshadowed in the second interim report, Committee Members questioned the Minister, WorkCover and Tillinghast about what appeared to be conflicting and confusing advice in relation to the financial impact of the legislative reforms, in hearings held in preparation for this report.¹⁷ Of particular focus were the areas of concern identified in para 2.16 above.

2.18 The representatives of both WorkCover and Tillinghast very strongly advised the Committee that, until the *Workers Compensation Legislation Further Amendment Act 2001* ("Further 2001 Act") was passed and the regulations enabling that Act were completed, it was almost impossible to complete a costing of the effect of the reforms on the Scheme's deficit. Ms McKenzie stated to the Committee:

As the Committee notes in its own report said, it is very difficult to cost these sorts of reforms. There is a lot of uncertainty attached to them. There is a lot of uncertainty before a bill is passed by Parliament as to whether it will come out the other end the same way it went in or will have substantial amendments made to it. All of those things potentially have big implications for costings.

There was a lot of cultural change that we were aiming for in the reforms. Actuaries really cannot cost that. As the Committee itself said, very tight time frames were associated with this. The reforms were evolving through a series of consultations with stakeholders and it was very difficult in that environment to be confident about the accuracy of something that was produced with speed ...¹⁸

2.19 When explaining the differences between the figures contained in the reports provided to the Committee (particularly the one-off impact of the reforms) Mr Finnis reiterated the inherent uncertainty of costing the impact of legislation during the period that the legislation was being developed:

In our view it has been at best extremely difficult, perhaps almost impossible, to determine a reasonable estimate of the total one-off impact of the deficit prior to the implementation of the reforms which introduced lump sum cut-off dates; our prior experience in these sort of reforms has shown that the surge of applications, a result of claimants and their advisers avoiding the more stringent conditions following implementation of the reforms. That surge is unpredictable for lump sum claims but does happen. Common law and commutations are the obvious examples.

We believed that the proposed reform package at 26 November 2001 would result in such a surge of applications, resulting in any attempt to assess the retrospective impact of the proposed reforms being highly uncertain and, in our view, of limited value at that time. As a result, the scope of our draft 26 November report expressly stated that we did not assess that retrospective impact. We were basically waiting until we saw those common law statements of claims, those commutation applications, which we have now seen and which we have now allowed for in our \$809 million-\$810 million estimate.¹⁹

¹⁷ Ernst & Young Second Report, p 21. This report is appended to the Committee's Second Interim Report as Appendix 1.

¹⁸ Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, 14 February 2002, pp 27-28.

¹⁹ Evidence of Mr David Finnis, Principal, Tillinghast-Towers Perrin, 6 March 2002, p 11.

2.20 The NSW Auditor-General, Mr Bob Sendt, also discussed the difficulties faced by actuaries attempting to cost legislative changes to a workers compensation scheme that has undergone the number and extent of changes experienced in NSW over recent years:

We are not here to particularly defend the actuarial profession or the expertise of any particular actuaries. But I would have to say that one of the things that actuaries rely on in making forecasts or projections is the analysis of recent trends. That work is made much more difficult in a situation such as workers compensation where there have been a number of changes over a number of years which (a) disturb the existing trends and (b) may be establishing a trend of its own. In that case, the work of actuaries is particularly difficult.²⁰

2.21 The Committee noted that two figures were provided by Tillinghast as an estimated one-off reduction in the deficit resulting from the reforms. The first figure, \$1.33 billion, was described to the Committee as a figure based on WorkCover achieving their implementation targets. The second figure, \$810 million, is Tillinghast's actuarial best estimate. In explaining the difference in the figures to the Committee, Ms McKenzie stated:

Our view was that the more likely outcome was the more optimistic scenario, and they [Tillinghast], as actuaries are wont to do, took the more pessimistic view of what they thought the outcome is going to be.²¹

and

...the actuaries, not surprisingly, are always going to err on the side of conservatism and give us less credit until they see development, over time, of how these reforms roll out. Once again, as we said last time, there are a lot of factors at play here. We are trying to take account of cultural change that we are achieving here and a whole range of different reforms, and how some of them will pan out is a bit difficult to predict until we have some experience. In that sort of context, the accuracy of any bottom-line number is not something that should be focused upon.²²

2.22 Ms McKenzie continued by warning of the dangers of focussing on a bottom line number in relation to the effect of reforms on the Scheme generally:

I think it is actually quite misleading to have so much of a focus on that bottom-line number. It has to be read in the context of that entire report that talks about a very large number of variables that have to be factored into this. We will be able to get more accurate over time ... about what the most likely outcomes are.

2.23 Mr Rod McInnes, Assistant General Manager, Insurance Division, WorkCover NSW, further explained the differences to the Committee:

Obviously, the lower scenario is what they are calling their actuarial central estimate, which is their midpoint. The highest scenario is, if you like, their advice on what result we would get if we, as we have described it, mainly achieved the targets that we originally set. This comes back to some of the issues that have

²⁰ Evidence of Mr Bob Sendt, NSW Auditor-General, 14 February 2002, p 15.

²¹ Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, 6 March 2002, p 28.

²² Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, 6 March 2002, pp 28- 29.

been talked about—the conservatism of the actuarial process. They are not confident that the targets that we have set ourselves will be met. Obviously, we are aiming to achieve those targets, and ideally better those targets.²³

2.24 Mr Finnis confirmed the figure of \$810 million as Tillinghast's 'best estimate', and affirmed a statement made by himself in a report to the Committee dated 7 January 2002, that:

The impact of the Scheme reforms under the low savings scenario [Tillinghast's best estimate] was not substantial enough in itself to reduce the deficit without the aid of further premium increases or reductions in the break even cost of the Scheme.²⁴

2.25 In conclusion Mr Finnis stated in evidence before the Committee in relation to the impact of the 2001 legislative reforms on the Scheme deficit:

... the position has been improved. Certainly it does not solve the whole problem.

2.26 It was unanimously stated by all parties that they were satisfied with the actuarial advice provided by Tillinghast. Ms McKenzie stated, in response to a question from the Committee:

We, of necessity, rely on their [Tillinghast's] professional advice and expertise. They are a well-respected, renowned actuarial firm. We have got no reason to think that they are giving us anything other than their best professional advice.²⁵

2.27 Mr Finnis stated:

We would wish to make it clear to the standing committee that we are satisfied that we have performed our work for WorkCover professionally, objectively and in accordance with the scope of our work, whilst applying our best endeavours to meet reporting time frames asked of us by WorkCover.²⁶

Conclusion 2

The Committee concludes that actuarial costings are inherently uncertain. The one-off impact on the Scheme's deficit should be evident later this year while the impact on an annual basis may not be fully evident for as many as three to five years and will be subject to revision.

²³ Evidence of Mr Rod McInnes, Assistant General Manager, Insurance Division, WorkCover NSW, 6 March 2002, p 43.

²⁴ David Finnis & Sally Wijesundera, Tillinghast-Towers Perrin, *Actuarial Projections of Funding Scenarios for the NSW Workers Compensation Scheme*, 7 January 2002, p 13, affirmed in evidence of Mr David Finnis, Principal, Tillinghast-Towers Perrin, 6 March 2002, pp 17-18.

²⁵ Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, 14 February 2002, p 29.

²⁶ Evidence of Mr David Finnis, Actuary, Tillinghast-Towers Perrin, 6 March 2002, p 2.

Conclusion 3

The Committee will look to the 31 December 2001 Scheme evaluation for an indication of the one-off impact on the deficit of the 2001 reforms in light of the estimated, optimistic, \$1.33 billion one-off impact and the more realistic estimate of \$810 million one-off impact.

- 2.28** Mr Finnis tabled a report as part of Tillinghast's evidence before the Committee, outlining the role of Tillinghast in the reform process. The report provides the basis upon which representatives of Tillinghast gave evidence before the Committee on 6 March 2002 and, therefore, Tillinghast state that it forms part of their evidence to the Committee. The report is reproduced as Appendix 2.

Financial accountability and ownership

- 2.29** In its second interim report, the Committee identified two ways in which the term 'ownership' may be used.²⁷ These are:

- direct ownership and responsibility for the Scheme's deficit ("deficit ownership") and
- ownership by stakeholders of the Scheme generally.

- 2.30** Ms McKenzie has previously advised the Committee that the Scheme deficit:

... is owned by a statutory trust. It is a creature of the statute. It is not owned by Government. It is run for the benefit of employers and ... it is a legislative construct.²⁸

- 2.31** The concept of a 'statutory trust' was further explained by Mr Douglas Pearce, Chief General Manager, Commercial Insurance and Financial Services, NRMA, in evidence to the Committee:

It goes back to some of the earlier questions as to who owns the deficit, and that financial discipline, or lack of it, we see as the big problem. Our understanding is that it is not the Government who owns the liability, it is not the insurers, definitely, and it is not WorkCover. It seems that the scheme we have is some sort of trust, and the deficit is collectively owned by the employers of New South Wales, but even that is not clear.²⁹ If it ever actually came to it there would be very interesting litigation over the matter.

²⁷ Evidence of Ms Kate McKenzie, General Manger, WorkCover NSW, 21 November 2001 p 59. For further discussion of the problems associated with a lack of ownership of the Scheme and its deficit, see Chapter 4 of the Committee's second interim report.

²⁸ Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, 21 November 2001, p 59.

²⁹ Evidence of Mr Douglas Pearce, Chief General Manager, Commercial Insurance and Financial Services, NRMA, 21 November 2001 p 51.

2.32 The impact of a lack of financial ownership of the Scheme was emphasised by Mr John Walsh, Partner, PricewaterhouseCoopers, during his presentation to the Forum:

Financial ownership in the scheme I think has been non-existent. The Government has distanced itself from recognising the deficit in the accounts, and until recently has not taken the legislative steps necessary to satisfy the requirements. Employers really have not, I think, accepted responsibility to manage claims properly, and insurers, because they have no financial incentives in the scheme, probably have not done the job as well as they should.³⁰

2.33 In its second interim report, the Committee referred to evidence given by Mr Bob Sendt and Mr Lee White, Assistant Auditor-General, before a Public Accounts Committee (PAC) inquiry into the financial disclosure of the WorkCover Scheme Statutory Fund. That evidence stated that the deficit needs to be recorded – that it “has to sit somewhere”.³¹

2.34 The Committee had the opportunity to hear evidence from Mr Sendt and Mr White on the issue of the financial ownership of the Scheme. Mr Sendt pointed out to the Committee that while in his opinion the question of stakeholder ownership of the Scheme is more important than that of financial ownership, the lack of recognition of the Scheme’s finances in the State’s overall financial statements is a concern:

As you will be aware, for a number of years now the Audit Office has been concerned about the WorkCover scheme statutory funds. Our concerns have mainly been the lack of recognition of the scheme’s finances in the State’s over all financial statements. Because of the size of the scheme funds and their net financial position—and hence the impact of the non-recognition—I have qualified the audit opinion on the Treasurer’s total State sector accounts for not consolidating the scheme. ...

From my review of the two interim reports of this Committee issued to date, I note that a conclusion has been drawn that there is an urgent need to establish clear ownership responsibility for the scheme. I think it is important to distinguish, as your reports do, between the issue of accounting recognition and the issue of stakeholder ownership of the scheme. The former may excite accountants and auditors but clearly the latter is more important. Without that accountability for the scheme being clear, parties and sectors may operate in ways inconsistent with bringing financial stability to the scheme.³²

2.35 Mr Sendt restated to the Committee his opinion that:

... yes, the government does have ownership [of the Scheme].³³

³⁰ Presentation of Mr John Walsh, Partner, PricewaterhouseCoopers, 15 March 2002, p 17.

³¹ PAC Inquiry into the financial disclosure of the NSW Workers Compensation Scheme Statutory Funds, 4 May 2000, p 66, quoted in the Committee’s second interim report, para 4.18.

³² Evidence of Mr Bob Sendt, NSW Auditor-General, 14 February 2002, p 11.

³³ Evidence of Mr Bob Sendt, NSW Auditor-General, 14 February 2002, p 18.

2.36 The NSW Audit Office has responded to the question of financial ownership by qualifying the total state sector accounts. Mr White explained to the Committee what this would entail:

It is consolidation of the entity. The WorkCover statutory funds have assets and liabilities, the difference being the deficit. So all of it would go in: you would take in the assets and you would take in the greater liabilities, and it would have a deficit effect.³⁴

2.37 Mr Sendt clarified to the Committee the nature of the qualification. It was not, he explained, a qualification on the grounds that the Scheme was not “a going concern”. Rather, it was a qualification that the growing liability was something that the Government needed to address:

We expressed concern in the last report that while we had not qualified on the basis of the scheme not being a going concern, it certainly was an issue we addressed. We did not qualify it as not being a going concern—which, removing it from accounting and audit speak, basically means if you take the view that the scheme or the entity is not capable of remaining solvent in the short term, an auditor would qualify the opinion. We did not take that view because there were a number of reforms being discussed and being proposed. Also, there was no immediate financial difficulty, in the sense that there were substantial investments of some \$6+ billion had by the scheme. So it was not as though the scheme was in imminent danger of collapse.

Our concern was more about the need for government to address the growing liability. There have been a raft of reforms over recent years, including the more substantial ones in 2001. So we will continue to monitor the position. If it appears over a period of time that those reforms are not working, or other problems arise, clearly the investments of the authority will be run down, and at some stage in the future we might have to revisit our opinion and say that it is no longer a going concern. But at this stage that is not something that we have had to address.³⁵

2.38 Relevant extracts from the Auditor General’s *Report to Parliament 2001 volume 7* are reproduced as Appendix 5.

2.39 The rationale for the Auditor-General’s view was explained to the Committee by Mr White as being based on an understanding of “control”:

Clearly, the employers of New South Wales will have to make contributions, as they do each year in renewing their workers compensation. So they are the people who end up paying. But who is controlling it? I am not sure that Mr [Doug] Pierce [from the NRMA in evidence before the Committee on 21 November 2001] would actually be saying that the employers in New South Wales are controlling it. With accounting standards, it is the concept of control that leads us to bring it back to the government’s total State sector accounts. So there is a distinction there for accounting purposes between who is controlling an organisation and who may necessarily be funding it. So, in the private sector, if you see a scenario with a

³⁴ Evidence of Mr Lee White, NSW Assistant Auditor-General, 14 February 2002, p 17.

³⁵ Evidence of Mr Bob Sendt, NSW Auditor-General, 14 February 2002, p 19.

group of companies, you will see that the holding company will consolidate subsidiary entities into their financial statements, but they may not necessarily be held responsible for making the cash payments for the liabilities of those subsidiaries. So cash flow and control are two different concepts.³⁶

2.40 The Committee questioned Mr Sendt and Mr White about the effect that consolidating the deficit into the total State accounts may have on the overall financial position of NSW. Mr Sendt explained:

It would certainly take a few billion dollars off the Government's net asset position. It certainly would not put the overall balance sheet into deficit. If the results for the year were incorporated—and the results for individual years jump around quite substantially—it may well be that in a particular bad year it would have the effect of putting the State's results into deficit. But, equally, in other years it has broken even or even made a small profit.³⁷

2.41 In relation to NSW maintaining its AAA credit rating, Mr Sendt stated:

The ratings agencies are well aware of the workers compensation situation. They are well aware that the finances of the scheme are not brought into account. I know, from my days working in Treasury, that the rating agencies would query Treasury, when they are doing their annual review, as to what was happening with workers compensation, what reforms might be being planned, and what the outlook was. So the fact that it is not consolidated, or if it were to be suddenly consolidated, I do not think would in itself would affect the ratings. What would affect the ratings would be if the deficit continued to grow and there was no immediate prospect of it being addressed.³⁸

and further

I know the ratings agencies, in determining how sound they regard the Government finances, take WorkCover into account. They would have been aware of the growth in the deficit. They are still taking the view that it is not serious enough to impact on the overall State finances. I guess where it would have an impact or would have real economic effects, if I can distinguish from what auditors and accountants might view it as, is if the deficit became such that there was either no real possibility of expecting employers to fund it, hence general taxpayers would have to fund it, or, alternatively, if the premiums or a special levy on the top of premiums had to be imposed and that was so high that it had an impact on investment decisions in the State by employers—for example, if the employers decided not to expand in New South Wales because workers compensation premiums were so high.

What that level is, I do not know. I do not doubt that employers or businesses, when deciding where to invest, look at a whole range of issues from land tax to stamp duty to pay roll tax and to workers compensation as well as where the markets are. How much each of those is weighted in their minds, I cannot say. Certainly we consider it is serious enough at this stage to have reported on it to

³⁶ Evidence of Mr Lee White, NSW Assistant Auditor-General, 14 February 2002, p 19.

³⁷ Evidence of Mr Bob Sendt, NSW Auditor-General, 14 February 2002, p 17.

³⁸ Evidence of Mr Bob Sendt, NSW Auditor-General, 14 February 2002, p 18.

Parliament and to have contemplated at least qualification on the basis of going concern.³⁹

2.42 Mr Sendt was even more definite in response to the question of the impact on the State's AAA credit rating in his presentation to the Forum:

One of the suggestions that has been made from time to time, which my paper addresses, is that including the scheme's results in the total State sector accounts would have an adverse effect on the State's financial standing and the perception of that standing by ratings agencies. As my paper said, I think that view is totally incorrect. From my previous role in Treasury and sitting across the table from ratings agencies year by year, I can advise you quite specifically that that understanding is false. The ratings agencies are very interested in what is happening in workers compensation, as they are in a whole range of issues with the State. They certainly take account of the WorkCover scheme, its financial results, as well as progress that has been made on changes to the scheme. They take those factors into account in determining the State's credit rating and they do question Treasury and other offices at the time of their annual visits on what is happening.⁴⁰

2.43 Another alternative to the Auditor's suggestion of consolidating the WorkCover scheme statutory funds into the total State accounts is that the deficit must belong to the state's employers and should therefore be recognised on their balance sheets. This alternative was discussed by Mr Sendt:

Clearly, Mr Chairman, we have qualified the total State sector accounts because of our belief, based on accounting standards, that it should be recognised in the State's finances. I think the quote from Mr [Doug] Pierce [from NRMA, in evidence before the Committee on 21 November 2001] probably stemmed from a contrary view expressed by someone in government, and perhaps by ourselves, that if you did not accept the view that it belongs in the State's accounts then it must belong somewhere, it cannot just exist in the ether; and if it does not belong in the State's accounts, it must belong in the accounts of the employers. If you take the view, contrary to ours, that the scheme is owned by the employers, then in theory some component of the deficit should be recognised in each of their balance sheets.⁴¹

Conclusion 4

The Committee concludes that the Auditor General's opinion that the Scheme's deficit or profit should be consolidated in the total State accounts should be considered by the independent Review of Scheme Design as reported by the Minister in his letter to the Committee dated 5 April, 2002.

³⁹ Evidence of Mr Bob Sendt, NSW Auditor-General, 14 February 2002, p 22.

⁴⁰ Presentation of Mr Bob Sendt, NSW Auditor-General, 15 March 2002 pp 11-12.

⁴¹ Evidence of Mr Bob Sendt, NSW Auditor-General, 14 February 2002, p 16.

Australian Prudential Regulation Authority (“APRA”) new prudential requirements

2.44 In 1991, the Federal government amended the *Insurance Act 1973* (“the Insurance Act”) to reform the prudential regulation of the general insurance industry in Australia. Section 32 of the Insurance Act empowers APRA to determine prudential standards that must be complied with by all general insurance companies to the extent noted in the Insurance Act or the standards.

2.45 The new prudential regime will come into force on 1 July 2002. In a discussion paper released in March 2001, APRA states that:

Fundamentally, the policy reform aims to provide more effective protection for policyholders, and less intrusive regulation for industry/ Policyholders can be expected to benefit from risk-based capital requirements, better internal governance and stronger market discipline. Companies will benefit from the shift to flexible standards, the option to use internal models, and compliance self-assessment.⁴²

2.46 To provide a framework for the regime, APRA has issued six new prudential standards relating to:

- Capital adequacy,
- Assets in Australia,
- Liability valuation,
- Risk management,
- Reinsurance, and
- Transfer and amalgamation of insurance businesses.

⁴² APRA, *Prudential Supervision of General Insurance Policy Discussion Paper*, March 2001, p i.

- 2.47** In their third report to the Committee, Ernst & Young summarises APRA's new prudential standards⁴³:

A SUMMARY OF APRA'S PRUDENTIAL STANDARDS

The Minimum Capital Requirement (MCR) may be determined by:

- An internal model;
- The prescribed method;
- A combination of the two; or
- A higher APRA requirement.

The prescribed method

MCR is the sum of:

- Insurance risk;
- Investment risk and;
- Concentration risk.

Valuation of insurance liabilities

- An insurer must appoint an approved actuary if insurance liabilities exceed \$20m or the insurance liabilities for long tail classes are material relative to the total insurance liabilities;
- Unearned premium provisions and deferred acquisition costs asset are replaced by an actuarially certified premium liability provision by class including an allowance for claims handling and policy administration expenses;
- Both claims and premium liabilities must include a risk margin to give a 75% probability of sufficiency; and
- Claims and premium liabilities must be discounted at the risk free rate of return.

The Governance Standards

The standards require:

- All key people (as defined) to be "fit and proper".
- Board Declarations covering
 - Compliance with the Act
 - Reinsurance Management Strategy
- Local company Board and Audit Committees to be majority non executive directors.
- Risk management strategy

⁴³ Ernst & Young Third Report, Appendix 3.

The Risk Management Standard

The Risk Management Standard takes a systems-based approach. Each insurer can establish the risk framework that best caters for its processes, information systems and culture.

The Standards also raise a number of new concepts including:

- fit and proper person;
- identification of tolerance for risk;
- tripartite meetings;
- stress testing and scenario analysis;
- assessments of brokers procedures and systems;
- audits of ceding companies; and
- 'whistle blowing' responsibilities.

The 'fit and proper' test is the most wide reaching, covering directors, senior management, auditors and valuation actuaries. Used wisely, it is one of the most powerful tools for a regulator, however, it is also one of the most challenging to find the right balance.

The new reporting requirements

The reporting requirements to APRA will be more extensive and will include:

- annual statement regarding directors;
- annual board declaration;
- quarterly reporting (unaudited);
- annual audited accounts (increased scope);
- annual report from valuation actuary;
- business plan;
- risk management strategy (as updated);
- non-routine reporting by auditor; and
- non-routine reporting by a valuation actuary.

On an ongoing basis, the key requirements will be the board declaration and the valuation report for the actuary.

What risks needs to be covered?

The Standard requires 'effective risk management' and does not limit the requirements to particular areas. However, it does go on to state that at a minimum the categories to be addressed are:

- balance sheet and market risk;
- credit risk; and
- operational risk.

For most companies balance sheet and market risk is likely to be the most complex. This category covers the insurance specific issues of underwriting, claims, product design and pricing as well as liquidity and derivatives.

Some of the requirements that must be documented in the Risk Management Statement include:

- details of global risk management and global reporting for overseas groups and branches;
- statement of willingness and capacity to accept risk;
- criteria for use of policy exclusions and reinsurance;
- assessment of brokers' procedures (underwriting and claims);
- audits of ceding companies (underwriting and claims);
- how emerging experience is to be reflected in price adjustments;
- how product pricing responds to competitive pressures;
- the level of mismatch between asset and liability cashflows; and
- risk tolerance for derivatives.

2.48 Ernst & Young's report is reproduced in full as Appendix 3.

2.49 Section 5 of the Insurance Act specifically excludes "State insurance" from the Act's coverage. Therefore, the NSW workers compensation insurance scheme is not subject to either the Insurance Act or the APRA prudential standards. This point was stressed by Ms McKenzie in response to a question regarding to what extent the NSW Scheme should comply with the APRA requirements:

The scheme is not bound by APRA regulation and has not been bound by APRA regulation, so it [the need to comply with APRA requirements] does not necessarily flow on at all.⁴⁴

2.50 The Committee notes the Scheme's exclusion from coverage by APRA. With respect to the extent to which the Scheme should comply with APRA's requirements, Mr White stated:

WorkCover, including the management, the board of directors and the different boards, has always maintained that they are closer in an analogy to an insurance operation than another type of organisation such as a manufacturer.⁴⁵

2.51 The Committee also notes that while the NSW Workers Compensation Scheme Managed Fund is exempt from the Insurance Act and APRA requirements, specialised insurers may be licensed under the Insurance Act. Self insurers are subject to WorkCover's prudential regulation, which may or may not be consistent with the APRA requirements. The

⁴⁴ Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, 14 February 2002, p 39.

⁴⁵ Evidence of Mr Lee White, Assistant Auditor-General, 14 February 2002, p 25.

inconsistencies between prudential regulation of specialised insurers, self insurers, the Treasury Managed Fund and the Scheme's Managed Fund are discussed in more detail in Part 2 of Ernst & Young's third report to the Committee.

2.52 In light of the Scheme's current financial position, and the objectives of the APRA requirements – to provide a more effective protection to policyholders – the Committee requested Ernst & Young to assist in assessing the extent to which the Scheme should comply with the APRA reforms. The results of Ernst & Young's assessment is contained in their third report to the Committee. Ernst & Young's report contained a number of conclusions. Fundamentally, Ernst & Young stated that:

2.9 Both APRA and WorkCover's prudential requirements that apply to agents/insurers, self-insurers and specialised insurers are designed to protect policyholders and claimants and a degree of consistency between them is desirable.⁴⁶

2.53 One requirement of APRA that has attracted particular attention is the capital adequacy requirement. Currently, WorkCover adopts a 50% level of sufficiency in relation to the Scheme's outstanding claims reserves. This means that there is a 50% chance that the reserves will be sufficient to pay all outstanding claims as and when they arise, and a 50% chance that they will be insufficient. Mr White stated to the Committee that in his opinion, if a 75% sufficiency level is being applied by other insurance organisations then:

I would say that WorkCover would need a good reason not to be consistent with other insurance organisations on that matter.⁴⁷

2.54 Ernst & Young identified some of the issues that would need to be considered in deciding the level of sufficiency that is appropriate for the Scheme. These are:

2.25 The issues to be considered in deciding the level at which the WorkCover Managed Fund should be set reserves are complex. Some of the issues to be dealt with include:

- i. If workers compensation under the Managed Fund is not considered to be insurance then one can argue that reserves should be set at the 50% sufficiency level. That is, workers compensation is a form of social security and premiums are really a tax.
- ii. If NSW workers compensation under WorkCover is viewed as insurance then prudent management using APRA's reform suggests insurance liabilities should be set at the 75% sufficiency level for the Managed Fund.
- iii. The Government considers that the WorkCover Managed Fund assets and liabilities are held in trust for employers. We note the NSW Auditor General does not agree with this view. Under this scenario the Fund would not have access to the tax and other revenue of the State Government. It may then be argued that the Fund should reserve at a 75% sufficiency level.

⁴⁶ Ernst & Young Third Report page 4.

⁴⁷ Evidence of Mr Lee White, Assistant Auditor-General, 14 February 2002, p 20.

- iv. The NSW Auditor General believes the WorkCover Managed Fund should be consolidated in the State Government's financial statements including its balance sheet. Currently it is not treated in this manner. If it was to be included on the Government's balance sheet then the Fund may have access to State taxes to finance the deficit. In this situation it could be argued outstanding claims reserves should be set at a 50% sufficiency level.
- v. Even if the WorkCover Managed Fund was included on the State Government's balance sheet it may not legally have access to State Government taxes to finance the deficit. In this situation it may be argued that the outstanding claims reserves should be set at a 75% sufficiency level.⁴⁸

2.55 Mr Sendt and Mr White discussed the ramifications of increasing the level of sufficiency from 50% to 75%. If the level of sufficiency was to be increased, Mr White highlighted the fact that it would actually increase the deficit quite substantially:

If you moved the sufficiency or if WorkCover decides to move the sufficiency of its outstanding claims provision from a central estimate of 50 per cent up to 75 per cent, that is not automatically a 25 per cent change but it would be a significant increase onto the outstanding claims provision and then automatically onto the unfunded deficit. So that change in accounting policy may very well have a hundreds of millions of dollars change to the unfunded deficit, all other things that we have spoken about being equal.⁴⁹

2.56 Mr Sendt pointed out that the changes are, essentially, accounting changes. Even the increase in the deficit that would result from the change would not be a reflection of the way the Scheme was operating:

I think you have to understand that changing the provision is simply an accounting entry; it does not change the way the scheme is operating. It certainly would increase the numbers, but that in itself would not be cause for concern. What is a cause for concern is if the scheme itself is continuing to run at a deficit and if the premiums continue to be less than what is required to meet the existing level of benefits, or, looking at it the other way, where the benefits are higher than the existing level of premiums will allow.⁵⁰

2.57 The prudential practices of workers compensation and CTP insurance Schemes in Australia vary. An interesting comparison is provided by the Queensland Scheme. Unlike the NSW Scheme, the Queensland Scheme is specifically bound by the Insurance Act and APRA requirements in relation to solvency. The Scheme is established under section 5 of the *WorkCover Queensland Act 1996*. Section 5(5) states in relation to the Scheme being fully funded:

⁴⁸ Ernst & Young Third Report pp 6-7.

⁴⁹ Evidence of Mr Lee White, Assistant Auditor-General, 14 February 2002, p 25.

⁵⁰ Evidence of Mr Bob Sendt, NSW Auditor-General, 14 February 2002, p 24.

- (5) The scheme is taken to be fully funded if WorkCover is able to meet its liabilities for compensation and damages payable from its funds and accounts and maintains –
- (a) minimum solvency or capital adequacy standards under the *Insurance Act 1973* (Cwth), section 29; and
 - (b) solvency required under a regulation.

2.58

It is the policy of the WorkCover Queensland Board to include a risk margin in its outstanding claims liabilities at a sufficiency level of 80% to 85%. WorkCover Queensland's *2000/2001 Annual Report* sets out the reasons why the Board has adopted this level of sufficiency:

WorkCover's actuary, PricewaterhouseCoopers, provides an actuarial valuation twice a year. The estimates of liability are known as central estimates and are intended to have a chance of adequacy in the order of 50%

WorkCover's management prefers a higher degree of confidence than this. The outstanding claims provision therefore includes a prudential margin over the central estimates. The magnitude of the prudential margin is such as to increase the chance of adequacy of the provision to the desired level.

In recognition of this overall uncertainty, the WorkCover Board adopted a prudential margin at 30 June 1999 of 15% of the central estimates. This has been retained, and the provision can be said to have an intended probability of sufficiency of between 80% and 85%.⁵¹

Conclusion 5

The Committee concludes that the issue of whether there is merit in adopting the APRA prudential requirements should be considered by the independent Review of Scheme Design as reported by the Minister in his letter to the Committee dated 5 April, 2002.

⁵¹ WorkCover Queensland *2000/2001 Annual Report*, p 22.

Chapter 3 Occupational health and safety/injury prevention

The importance of occupational health and safety/injury prevention

- 3.1** The Workplace Injury Management and Workers Compensation Act 1998 (“the 1998 Act”) provides in section 3:⁵²

System objectives

The purpose of this Act is to establish a workplace injury management and workers compensation system with the following objectives:

- (a) to assist in securing the health, safety and welfare of workers and in particular preventing work-related injury,

...

- 3.2** The Committee recognises the importance of workplace injury prevention and occupational health and safety (“OH&S”) to not only the health and welfare of workers in NSW but also to the financial position of the Scheme. This understanding of the important role of OH&S was affirmed by Ms Kate McKenzie, General Manager, WorkCover NSW during her presentation to the Forum:

... I think it is always very important to bear in mind the importance of the occupational health and safety side of this debate and the contribution that employer attention to occupational health and safety can make to the improvement in the rates of injury to workers and therefore to the financial health of the scheme, a point that is often forgotten unfortunately.⁵³

- 3.3** Similarly, Mr John Walsh, Partner, PricewaterhouseCoopers, identified a lack of responsibility with regard to workplace safety on the part of employers as a significant underlying problem of the Scheme:

In particular, I think the underlying problems are those of poor ownership of the mutual responsibilities in the workplace on the part of the employers to recognise that workplace injury is a part of doing business and they need to accept that and they need to take care of the workplace safety and the injured worker when a claim occurs, and on the part of the claimant, to recognise that the main responsibility is to address their injury and get back to work, rather than to seek a

⁵² Other objectives of the Scheme outlined in section 3 include: to provide prompt treatment of injuries, effective and productive management of injuries and necessary medical and vocational rehabilitation following injuries in order to assist injured workers and to promote their return to work as soon as possible; to provide injured workers and their dependants with income support during incapacity, payment for permanent impairment or death, and payment for reasonable treatment and other related expenses; to be fair, affordable, and financially viable; to ensure contributions by employers are commensurate with the risks faced, taking into account strategies and performance in injury prevention, injury management, and return to work, and to deliver these objectives efficiently and effectively.

⁵³ Presentation of Ms Kate McKenzie, General Manger, WorkCover NSW, 15 March 2002, p 3.

maximum in terms of financial compensation. From my point of view, those dynamics are the underlying problems of the scheme, and still remain that way.⁵⁴

- 3.4** Initiatives such as industry reference groups (IRGs), the Premium Discount Scheme and Small Business Strategy and WorkCover Assist have been identified by WorkCover as aiming to improve OH&S.⁵⁵

Incidence of workplace injury

- 3.5** WorkCover's *Regulatory Impact Statement for the proposed Occupational Health and Safety Regulation 2001*, prepared as part of the formal review of the proposed regulation, concludes in relation to workplace injury and disease:

There is an unacceptably high level of injury and disease in the workplace.⁵⁶

- 3.6** The following sections describe the number and incidence of work related fatalities and injury in NSW for the period 1991/92 to 1999/00, with particular reference to the period 1999/00.

Work related fatalities

- 3.7** During the period 1991/92 to 1999/00, a total of 1,574 fatalities were reported in NSW. Of these:

- 562 resulted from workplace injures,
- 649 resulted from non-workplace injuries⁵⁷ and
- 361 were from occupational disease.

- 3.8** The following table illustrates the number, incidence and frequency rate of workplace fatalities between 1987-88 and 1999/00. In the following tables, "Incidence" refers to the number of fatalities per 100,000 employees at risk. "Frequency rate" is the number of fatalities per million hours worked.

⁵⁴ Presentation by Mr John Walsh, Partner, PricewaterhouseCoopers, 15 March 2002, p 17.

⁵⁵ Correspondence received from WorkCover 5 March 2002, p 6.

⁵⁶ *Regulatory Impact Statement for the proposed Occupational Health and Safety Regulation 2001*, p 9.

⁵⁷ Non-workplace injuries refer to an injury occurring where the employee was away from the workplace but where the worker is considered on duty. Road accidents arising in the course of duty as well as commuting accidents and accidents while away from work during a recess are also included in this category. There were two fatalities for which the nature of occurrence was unknown.

Table 3.1 - Workplace fatalities, 1987/88 – 1999/2000.

Year	Number	Incidence	Frequency rate
1991/92	177	8.7	0.05
1992/93	156	7.6	0.04
1993/94	185	8.9	0.05
1994/95	177	8.0	0.05
1995/96	181	7.9	0.05
1996/97	173	7.5	0.04
1997/98	181	7.8	0.04
1998/99	163	6.8	0.04
1999/00	181	7.2	0.04
Total	1574	n.a	n.a

Source: WorkCover NSW, Statistical Bulletin 1999/2000, p 19.

- 3.9** The Committee notes that the statistics in Table 3.1 are based solely from the workers compensation system and represent compensated injuries. As such they do not include: fatalities to self-employed people; where the person was covered by the Scheme but the funeral expenses have not been made; if there were no dependants to pay the death benefits; fatalities related to Commonwealth employees, and fatalities occurred due to dust diseases with the exception of coal mines.
- 3.10** From table 3.1, a decreasing trend in the incidence of workplace fatalities over the period 1987/88 to 1999/00 is observable, with the lowest incidence reported in 1998/99. The frequency rate was more stable over the period since 1991/92 varying only slightly between 0.04 and 0.05 fatalities per million hours worked.
- 3.11** As noted, compensated fatalities as recorded in Table 3.1 comprise only a portion of work related fatalities each year in NSW. In WorkCover's *Regulatory Impact Statement* WorkCover estimated an average of 822 deaths each year in NSW due to their work during the period 1991/92 to 1996/97. This figure comprises the compensated fatalities described above as well as uncompensated fatalities and estimated unreported fatalities.
- 3.12** Certain industries experienced higher levels of workplace fatalities than others. In 1999/00, the mining, agriculture, forestry and fishing, construction and transport and storage industries had incidence rates well above the average NSW incidence rate of 7.2 fatalities per 100,000 employees at risk. This is depicted in table 3.2:

Table 3.2 - Number and incidence of workplace fatalities, selected industries, 1999/2000.

Industry	Number	Incidence
Mining	9	54.7
Agriculture, forestry & fishing	16	31.7
Construction	32	18.4
Transport & storage	21	17.1
Electricity gas and water	2	8.9
Communication services	2	8.5
Manufacturing	28	83.5
Personal and other services	7	7.7
Cultural and recreational	4	7.3

Source: WorkCover NSW, *Statistical Bulletin 1999/2000*, p 20.

3.13 In relation to the occupations which experienced the greatest number of work related fatalities, labourers had the highest number of fatalities with 53. Within this group, miscellaneous labourers and related workers had the highest numbers – 20, with an incidence of 13.6. Plant, machine operators and drivers experienced the second highest number of work related fatalities with 63. Within this group, road and rail transport drivers had the highest number – 24, with an incidence of 31.0. The highest number of work related fatalities occurred in the 50-54 years age group with 32, followed by the 25-29 years age group with 21, the 35-39 years group with 21 and then the 40-44 years age group with 20.⁵⁸

3.14 The recorded reasons for workplace fatalities, in order of frequency include:

- being hit by moving objects,
- vehicle accident,
- being hit by falling objects,
- falls from a height,
- contact with electricity,
- being trapped by moving objects, and
- single contact with chemical substance.⁵⁹

3.15 Over the period 1991/92 to 1999/00, the largest number of fatalities occurred in the inner Sydney region with 239 or 15% of all fatalities. This was followed by Newcastle with 111 or 7% and Murray-Murrumbidgee with 101 or 6.4% of all fatalities.⁶⁰

⁵⁸ WorkCover NSW, *Statistical Bulletin 1999/2000*, p 20.

⁵⁹ WorkCover NSW, *Statistical Bulletin 1999/2000*, p 22.

- 3.16** A study conducted by WorkSafe Australia in 1991 concluded that pre-existing unsafe practices, when combined with human error, were the most common cause of work related deaths. Furthermore, the study concluded that 97% of traumatic deaths in the workplace were preventable.⁶¹

Non-fatal workplace injuries

- 3.17** A workplace injury is defined in section 3 of the 1998 Act to be:

Injury:

- (a) means a personal injury arising out of or in the course of employment, and
- (b) includes:
 - (i) a disease contracted by a worker in the course of employment, where the employment was a contributing factor to the disease, or
 - (ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration, but
- (c) does not include (except in the case of a worker employed in or about a mine to which the *Coal Mines Regulation Act 1982* applies):
 - (i) a dust disease, or
 - (ii) the aggravation, acceleration, exacerbation or deterioration of a dust disease.

- 3.18** A workplace injury therefore includes an accident that occurs at the workplace, whether during work or during a work break, and where the worker's activity is under the control of an employer. These include accidents occurring in premises at which the worker is employed, and injuries that occurred while the employee was working at a location other than their normal workplace or base of operations.⁶²

- 3.19** Since the period 1996/97, when the number of workplace injuries peaked at 44,654, there has been a steady decrease in the number of workplace injuries: the 1999/00 figure of 39,531 was approximately 12% lower than the 1996/97 figure. Table 3.3 illustrates the number of workplace injuries for the period 1991/92 to 1999/00:

⁶⁰ WorkCover NSW, *Statistical Bulletin 1999/2000*, p 20.

⁶¹ WorkSafe Australia, *The Role of Work Practices in Occupational Accidents 1991*, quoted in *Regulatory Impact Statement for the proposed Occupational Health and Safety Regulation 2001*, p 17.

⁶² WorkCover NSW, *Statistical Bulletin 1999/2000*, p 25.

Table 3.3 - Number of workplace injuries 1991/92 to 1999/2000.

	Total	Males		Females	
		Number	%	Number	%
1991/92	38,086	30,086	79%	8,077	21%
1992/93	35,925	25,5776	77%	8,349	23%
1993/94	39,307	29,680	76%	9,620	26%
1994/95	42,505	31,611	74%	10,893	26%
1995/96	42,648	31,483	74%	11,162	26%
1996/97	44,654	23,318	72%	12,336	28%
1997/98	43,982	31,925	73%	12,057	27%
1998/99	41,739	30,200	72%	11,539	28%
1999/00	39,531	28,798	73%	10,773	27%

Source: WorkCover NSW Statistical Bulletin 1999/2000, p 25.

3.20

Despite the apparently positive trends in relation to the number of workplace injuries, the overall cost of workplace injuries in NSW more than doubled during the nine-year period from 1991/92 to 1999/00, from \$304 million to \$696 million per year. The average cost of a workplace injury also rose during the period, from \$8,264 in 1991/92 to \$17,596 in 1999/00. This represents a 113% increase. A large part of this increase has been attributed to a rise in the number of permanent disabilities which rose from 2,989 in 1991/92 to 8,818 in 1999/00. These injuries generally incur both a higher than average cost as well as greater than average time off work. In comparison, the number of temporary disabilities declined by 13% over the period, from 35,105 in 1991/92 to 30,649 in 1999/00.⁶³

3.21

As with respect to work related fatalities, the incidence of workplace injury varieties among industry classifications. Table 3.4 illustrates those industries that recorded the highest number of workplace injuries in the period 1999/00:

Table 3.4 - Incidence and number of work related injuries – male and female, 1999/2000

Industry	Males		Females		
	Incidence	Number	Incidence	Number	
Mining	39.2	622	Agriculture, forestry & fishing	18.3	229
Agriculture, forestry & fishing	38.9	1,476	Accommodation, cafes & restaurants	16.7	1,174
Construction	33.1	5,131	Health & Comm. services	15.3	3,225
Transport & storage	32.1	3,876	Manufacturing	12.0	1,100
Manufacturing	28.0	6,654			

Source: WorkCover NSW, Statistical Bulletin 1999/2000 p 27.

⁶³ WorkCover NSW, Statistical Bulletin 1999/2000, p 25.

- 3.22** Within the industry classifications outlined in Table 3.4, the ten highest risk occupational groups are:

Table 3.5 - Ten highest risk occupational groups incidence and frequency rate 1999/00

Occupation group	Incidence	Frequency rate
Trades assistant and factory hands	51.4	28.6
Construction and mining labourers	42.5	20.7
Miscellaneous labourers	42.3	28.2
Mobile plant operators	41.6	20.7
Stationary plant operators	38.3	19.3
Road and transport drivers	37.3	18.1
Other metal tradespersons	35.3	17.4
Building tradespersons	34.2	16.7
Agricultural labourers & related workers	31.4	18.4
Amenity, horticultural tradespersons	30.9	17.1

Source: WorkCover NSW, Statistical Bulletin 1999/00, p 27.

- 3.23** As for work related fatalities, the highest incidence of injuries occurred in inner Sydney, with 5,250 injuries accounting for 13.3% of injuries. The next highest incidence occurred in the Northern, Far Western North, Central West region, then the Outer Western Sydney and Blacktown region and the Newcastle region.⁶⁴
- 3.24** Back injury was the most common form of workplace injury in 1999/00 representing 29% of all injuries (11,466 injuries). Back injuries cost a total of \$220 million and involved a time lost of 98,942 weeks. Other common injuries include open wounds, fractures, contusions and crushings. Manual handling was the most common mechanism for injury, representing 33.9%. This was followed by falls on the same level (14.5%) and falls from a height (9.8%). Violence related injuries only accounted for 2% of injuries during 1999/00.⁶⁵

Occupational diseases

- 3.25** As a proportion of all employment related injuries occupational diseases represented 17.2%. This reflected 9,169 cases of occupational disease, and was a 4% decline from the previous year. Since peaking in 1993/94 at 58,589 or 27.5%, the number and proportion of occupational disease has steadily decreased. The decline has mainly been attributed to a decrease in the number and incidence of industrial deafness cases. This is a direct result of changes to the 1987 Act in 1995 which restricted deafness claims to a minimum of 6% hearing loss. Other common occupational diseases include mental disorders, Occupational Overuse Syndrome and Hernia.

⁶⁴ WorkCover NSW, *Statistical Bulletin 1999/2000*, p 28.

⁶⁵ WorkCover NSW, *Statistical Bulletin 1999/2000*, pp 28-29.

- 3.26** The cost of occupational disease and time lost reflected the overall trend, decreasing in recent years from a peak in 1997/98.⁶⁶ The cost of occupational disease in 1999/00 was \$187 million, which was 19% of the total cost of employment injuries. The average cost for diseases was \$20,354, however over half of these incidents had a cost of less than \$9,655.⁶⁷
- 3.27** Occupational diseases have a higher propensity to result in permanent disability than do other work related injury. While occupational disease comprises 17% of all employment injuries, they comprise 59% of permanent disabilities.⁶⁸
- 3.28** Mining, electricity, gas and water supply, manufacturing and construction have had the highest incidence of occupational disease. The largest number of cases for occupational disease was for labourers and related workers, followed by trades persons and then plant and machine operators and drivers. This is mainly attributed to the high number of industrial deafness cases in these industries/occupations. Mental disorders, including stress, tend to dominate in white collar occupations including sales, clerical, professional and para professional occupations.⁶⁹

Injury and disease in regional NSW

- 3.29** Rural industries are reputed to have a higher incidence of work related injury and disease than the metropolitan centres around Sydney. WorkCover has undertaken research which suggests that this is not in fact the correct understanding of the incidence of injury and disease in regional NSW. In a study which compared compensation claims for injuries and diseases occurring in 1994/95 on a regional basis for metropolitan/non-metropolitan NSW, the average rate per 1000 employees was 46.7 claims. This comprised a rate of 47.5 per 1000 employees for the metropolitan region and a rate of 44.3 per 1000 employees for the non-metropolitan region.⁷⁰ The results indicate that regional NSW has less of an OH&S problem than is often attributed to it.⁷¹

Injury and disease in small business

- 3.30** The Industry Commission found in 1995 that while workplaces with less than 5 employees were responsible for 21% of work related health problems, they only employed 15% of the workforce.
- 3.31** WorkCover has done further research into the incidence of workplace injury in small businesses and has found that for employers with less than 20 employees, the incidence of claims for less serious injuries is lower than for larger employers, while the incidence of claims for more serious injuries is significantly higher. One reason suggested for this

⁶⁶ WorkCover NSW, *Statistical Bulletin 1999/2000*, p 31.

⁶⁷ WorkCover NSW, *Statistical Bulletin 1999/2000*, p 32.

⁶⁸ WorkCover NSW, *Statistical Bulletin 1999/2000*, p 32.

⁶⁹ WorkCover NSW, *Statistical Bulletin 1999/2000*, pp 33-34.

⁷⁰ In this research, metropolitan NSW is defined to be all of the Sydney statistical divisions plus the statistical subdivisions of Newcastle and Wollongong.

⁷¹ *Regulatory Impact Statement for the proposed Occupational Health and Safety Regulation 2001*, pp 15-16.

phenomenon is that small businesses may directly compensate their less severely injured workers rather than make a claim on the workers compensation scheme. Another reason may be because large employers have more opportunities to rehabilitate their injured workers than do small employers.⁷²

Preventing workplace injury

3.32

As part of the process of developing the OH&S Regulation 2001, WorkCover commissioned Coopers & Lybrand to survey 1,500 workplaces. The survey identified areas where OH&S performance could be improved in NSW workplaces. It also identified small employers as a group that may need the greatest assistance in improving OH&S in their businesses. Key findings of that study, published in OH&S Regulation *Regulatory Impact Statement* include:

- approximately 30% of employers or senior managers were not aware that employers have the primary legal responsibility for providing a safe and healthy workplace;
- approximately 21% of respondents thought that it was likely or very likely that a serious injury could occur in their workplace in the next 12 months - despite this awareness some employers did not plan to make OHS improvements;
- small employers were less likely than larger employers to identify the possibility that someone could be killed, were less aware of the frequency of serious back injuries and were less likely to indicate that they had plans for making OHS improvements;
- larger employers indicated that a serious injury would be most likely to be caused by the absence of appropriate risk controls (such as slippery floors etc), by contrast small employers tended to identify individual worker behaviour as the most likely cause;
- training in safe work practices was given to new employees in only 54% of workplace;
- supervisors did not receive health and safety training in 40% of workplace;
- employers who indicated that they had had systems in place for identifying hazards before injuries occurred were more likely to have trained supervisors, have provided health and safety induction training, and have up-to-date safety information.

The results of the survey suggest that the unacceptable level of injury and disease in NSW workplaces can be improved if OHS management practices are improved. At an annual cost of \$5,713 million dollars each year, even a small reduction in the level of injury and disease will have major benefits for employers, employees and the community. Significant improvements in prevention are possible and the potential benefits from improving OHS standards are enormous.⁷³

⁷² *Regulatory Impact Statement for the proposed Occupational Health and Safety Regulation 2001*, pp 13-14.

⁷³ *Regulatory Impact Statement for the proposed Occupational Health and Safety Regulation 2001*, p 18.

Conclusion 6

The Committee agrees that a majority of workplace deaths and injuries are preventable. This further reinforces the importance of good OH&S practices in NSW.

Recent legislative reforms

- 3.33** On 1 September 2001 new workplace safety laws came into effect in NSW – the *Occupational Health and Safety Act 2000* (“the OH&S Act”) and the *Occupational Health and Safety Regulation 2001* (“the OH&S Reg”). While the new Act commenced immediately, the OH&S Reg has a transitional implementation over a 12 month period from 1 September 2001. Small employers have a two year period to implement the risk management requirements of the Regulation.⁷⁴ The new Acts together rewrite pre-existing workplace safety laws and consolidate them into plain English with clearly spelt out responsibilities and duties.
- 3.34** It is not within the Committee’s terms of reference to evaluate or monitor the implementation of the new OH&S legislation. This section will therefore briefly outline the main features of the new legislation and recent initiatives of WorkCover aimed at improving OH&S in NSW.
- 3.35** The Legislative Council’s Law and Justice Committee conducted an extensive inquiry into workplace health and safety in NSW during 1997-98. The Committee’s final report was issued in November 1998. The Law and Justice Committee’s report can be accessed via the Internet at www.parliament.nsw.gov.au following the links to the Law and Justice Committee.

Occupational Health and Safety Act 2000

- 3.36** OH&S Act replaced the previous *Occupational Health and Safety Act 1983*. The new Act is in ‘plain English’ and has been made simpler to understand. The objectives of the OH&S Act are clearly set out in section 3. They are:

The objects of this Act are as follows:

- (a) to secure and promote the health, safety and welfare of people at work,
- (b) to protect people at a place of work against risks to health or safety arising out of the activities of persons at work,
- (c) to promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs,

⁷⁴ Information taken from the WorkCover website: www.workcover.nsw.gov.au.

- (d) to provide for consultation and co-operation between employers and employees in achieving the objects of this Act,
- (e) to ensure that risks to health and safety at a place of work are identified, assessed and eliminated or controlled,
- (f) to develop and promote community awareness of occupational health and safety issues,
- (g) to provide a legislative framework that allows for progressively higher standards of occupational health and safety to take account of changes in technology and work practices,
- (h) to protect people (whether or not at a place of work) against risks to health and safety arising from the use of plant that affects public safety.

3.37 Most of the previous duties prescribed under the 1983 Act have not been changed in the new Act. However, one of the most important changes under the new Act is the imposition of the 'duty to consult'. Section 13 of the OH&S Act makes a new criminal offence of failing to consult with employees to enable employees to contribute to the making of decisions affecting their health, safety and welfare at work. The OH&S Reg, discussed below, contains guidance on how to comply with this new duty. Another significant change is the addition of object (e) in section 3 of the OH&S Act. This new object places the emphasis of OH&S on the concept of risk management, which is again a major feature of the OH&S Reg.⁷⁵

Occupational Health and Safety Regulation 2001

3.38 The OH&S Reg replaces 36 previous sets of regulations and two Acts governing OH&S. The OH&S Reg adopts a performance-based approach to OH&S whilst maintaining prescribed controls in highly hazardous areas. The OH&S Reg sets out requirements for workplaces for putting into place systems to identify, assess, control and/or eliminate health and safety risks. It also details how the duty to consult with employees about health and safety can be met. The regulation provides coverage for all workplaces along with specific control measures for particular hazards and industry activities. These include:

- identification of all workplace hazards,
- assessment of risks arising from those hazards,
- implementation of measures to control those risks,
- provision of training, instruction and supervision,
- workplace consultation between employers and employees,

⁷⁵ N Foster, 'New OH&S regime calls for consultation and risk management', *Law Society Journal*, December 2001, p 56.

- the control of specific high risk hazards such as plan, hazardous substances and hazardous processes,
- construction work, and
- requirements for:
 - certification of operators of equipment,
 - licensing of certain businesses, and
 - notifications to WorkCover.⁷⁶

3.39 One of the most important features of the OH&S Reg is its emphasis on risk management. Risk management has been described as “essentially ... thinking ahead rather than reacting to accidents as they happen”. WorkCover has summed it up as:

- knowing what the possible OH&S problems are in the workplace,
- knowing what harm they might cause, and
- doing something about them to stop people being hurt.⁷⁷

3.40 Implementing an employer’s statutory duty of care in the workplace will, under the OH&S Reg, involve an ongoing assessment of possible hazards, the risks to safety posed by those possible hazards and the elimination or control of those risks. These risk management procedures have been described as mainly “common sense”, with:

... most employers who are in any way concerned about the welfare of their workers (and the size of their workers compensation premiums) will already be doing them [risk management procedures]: thinking ahead about possible hazards and the best way to remove them.⁷⁸

Success of workplace injury prevention strategies

3.41 In response to a question on notice regarding the adequacy of WorkCover’s initiatives aimed at preventing workplace injury, Mr Robert Thomson, Manager, Workers Compensation, Insurance Council of Australia stated:

WorkCover have undertaken number of initiatives in the OHS area and it is difficult to judge whether it has been sufficient or not. There has been a lot of work targeted at specific industries whilst others have had little attention. As long as the focus has been on the high risk areas this strategy would appear to be appropriate.

All workers compensation schemes in Australia face similar issues and they have all tried different ways in dealing with the issues facing them. New South Wales

⁷⁶ The information in this section is taken from WorkCover’s website, ww.workcover.nsw.gov.au.

⁷⁷ N Foster, ‘New OH&S regime calls for consultation and risk management’, *Law Society Journal*, December 2001, p 56.

⁷⁸ N Foster, ‘New OH&S regime calls for consultation and risk management’, *Law Society Journal*, December 2001, p 56.

have recently introduced a Premium Discount Scheme and it will be interesting to observe after a couple of years whether it has had the desired impact and reduced the incidence and severity of claims where initiated.⁷⁹

3.42 In relation to insurers' role in OH&S, Mr Thomson stated:

The new remuneration arrangements do not have any specific measures that are focused on insurer participation in OH&S initiatives. The loss ratio measure does provide some incentive for insurers to undertake some work with existing or potential clients as injuries prevented will be reflected positively under this measure.

The industry believes that the premium payable by an employer should reflect their exposure to hazards and their approach to OH&S and injury management initiatives. As such we believe that the industry has an important role to play in ensuring that the link between performance and premium payable is clearly understood. The ability to adequately influence this is dictated by the premium level payable and for the majority of small employers the causal connection is limited in impact as they are only affected by changes in industry rate and not reflective of their actual performance. Insurers do have a vital role to play in influencing this and with the appropriate arrangements/incentives in place can certainly add value to the outcomes of the scheme.⁸⁰

Premium Discount Scheme

3.43 The Premium Discount Scheme ("PDS") is one means by which WorkCover is structuring incentives to promote safer workplaces and better return-to work strategies for injured workers. The PDS has been available to all NSW employers since 30 June 2001. The PDS is a voluntary scheme which provides a discount on the employer's workers compensation premium, for a period of 3 years for any individual employer, as long as their OH&S and injury management systems meet WorkCover's benchmarks.

3.44 Employers who qualify for the PDS can receive the following discounts:

- in the first year, up to 15% of their premium, to a maximum discount of \$75,000;
- in the second year, up to 10% of their premium, to a maximum discount of \$50,000; and
- in the third year, up to 5% of their premium, to a maximum discount of \$25,000.⁸¹

⁷⁹ Correspondence received from Mr Robert Thomson, Manager Workers Compensation, Insurance Council of Australia, 27 March 2002.

⁸⁰ Correspondence received from Mr Robert Thomson, Manager Workers Compensation, Insurance Council of Australia, 27 March 2002.

⁸¹ WorkCover NSW, *Premium Discount Scheme General Guide*, June 2001, p 4.

3.45 The Committee received a copy of Tillinghast's *Cost Benefit Analysis of Implementing a Premium Discount Scheme*, dated 1 February 2001. This analysis was prepared for WorkCover to assist WorkCover recognise and help maximise the savings potential from the PDS. The Analysis concluded that beneficial financial effects from implementing the PDS were to be expected:

Total discount scheme effects are positive (ie they represent savings) for all projected future years in which the scheme operates. Our analysis measures cost savings as the impact on the whole WorkCover Scheme (both claims costs and premiums), of employers entering the premium discount scheme compared to the case where employers do not enter.

Total scheme savings seems to stabilise over time. This trend is driven by two key assumptions:

- Loss ratio improvement (deterioration) factors. The greater the loss ratio improvement, the greater the savings to the WorkCover Scheme. If employers are assumed to be able to display superior loss ratios even when they finished, failed or dropped out from the scheme (relative to non-participants), then cost savings will persist.
- Participation rate. The higher level of participation in the scheme, the greater the amount of absolute dollars saved. Given that ex-participants are able to display superior loss ratio to non-participants, if participation rate drops over time, total scheme savings stabilise. Cost savings are higher if the discount scheme attracts more participation from small employers.

... the bulk of the total discount scheme effect is made up of claim cost savings followed by premium reduction, especially for later discount scheme years. ...

The significance of premium discounts diminish over time. This is because the discount scheme does not have to pay out premium discounts after employers have been in for 3 years, but the beneficial effects of the discount scheme on the behaviour of ex-participants are assumed to persist.⁸²

3.46 Mr George Katsogiannis, private citizen (NSW Workers compensation Manager, QBE Insurance) told the Committee that he believed there was a lot of interest in the PDS:

I think it is early days yet, but certainly there has been a lot of interest generated from our customers, which is a good thing, and hopefully the quality of the people who have been appointed and accredited will assist those employers in reducing their claims' costs. So it has the potential, but to what extent and what sort of savings are going to be incurred, only time will tell. I believe that there have been some actuarial evaluations done but I am not quite sure what those savings are. A figure of \$200 million probably is not out of the question from what I hear, but I cannot confirm or deny that.⁸³

⁸² Dave Finnis & Sally Wijesundera, Tillinghast, *Cost Benefit Analysis of Implementing a Premium Discount Scheme*, 1 February 2001, p 7.

⁸³ Mr George Katsogiannis, private citizen (NSW Workers Compensation Manager, QBE Insurance), 10 October 2001, p 38.

3.47 Mr John Walsh expressed his opinion on the impact of the PDS at the Committee's Forum:

The premium discount scheme does or should provide incentives for employers to improve their workplace safety through a direct discount on their premiums, although my feeling is that employers are more interested in achieving the discount than achieving a safe workplace at the moment.⁸⁴

3.48 Sir Laurence Street, in summing up the Forum's afternoon session, came to a similar conclusion:

The new OH & S laws and premium discount scheme will influence employer behaviour, however WorkCover needs to be very active in enforcement.⁸⁵

3.49 The apparently slow take-up of the PDS by employers was discussed by Mr Colin Fagan, General Manager of Workers Compensation, QBE Insurance, in evidence before the Committee:

I get the impression that it [the PDS] is starting to gain momentum now, so there has been a bit of a lag time with employers adopting it and seeing if it is useful... I was expecting a faster take-up [of the PDS], and I do not pretend to know the reason why.⁸⁶

3.50 Mr Fagan explained that insurers "are not allowed to be directly involved in it" but:

... we definitely promote it and suggest to our employers that they look at that as an option.⁸⁷

3.51 Mr Fagan continued by explaining that because the PDS was a three year scheme, there was potential that at the end of the scheme premiums may go back up. He stated:

It depends on how the premium measures are going to be working in that time frame. I suppose it is a gamble, and because of the uncertainty at the end of it maybe there is a disincentive to investing.⁸⁸

Conclusion 7

The PDS has potential for substantial savings to the Scheme. The PDS should continue to be promoted to targeted employers where relevant to increase the take up rate.

⁸⁴ Presentation by Mr John Walsh, Partner, PricewaterhouseCoopers, 15 March 2002, p 19.

⁸⁵ Summary by Sir Laurence Street, 15 March 2002, p 34.

⁸⁶ Evidence of Mr Colin Fagan, General Manager Workers Compensation, QBE Insurance, 6 March 2002, pp 68-69.

⁸⁷ Evidence of Mr Colin Fagan, General Manager Workers Compensation, QBE Insurance, 6 March 2002, pp 68-69.

⁸⁸ Evidence of Mr Colin Fagan, General Manager Workers Compensation, QBE Insurance, 6 March 2002, pp 68-69.

Chapter 4 Insurers – WorkCover’s Agents

The role of Insurers

- 4.1** Licensed insurers in the Scheme do not underwrite the Scheme so they are not ultimately liable for the cost of workers compensation claims.
- 4.2** Under the NSW Scheme insurers are responsible for:
- the classification and assessment of premiums and premium collections in accordance with the Insurance Premium Order;
 - Claims payment and administration of the statutory fund;
 - Injury management and return to work; and
 - the investment of statutory funds.⁸⁹
- 4.3** Because the insurers in the Scheme (otherwise known as “agents”) are not underwriters the main financial benefits they gain from the Scheme are the management (remuneration) fees they earn from providing policy, claims and investment management services.⁹⁰ WorkCover pays the insurers for their services based on a complex system of base fees and performance fees.
- 4.4** Mr Robert Thomson, Manager Workers Compensation, Insurance Council of Australia (ICA) summarised the role of insurers as follows:
- Insurers are the agents of WorkCover. They are responsible for managing policies, claims and investments within the scheme and have been responsible for doing so since the commencement of the 1987 Act.⁹¹
- 4.5** As at 30 June 2001, there were 9 licensed insurers. They were:
- Allianz Australian Workers Compensation (NSW) Limited,
 - CGU Workers Compensation (NSW) Limited,
 - Employers Mutual Indemnity (Workers Compensation) Limited,
 - GIO Workers Compensation (NSW) Limited,
 - NRMA Workers’ Compensation (NSW) Limited,

⁸⁹ WorkCover NSW, *Outline of the Operation of the NSW Workers Compensation Scheme*, November 2001, p 43.

⁹⁰ WorkCover NSW, *Outline of the Operation of the NSW Workers Compensation Scheme*, November 2001, p 44.

⁹¹ Mr Robert Thomson, Manager Workers Compensation Division, Insurance Council of Australia, 15 March 2002, p 23.

- NRMA Workers' Compensation (NSW) (No2) Pty Ltd,
- QBE Workers Compensation (NSW) Limited,
- Royal and Sun Alliance Workers Compensation (NSW) Limited,
- Zurich Australian Workers Compensation Limited.

4.6 These insurers cover the majority of NSW employers. The remainder of employers are either specialised insurers, group insurers or self insurers.⁹²

Performance of Insurers

4.7 Evidence presented to the Committee has indicated that to date the performance of insurers in the Scheme has been variable, but generally poor. In relation to the performance of insurers WorkCover's Annual Report states that:

[PWC] found that insurers are generally under performing and their profitability is low and to improve their performance, they need to invest significantly in staff resources and IT/infrastructure systems.⁹³

4.8 At the request of WorkCover, in 2000 PWC completed an analysis of the performance of insurers in 2000. The results are published in their report entitled *Review of WorkCover NSW MGA Remuneration Arrangements*. The report states:

The current performance remuneration measures have not necessarily led to improved MGA performance.⁹⁴

4.9 The report by PWC also highlights the particular areas in which there has been under performance by insurers. These include:

- Claims reporting lags,
- Paid loss duration, and
- Claims management.

⁹² *WorkCover NSW, Annual Report – Improving Health and Safety in the Workplace 2000/01*, p 40.

⁹³ *WorkCover NSW, Annual Report – Improving Health and Safety in the Workplace 2000/01*, p 20.

⁹⁴ Mr John Walsh, Mr Daniel Tess, and Ms Ingrid Rylander, *Review of WorkCover NSW MGA Remuneration Arrangements*, 2000, p 32.

Claims Reporting lags

- 4.10** PWC highlight reporting of claims as one area of poor performance by insurers. They indicate that there are considerable differences across the insurers about the timing for reporting. The report states:

... on average, only 60% of claims have been reported to MGA's by 21 days after the accident /injury; the scheme average is around 20 days. There is also quite a spread of results across the MGA's in the scheme. The pattern is the same for both serious (5 days lost time) and non serious claims. By way of contrast, for the eight states benchmarked in the July 2000 WCRI CompScope Multistate Comparisons, 85% of serious (7 days lost time) claims were reported within 21 days of accident/injury and 60% within seven days.⁹⁵

Paid loss duration

- 4.11** PWC also indicate that the duration of payments in NSW is relatively slow compared to other jurisdictions. The report states:

Benefits are paid out relatively slowly in NSW. The average financial duration of benefits in NSW is around six years. By comparison the privately underwritten schemes in Tasmania and Western Australia have financial durations of around 3.5 years, which would also be the norm in the US. This difference is primarily driven by these jurisdictions having some form of aggregate cap on the amount of benefits paid.⁹⁶

Claims management

- 4.12** An analysis of the remuneration of insurers led PWC to conclude that there were problems with the performance of insurers with respect to claims management, because the remuneration awarded for this performance measure had been low. The report states:

... compliance with measures relating to the underwriting and debt collection has consistently been high, but certain aspects of claims management have never been above 50% compliance.⁹⁷

⁹⁵ Mr John Walsh, Mr Daniel Tess, and Ms Ingrid Rylander, *Review of WorkCover NSW MGA Remuneration Arrangements*, 2000, p 32.

⁹⁶ Mr John Walsh, Mr Daniel Tess, and Ms Ingrid Rylander, *Review of WorkCover NSW MGA Remuneration Arrangements*, 2000, p 32.

⁹⁷ Mr John Walsh, Mr Daniel Tess, and Ms Ingrid Rylander, *Review of WorkCover NSW MGA Remuneration Arrangements*, 2000, p 32.

4.13 As part of this work PWC also analysed international schemes to ascertain the comparative performance of the NSW scheme. In evidence to the Committee Mr Daniel Tess, Actuary, PWC, explained to the Committee his findings. He said:

One of the standard ways that schemes are benchmarked and measured against each other is through an organisation called the Workers Compensation Research Institute [WCRI] that is based in Boston, Massachusetts. They have a standard approach towards benchmarking and measuring schemes that covers four main areas: How quickly claims are reported; how much average claims cost; the level and cost of disputes in a system; and how quickly people go back to work. We simply took New South Wales scheme wide data, modified it so that it was more or less comparable to the data in the Workers Compensation Research Institute reports, and stacked it up against performance in the United States of America. Some of these indicators are difficult to make fair comparisons for. However, by and large, New South Wales seems to under perform a good number of those indicators. I think it is fair to say that, as far as the remuneration committee was concerned, there was general agreement that there was under performance before we did this qualitative and quantitative research and that only strengthened everyone's belief that, in fact, there was under performance...⁹⁸

4.14 The new remuneration measures being implemented by WorkCover are designed to incentivise insurers in a way which improves performance. These measures are discussed further in Chapter 5.

4.15 The Committee notes that the analysis undertaken by PWC of insurers for the remuneration report is now slightly dated and that the introduction of new remuneration arrangements may be resulting in changes in behaviour. In a question on notice dated 27 November 2001, the Committee asked the Minister whether WorkCover had assessed the performance of each insurer and, if so, the details of the results for each insurer.⁹⁹

4.16 The Minister responded on 10 January 2002, that yes, WorkCover has assessed the performance of each insurer but:

The specific details of insurer performance results are subject to privacy constraints under the Privacy and Personal Information Protection Act 1998 and the Workplace Injury Management and Workers Compensation Act 1998. As previously indicated to the Committee, WorkCover has received Crown Solicitor's advice that written consent must be obtained from each individual insurer before this information can be provided to the Committee. This approval is currently being sought from those insurers.¹⁰⁰

⁹⁸ Evidence of Mr Daniel Tess, Director, PWC, 21 November 2001, p 12.

⁹⁹ Questions on Notice and answers received from the Minister are reproduced in Appendix 8 of the Committee's Second Interim Report. See, in particular, p 231.

¹⁰⁰ Questions on Notice and answers received from the Minister are reproduced in Appendix 8 of the Committee's Second Interim Report. See, in particular, p 231.

4.17 In subsequent questions on notice to the Minister, the Committee again requested data measuring the performance of insurers, necessitated by WorkCover not providing information as requested on 27 November 2001. The Committee requested the following data:

3. Data

Find following a list of specific and unrelated data requests. Please provide this information, where possible, in both written and electronic format. Please note, to ensure confidentiality it is appropriate for all insurers to be allocated a letter and for this letter to be applied consistently throughout.

- Number of claims by severity for the calendar year 2001. Please classify into the following groups- 0-15%, 16-25%, 26-50%, 51-80% and 81%+ according to the table of injuries.
- How would these figures change under the work cover impairment guidelines based on the w.p.i.? Please provide details.
- Number of claims processed per month (in 2001) per each insurer.
- Number of claims lodged per month (in 2001) per each insurer.
- Total number of commutation payments made in 2000 and 2001 per insurer (please provide the 2000 and 2001 figures separately – not combined).
- Total dollar value of commutation payments in 2001 by insurer.
- Average dollar value of commutation in 2001 by severity (please use the same severity groups as outlined in 3.2).
- Commutations per 1000 closed claims by insurer. (please only use recent years i.e. 1999, 2000 and 2001 when calculating)
- Number of employees covered by each insurer and the percentage of employees.
- Number of active weekly claimants by insurer at 30 June- 1998, 1999, 2000, 2001 and 31 December 2001. Please specify the definition of “active” upon which the figures were based.
- Number of open claims per insurer at 30 June; 1998, 1999, 2000, 2001 and December 2001.
- Number of claims finalised per insurer in 1997/98, 1998/99, 1999/00 and 2000/01.
- Number of new writs issued by insurer in 1997/98, 1998/99, 1999/00 and 2000/01.¹⁰¹

¹⁰¹ Questions on Notice and answers received from the Minister are reproduced in Appendix 7 of the Committee’s Second Interim Report.

4.18 The Committee received answers to questions on notice dated 8 February 2002 on 6 March 2002. In reference to the data request, WorkCover stated:

WorkCover has requested PricewaterhouseCoopers to conduct some preliminary analysis of the Committee's questions. PricewaterhouseCoopers has responded that clarification is required concerning a number of questions, and that preparing answers will be (a) very time consuming, (b) resource intensive, and (c) expensive (estimated to be approximately \$10,000).

Under the circumstances, the Committee is requested to indicate whether on balance, this information is essential for the Committee's current inquiry, and whether WorkCover's key statistical analysis personnel should be diverted from core activities including the effective implementation of the 2001 legislative reforms.¹⁰²

4.19 The Committee Secretariat met with representatives of WorkCover on 14 March 2002 to discuss a strategy to assist WorkCover meet the needs of the Committee. At that meeting it was agreed that WorkCover would provide the Committee with the following information:

2000/01

1. What are the performance measures for insurers?
2. What scheme outcomes are the performance measures designed to achieve?
3. How does WorkCover (or others) quantify the performance of insurers against those measures?
4. How do individual insurers rate against those performance measures (subject to privacy constraints)?

2001/02

1. What are the performance measures for insurers?
2. What scheme outcomes are the performance measures designed to achieve?.
3. How does WorkCover (or others) quantify the performance of insurers against those measures?¹⁰³

¹⁰² Questions on Notice and answers received from the Minister are reproduced in Appendix 7 of the Committee's Second Interim Report.

¹⁰³ Correspondence to the Committee Secretariat from Mr Ryan Fletcher, WorkCover NSW, 19 March 2002.

- 4.20** Further answers to questions on notice to WorkCover were received by the Committee on 26 March 2002. In relation to the agreed data request arising out of the 14 March meeting between representatives of WorkCover and the Committee secretariat, it was stated that “this information would be provided as soon as possible”.
- 4.21** The answers to the Committee’s questions regarding insurers’ performance were provided late on Friday 5 April, 2002 after the draft report had been finalised. WorkCover had previously identified privacy requirements and the cost and time required to undertake the necessary data inquiries as reasons for the delay. The Committee has not had sufficient time to analyse this information for inclusion in this report, however the document provided by WorkCover is attached as Appendix 7. The information will be analysed further for the fourth and final report.
- 4.22** There appears to be problems with WorkCover’s current computer programs and systems, which need urgent updating. The Committee notes that WorkCover has plans for their IT systems as advised by WorkCover. A summary of WorkCover’s Information Management and Technology plan (IM&T) Overview is reproduced in Appendix 8.

What role should insurers have in the System?

- 4.23** Participants in the inquiry raised the possibility of changes to the role that insurers currently play in the Scheme. Mr Gregory McCarthy, Executive Director, Workplace Injury Management Services, suggested in his presentation to the Forum that different aspects of the system could be undertaken by specialists in that area. He said:

I also think the relationships with agents going forward is probably a longer term issue and not something for the immediate future, but to get value out of the scheme I think it is often appropriate to look at people who are experts in a particular area, not Jacks of all trades, so to speak. So as Bob Thomson alluded to, the insurers do collect premiums, they do invest monies and they do manage claims. Is it appropriate that they do all of those things, or should we be looking for experts in each of those individual areas? I think this is something that should be at least debated.¹⁰⁴

- 4.24** Correspondence received from Mr Mark Goodsell, Director NSW, Australian Industry Group (AIG) also suggested that separating the functions that insurers perform could be beneficial to the management of claims:

Opening up the claims management component of the current insurer role to non insurer competitors. As insurers don’t really “insure” or underwrite the risk in the current model, it raises the question as to why only insurer can manage claims. This would mean unbundling the components of insurer’s current role in the system.¹⁰⁵

¹⁰⁴ Presentation by Mr Gregory McCarthy, Executive Director, Workplace Injury Management Services, 15 March 2002, p 28.

¹⁰⁵ Correspondence from Mr Mark Goodsell, Director NSW, AIG, 14 March 2002, p 3.

Introducing price measures to make the “insurance” market more competitive. In the absence of price competition there is a stagnancy about the market for workers compensation insurance that dulls insurers responsiveness to customer needs. Although all insurers are obliged to offer the same price for workers compensation cover, in reality an insurers performance in claims management can affect the employers costs in future years. Therefore a more transparent market, through better information about nonporous competitive factors, would assist employers in making better choices in the interests of lower costs.¹⁰⁶

4.25 Ms Nancy Carl, Industrial Officer, NSW Labor Council, in her presentation to the Forum also suggested that the functions of insurers could be split. She said:

The options to be explored include insurers handling the investment, other agents administering and managing the claims, and the exploration of one administrator for all claims.¹⁰⁷

4.26 Ernst & Young summarises the functions of insurers as being:

- Claims and injury management,
- Investment management, and
- Policy administration (issue of policies and premium collection).¹⁰⁸

4.27 Ernst & Young continue by suggesting that it is not necessary that insurers perform all of these functions alone. Ernst & Young state in their third report:

Have different organisations manage some or all of the above functions. For example, specialist investment managers including or excluding current agents/insurers could have the mandate for the investment management. Similar examples could apply to the other functions.

Split up claims management into short term and long term claims each going to different agents.¹⁰⁹

Conclusion 8

Irrespective of whether the remuneration arrangements will have the desired impact that WorkCover hopes, there is still scope for the possible separation of the functions performed by insurers.

¹⁰⁶ Correspondence from Mr Mark Goodsell, Director NSW, AIG, 14 March, 2002, p3.

¹⁰⁷ Presentation by Ms Nancy Carl, Industrial Officer, NSW Labor Council, 15 March 2002, 35.

¹⁰⁸ Ernst & Young Third Report, p 18.

¹⁰⁹ Ernst & Young Third Report, p18.

Chapter 5 WorkCover - the Regulator

5.1 Under current arrangements WorkCover's primary control over insurers is through its licensing arrangements. Under Part 7 of the 1987 Act, WorkCover is given the authority to set regulations for the granting of licenses to insurers.

5.2 WorkCover's policy for granting licences sets out broad requirements that insurers must have before a licence can be granted. The requirements in summary are as follows;

- Capital requirement - minimum share capital of \$500,000 with net tangible assets to be maintained at or above that level at all times.
- Control and ownership of licensed insurer - no change in control of the licensed insurer and its immediate and ultimate holding company should occur and no change in ownership of the licensed insurer or a change exceeding 20% of the shareholding in any period of 12 months – should occur without the approval of the Authority.
- One licence per group of companies.
- The holding company of a licensed insurer must be a federal licensed insurer.
- Applicants should have prior workers compensation experience.
- Majority of directors of the licensed insurer must also be directors of its parent company.
- Licensed insurers must have a market share of not less than 3% and not more than 50%.
- Investment of statutory funds - licensed insurers must comply with the investment objectives and criteria issues by the Authority.
- Standard of administration- the continuity of a license is dependent on a fully professional standard of administration compliance with all directions of the Authority.
- Licensed insurers must cooperate with the Authority in the provision of timely and accurate data. A licensed insurer must have the ability to comply with the Authority's data collection requirements.
- Insurers can allow employers to participate in claims management.¹¹⁰

5.3 The licenses are granted under the 1987 Act. The Act does not prescribe a period for which the license will be current, this will differ depending on the license awarded by WorkCover.

¹¹⁰ WorkCover, *Licensing Policy of the WorkCover Authority for Insurers Licensed under Section 178 of the Workers Compensation Act 1987*.

- 5.4** Licenses can be cancelled for any reason the Authority thinks fit, however the Authority must give the reasons for its decision and give the insurer the opportunity to make representations on the matter.¹¹¹ WorkCover may cancel a license for reasons relating to efficiency and or the conduct of the insurer.¹¹²
- 5.5** It is important to note that WorkCover plays a regulatory role with regards to the oversight of insurers. It does this by setting broad boundaries within which the insurers can work. It does not administer or control the insurers and hence is not a manager.
- 5.6** In addition, WorkCover's arrangements with the insurers through licensing are not contractual. Mr Rod McInnes, Assistant General Manager, WorkCover NSW, clarified this situation during the public hearing when he stated:

It is not even a contractual arrangement; it is a licensing arrangement. They are licensees.¹¹³

General Issues with the Regulation of Insurers

Transparency and Information

- 5.7** Mr Mark Goodsell, Director NSW, Australian Industry Group ("AIG"), suggested that the current level of information about insurers performance made publicly available was inadequate and that improvements in this area needed to be made in order to improve efficiencies. In correspondence to the Committee he said:

...the scheme should mandate the publication of better information on insurers' performance on return to work outcomes and premium reduction so that the "competitive service" part of the model is more efficient.¹¹⁴

- 5.8** The Committee experienced delays in obtaining answers to questions on notice from the Minister in relation to insurer performance. For a detailed explanation see Chapter 4, paragraphs 4.15 to 4.22.

Licensing and Contracts

- 5.9** Ernst & Young raised concerns that no contractual agreement exists between the insurers and WorkCover NSW. Ernst & Young's third report to the Committee states:

There is no contractual agreement between WorkCover and agents/insurers. Each agent/insurer is licensed and subject to WorkCover's licensing criteria. Licensing criteria is normally focused on high-level requirements and compliance with legislation and do not necessarily consider detailed performance by an

¹¹¹ Section 183, *Workers Compensation Act, 1987*.

¹¹² Section 183, *Workers Compensation Act, 1987*.

¹¹³ Evidence of Mr Rod McInnes, Assistant General Manager, WorkCover NSW, 14 February 2002, p 30.

¹¹⁴ Correspondence from Mr Mark Goodsell, Director NSW, AIG, 14 March, 2002, p 4.

agent/insurer. Licensing is an all or nothing approach with disciplinary options in between the agent/insurer being licensed or not. Licensing is probably best viewed as a left over from when insurers were involved in underwriting the workers compensation risk.

Contractual arrangements are normal when agency arrangements are in place. A contractual agreement between WorkCover provides greater flexibility for it to require detailed performance from agents/insurers and may be a better option to improve the operation of agents/insurers and consequently the scheme performance.¹¹⁵

5.10 Examples of other Australian states that utilise a different method of remunerating and regulating insurers were identified by Ernst & Young:

South Australia and more recently Victoria have abandoned the common remuneration of Managed Fund agents/insurers and instead went through a detailed tender process. Our understanding is each agent set out in the tender how they wished to be remunerated. These are contractual agreements between WorkCover (and insurers) in South Australia and Victoria.

Conclusion 9

The adequacy of insurer performance is not transparent under the current legislative and regulatory framework. The legislation should be amended to make it clear that WorkCover can legally disclose publicly details of insurers performance.

Current licensing arrangements do not address management of insurers in their agency role and do not provide for WorkCover to direct the focus of insurers' management of injuries and claims.

The Committee considers that this issue should be addressed by the independent Review of Scheme Design as reported by the Minister in his letter to the Committee dated 5 April, 2002.

Remuneration Arrangements

5.11 The licensing arrangements available to WorkCover provide limited opportunity for aligning the work of insurers with the Scheme's objectives. One avenue available to WorkCover to achieve alignment (under the current structure) is through their remuneration arrangements with insurers. The theory is that if the incentives for insurers provided through the remuneration arrangements are closely aligned with the Scheme's overall objectives then insurers will naturally work towards these goals. In essence the remuneration arrangements should provide the similar incentives to that which exist in an environment where the insurers carry the risk.

¹¹⁵ Ernst & Young Third Report, p 18.

5.12 The following sections explore the aims and objectives of the new remuneration arrangements with insurers and some of the concerns raised about these arrangements.

Aims and Intentions of the Arrangements

5.13 WorkCover outlines its objectives for the insurer remuneration arrangements as being:

- To provide adequate remuneration for insurers to achieve the Scheme's legislative, social and financial objectives (where adequate means providing a responsible return for good performance).
- To ensure remuneration arrangements are aligned to Scheme objectives and remuneration levels correspond to performance (as measured against defined Scheme outcomes).
- To be simple and transparent.
- To minimise the risk of gaming and other aberrant behaviour.¹¹⁶

5.14 As discussed in the Committee's second interim report the remuneration arrangements utilised by WorkCover for the financial year 2000-01 and in previous years were not achieving WorkCover's objectives. In particular, remuneration arrangements were not ensuring an alignment between the Scheme's objectives and for what the insurers were being remunerated. The changes being put in place by WorkCover in consultation with the insurers for 2001-02 aim to ensure that this alignment is more fully achieved.

5.15 In evidence presented to the Committee, Ms McKenzie General Manager, WorkCover NSW, stated:

We are trying to build in the best set of incentives we can that line up insurers' behaviour with the outcomes that we are seeking from the scheme. Basically, we are setting rules at a high level and saying, "You work out for yourself how you are going to get there. If you get there, you'll get paid; if you don't get there, you won't get paid."¹¹⁷

5.16 Mr Robert Thomson, Manager Workers Compensation, Insurance Council of Australia ("ICA"), indicated that he thought the new remuneration arrangements would be beneficial in aiding the Scheme's objectives:

I think the new remuneration package certainly has that potential. I think it is a significant improvement on the past. I think that the way it has been structured now aligns their remuneration package more with the outcomes that the scheme is trying to achieve. ... overall I think a broad consensus would be that, yes, it does align the scheme outcomes with remuneration so that if you perform and deliver

¹¹⁶ PWC, *Review of WorkCover NSW MGA Remuneration Arrangements*, 2001, p 1.

¹¹⁷ Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, 14 February 2002, p 30.

on scheme outcomes then you are likely to achieve a reasonable return for the amount of investment that you have had to put into the scheme.¹¹⁸

5.17 The new remuneration system is based on four conceptual measurement/ remuneration components:

- a prospective service capability rating, translating into an entitlement percentage for base fees and performance fees,
- base fees based on processing volumes,
- performance measures (3-4 short term, 3-4 long-term), and
- claims cost improvement sharing – policy period loss ratio and tail measure.

5.18 The new remuneration system is summarised in Appendix 6.

5.19 Some of the performance measures include:

- Return to work,
- Setting correct premiums and ANZIC's classification of employers,
- Dispute prevention, and
- Pro active injury management.

Identified Issues and Concerns

5.20 Despite the fact that WorkCover and the insurance industry see the changes being made to the insurer remuneration arrangements as improving alignment with the Scheme's objectives, some concerns have been raised about the extent to which this is actually the case.

5.21 The Labor Council of NSW in particular has raised concerns about the extent to which the new remuneration arrangements will actually align the Scheme's aims with the way in which insurers are remunerated. In her presentation to Forum, Ms Nancy Carl, Industrial Officer, Labor Council of NSW, stated-

We believe that there are a number of areas in the WorkCover scheme which need to be restructured to ensure that the right incentives are in place to gain the best outcome. The insurance arrangements require complete revision to ensure that incentives are in place. The way that the current remuneration and incentive arrangements are made will not, we say, necessarily deliver the scheme's objectives. The options to be explored include insurers handling the investment, other agents administering and managing the claims, and the exploration of one administrator for all claims.¹¹⁹

¹¹⁸ Evidence of Mr Robert Thomson, Manager Workers Compensation Division, ICA, 6 March 2002, p 47.

¹¹⁹ Presentation by Ms Nancy Carl, Industrial Officer, NSW Labor Council, 15 March 2002, p 35.

- 5.22** In addition, concerns have been raised about the timing of the arrangements, their complexity and the regularity with which changes to the system have been made.

Timing of Development

- 5.23** One of the issues raised by representatives of the insurance industry centred around the timing of the changes being made to remuneration arrangements. Although the broad outline of the arrangements has been signed off by all insurers many of the details are yet to be determined and this has been creating some implementation problems for insurers.

- 5.24** In evidence presented to the Committee Ms McKenzie indicated that at this stage not all the measures for the remuneration arrangements had been fully developed and signed off. She stated:

Included in that package are some longer-term measures, which we are still doing work on, but they are things that will not kick in for a while yet. We are still going through the process of picking auditors to audit these arrangements. So, to that extent I guess I would say the job is not finished, but certainly the package has been signed off on by the insurers and by the board and we are rolling it out and implementing it as we speak.¹²⁰

- 5.25** Regarding the detail of the remuneration arrangements Mr Thomson said:

I think the industry is concerned to some extent with the length of time it has taken to finalise some of the measures. We are eight to nine months into the year in which we are being assessed and some of the detail is not necessarily finalised.¹²¹

- 5.26** Mr Thomson also raised concerns about the long term measures and the uncertainty surrounding what they will finally comprise. He stated:

I guess the other issue that comes out of it is that there is a concern about certainly those long-term measures—return to work, tail and loss ratios. The time taken or required to develop those makes managing the business more difficult.¹²²

- 5.27** Mr Colin Fagan, General Manager Workers Compensation, QBE Insurance, also reflected Mr Thomson's concerns about the need to have the remuneration structure finalised so that investment could be made accordingly. In evidence to the Committee he said:

It would have been advantageous if they had been completed prior to the beginning of the current period. However, there are various reasons for that not happening. A current weakness is that as a manager trying to improve a business it would be good if we had longer-term certainties over the remuneration areas, not necessarily certainty in the value, but certainty in the structure.¹²³

¹²⁰ Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, 6 March 2002, p 38.

¹²¹ Evidence of Mr Robert Thomson, Manager Workers Compensation Division, ICA, 6 March 2002, p 46.

¹²² Evidence of Mr Robert Thomson, Manager Workers Compensation Division, ICA, 6 March 2002, p 46.

¹²³ Evidence of Mr Colin Fagan, General Manager Workers Compensation, QBE Insurance, 6 March 2002, p 52.

Complexity of Arrangements

5.28 Mr Thomson also indicated that he felt the remuneration arrangements were not meeting WorkCover's key objective – that the measures be simple and transparent. In evidence to the Committee he stated:

The degree of complexity and transparency of some of these measures is very difficult to translate, that is passing on actually what is intended to the operators at the coalface so that they understand some of the measures that we are working on. There are those issues sitting inside of it.¹²⁴

Regularity of Changes

5.29 Another concern raised was in relation to the regularity of the changes to the Scheme and the impact that this is having on the stability of the Scheme and the ability of insurers to manage their businesses in such a way to keep up with the pace of change.

5.30 In evidence presented to the Committee Mr Fagan indicated that the regularity of changes to the remuneration arrangements were impacting on the ability of insurers to conduct their business successfully. He said:

Over the preceding few years it has been constantly renegotiated with a number of changes. As a manager of a business, I am trying to progress the business, but it stunts the decision-making to some degree. There are areas of significant expenditure for improvements in parts of our business, and when making the decision of way to invest or recruit what type of skill sets are needed, that could slow down the decision-making, because there is such a degree of uncertainty. In our other businesses throughout Australia and the world we have more of a degree of certainty about the measures and methods that can be used over a longer period. As such it is relatively easier to direct investment in those businesses and improve and project them.¹²⁵

Conclusion 10

The implementation of the new remuneration arrangements should improve insurers' outcomes.

¹²⁴ Evidence of Mr Robert Thomson, Manager Workers Compensation Division, ICA, 6 March 2002, p 46.

¹²⁵ Evidence of Mr Colin Fagan, General Manager Workers Compensation, QBE Insurance, 6 March 2002, p 52.

Information Technology and Data Management/Availability

Background

- 5.31** A key aspect of regulation is monitoring those being regulated to ensure that the rules and guidelines put in place are being adhered to. One of the key ways of achieving this is through the availability/provision of data and information from the regulated authority to the regulator.
- 5.32** The importance of having high quality data is highlighted by the WorkCover Authority in the *Licensing Policy of the WorkCover Authority for Insurers Licensed under Section 178 of the Workers Compensation Act 1987*. This policy states that WorkCover needs to have high quality data in order to:
- enable premium rates to be set correctly,
 - publish meaningful and accurate claims and injury statistics, and
 - monitor the financial viability of the WorkCover Scheme to ensure that this Scheme operates on a fully funded basis.¹²⁶
- 5.33** Ernst & Young have also highlighted to the Committee that it is essential for WorkCover to have good IT systems with appropriate and quick access to data. Ernst & Young's third report gives the following reasons why WorkCover needs to be able to access adequate data systems:
- for monitoring its own performance,
 - enabling stakeholders (WorkCover, agents/insurers, doctors etc) to target poorly performing areas or parts of the scheme,
 - setting strategies and looking at policy matters to improve scheme performance, and
 - enabling flexibility for the introduction of new initiatives.¹²⁷
- 5.34** The importance of having high quality data and advanced information technology has been highlighted during previous inquiries into the Scheme. For example, in 1997 the Grellman Report stated:
- Employers Associations are particularly concerned about the lack of reliable workers compensation industry statistics. Reliable and accessible industry focussed data is a valuable tool that can assist in improving many aspects of the system.

¹²⁶ WorkCover, *Licensing Policy of the WorkCover Authority for Insurers Licensed under Section 178 of the Workers Compensation Act 1987*.

¹²⁷ Ernst & Young Third Interim Report, p10.

Many groups seek relevant data and information to identify areas for improvement in their prevention and return to work programs. Lack of data and information is a major impediment to improving prevention performance.¹²⁸

5.35 Then in mid 2001 Justice Terry Sheahan in the Sheahan Report wrote:

It is essential that all steps are taken to ensure an improvement in the quality and extent of common law data, so as to provide more reliable report of the Scheme's position and of the key variables impacting upon it.¹²⁹

Issues

5.36 The importance of having excellent data and information systems for monitoring the performance of the Scheme was raised by a number of participants in the Committee's inquiry for the third interim report.

5.37 Mr John Walsh, Partner, PWC said:

It is absolutely essential in a scheme like this that close monitoring and information, as distinct from data, flows in a systemic and constructive way.¹³⁰

and

... information and data - I think it is improving but it has been a chronic problem with New South Wales WorkCover and it probably is germane to New South Wales.¹³¹

5.38 Mr Greg McCarthy, Executive Director, Workplace Injury Management Services, said:

It has been said that the better computer system is the better warehousing of data and access to data by all stakeholders. Certainly it is from data that you can learn where many of your problems are occurring, and until you can identify problems it is difficult to fix them.¹³²

5.39 Ernst & Young also identified the need for improved data systems:

Adequate IT systems are a key enabler for some possible options of Scheme reform. Many observers believe that the current state of IT within the Scheme is a significant barrier to entry for new agents/insurers and a significant impediment to improving the management of the Scheme by WorkCover, agents/insurers and other stakeholders.

¹²⁸ Grellman Report, para 4.1.

¹²⁹ Sheahan Report, p 49.

¹³⁰ Presentation by Mr John Walsh, Partner, PWC, 15 March 2002, p 18.

¹³¹ Presentation by Mr John Walsh, Partner, PWC, 15 March 2002, p 18.

¹³² Presentation by Mr Gregory McCarthy, Executive Director, Workplace Injury Management Services, 15 March 2002, p 28.

- 5.40** In her presentation to the Forum, Ms McKenzie identified a proliferation of databases and poor accuracy as a key problem. She said:

In the recent past we have had a proliferation of data bases created inside WorkCover. We have got problems with the accuracy of those data bases and we have got problems with turning that data into useful information...¹³³

- 5.41** Mr McCarthy indicated that poor data systems may be a disincentive to potential entrants to the system. He said:

I think the current technology issues are actually creating barriers to entry into the scheme in that it really does require very large significant organisations to put up the capital to move in, where a lot of that is about everyone having their own computer solutions.¹³⁴

- 5.42** The range and appropriateness of data was identified as a problem by Professor Michael Fearnside of Westmead Hospital:

It is recommended that consideration be given to expanding the WorkCover data base with regard to further refining of diagnoses, because the instruments used are really pretty blunt when you are looking at sprains, fractures, open wounds, et cetera, and there are very much better categories available now which could refine the diagnoses and make the data much more meaningful.¹³⁵

- 5.43** Ms Carl said that the absence of a centralised process was the main problem with WorkCover's data systems. She said:

Statistical data is fundamentally flawed owing to the absence of a centralised process.¹³⁶

WorkCover's Data Management and Development Strategies

- 5.44** WorkCover has recognised the problems that exist with its management of data and is currently developing some strategies to try and resolve the issue. WorkCover's Information Management and Technology (IM&T) plan overview, provided to the Committee by WorkCover, is reproduced as Appendix 8.

- 5.45** During the inquiry Ms McKenzie outlined a range of initiatives being undertaken by the Authority to improve its data management systems:

We have got a number of strategies which we are developing at the moment to achieve this objective. Customer contact investment in new modern communication infrastructure and customer contact systems focused on customers needs, allowing easy access to WorkCover services and electronic

¹³³ Presentation by Ms Kate McKenzie, General Manager, WorkCover NSW, March 15 2002, p 6.

¹³⁴ Presentation by Mr Gregory McCarthy, Executive Director, Workplace Injury Management Services, 15 March 2002, p 28.

¹³⁵ Presentation by Prof Michael Fearnside, Westmead Hospital, 15 March 2002, p 29.

¹³⁶ Presentation by Ms Nancy Carl, Industrial Relations Officer, Labor Council of NSW, 15 March, 2002 p 34.

lodgment and follow up of claims; reporting channels investment in enabling technology that supports decision-making, business intelligence and makes management information accessible. Typically this strategy involves establishing an enterprise wide data warehouse giving WorkCover analytical processing and data-mining facilities.¹³⁷

and

We are actually going back to square one and having a look at what information we need, whether all the business processes that we have in place are still relevant and necessary, and making sure that that work happens at the same time as the development of the infrastructure plan.

We are also replacing our insurance systems to a new central data warehouse. This is going to be a one-stop-shop of all insurer information and will involve electronic exchange of information with all insurers. We have got a big forum next week with all of the insurers in the scheme to try and advance the strategy in conjunction with the insurers.

The central data warehouse will provide management reporting at all levels and improve our capacity to monitor what is happening with the scheme. It is also able to provide portals of information for all of the stakeholders in the scheme, including insurers, arbitrators, approved medical providers and the general public. All systems will embrace the internet and allow the public access to information and to relevant workplace legislation. This is a three year plan. It is going to take some time to roll out...¹³⁸

5.46 Possible options for the improvement of WorkCover's information technology and data systems are discussed in Chapter 8.

Conclusion 11

It is important that WorkCover's IT and data management systems are adequate.

The Committee is concerned that WorkCover's data and information management systems are currently inadequate for WorkCover to properly fulfil one of its primary roles as regulator of the workers compensation scheme.

The Committee notes that WorkCover has announced the development of a new IT strategy to address these concerns.

Data management and accessibility by all stakeholders is an area of great concern to the Committee and options to improve WorkCover's data management will be further explored in the Committee's fourth and final report.

¹³⁷ Presentation by Ms Kate McKenzie, General Manager, WorkCover NSW, 15 March 2002, p 6.

¹³⁸ Presentation by Ms Kate McKenzie, General Manager, WorkCover NSW, 15 March 2002, p 6.

Regulation of Self Insurers

Background

5.47 Self insurance relieves an employer or corporate group of employers from obtaining a workers compensation policy and allows such employer to carry their own underwriting risk. Self insurers are responsible for the payment of their claim liability and for the management of those claims. All costs of any individual employee becoming injured in the work place are therefore borne by the employer directly. Self insurers by law are required to provide the same benefits to an employee as would be supplied by an employer covered by the NSW workers compensation scheme. Under the Scheme WorkCover has a responsibility to ensure that workers outstanding claims are adequately protected and will be met.

5.48 A recent study into self insurance, presented at the Eighth Accident Compensation Seminar in November 2000, outlined the benefits of self insurance. Self insurance:

- provides a direct way for companies to manage their OH&S risks,
- gives companies an economic reward for managing these risks,
- Provides competition for statutory schemes,
- gives employers control of their claims, and
- provides another source of innovative solutions to the problems facing workers compensation.¹³⁹

5.49 Ms McKenzie said at the Forum that she felt self insurance was beneficial because it creates incentives for the employer. She said:

Moving on to self-insurance... I guess we have taken the view in the recent past that these are arrangements that should be encouraged to the extent possible because they offer quite a lot of incentives when the employer is managing their own injured workforce.¹⁴⁰

5.50 However, she cautioned against extending the availability of self insurance further. She said:

Whilst we have encouraged the self-insurance take-up in the last 18 months, I think that there is an added cautioned that needs to be mentioned here in that this is a long-term business. Some of these claims might not occur in 40-50 years, and out there in the business world businesses often do not last quite that long, so there is a big challenge for regulators to ensure that in allowing those

¹³⁹ Presentation by Martin Fry, Daniel Smith and Taylor Fry at the Eighth Accident Compensation Seminar, entitled *Self Insurance – Its place in the scheme of things*, p 608.

¹⁴⁰ Presentation by Ms Kate McKenzie, General Manager, WorkCover NSW, 15 March 2002, p 6-7.

arrangements to go ahead there are adequate arrangements in place to keep track of mergers and acquisitions and liquidations of these companies to ensure that the money is always there.¹⁴¹

5.51 Self insurance is often considered to provide benefits to the whole system by introducing competition between insured and self insured parts of the scheme. The argument is that competition forces improvements on the insured sector, otherwise it loses employers to the self insured sector. Thus it reduces inefficient cross subsidies because the employers with the best experiences become self insurers and costs for the remainder are revealed.¹⁴²

5.52 The consequences of the better risk employers leaving are that the poorer risks remaining cause the average premium for the insured scheme to rise (therefore the ability to cross subsidise across industry classifications is reduced. From an individual jurisdiction's point of view this appears as higher published costs and because self insured costs are rarely published a jurisdiction can appear to be more costly than is really the case.¹⁴³

WorkCover's Policies and Regulation

5.53 Self Insurers are licensed by WorkCover NSW under Section 211 of the 1987 Act. The introduction of the WorkCover scheme in June 1987 required insurers to maintain separate statutory trust funds for employers premiums and outstanding claims. Liabilities are, therefore, secured by this statutory mechanism. Self insurers are not required to maintain separate trust funds to secure outstanding claims liabilities. Assets representing provisions for outstanding claims are not separated from the other assets of self insurers.¹⁴⁴

5.54 Self insurers are licensed under the following broad criteria:

- Applicants for a new self insurer license must have a minimum of 500 employees in NSW.
- A self insurer must have sufficient financial resources to meet its liabilities and be able to demonstrate long term financial viability by way of audited financial statements prepared in accordance with generally accepted accounting principles for the previous five years.
- Self insurers must prepare and lodge with WorkCover each financial year a copy of the annual report (including an audited statement).
- All self insurers (other than government employees who are exempted by S213 of the Act) must lodge either a deposit with WorkCover or provide a bank guarantee

¹⁴¹ Presentation by Ms Kate McKenzie, General Manager, WorkCover NSW, 15 March 2002, p 6-7.

¹⁴² Presentation by Martin Fry, Daniel Smith and Taylor Fry at the Eighth Accident Compensation Seminar, entitled *Self Insurance – Its place in the scheme of things*, p 610

¹⁴³ Presentation by Martin Fry, Daniel Smith and Taylor Fry at the Eighth Accident Compensation Seminar, entitled *Self Insurance – Its place in the scheme of things*, p 610

¹⁴⁴ WorkCover NSW, *Licensing Policy of the WorkCover Authority for Self Insurers and Group Self Insurers Licensed under Section 211 of the Workers Compensation Act, 1987*, p 1.

to secure total outstanding claims liabilities. The amount of liability to be secured by deposit and/or bank guarantee will be calculated by WorkCover as follows:

- central estimate of outstanding claims liability at balance date, plus;
- a prudential margin of 30%.

- There must be a cross/holding company guarantee in a form which WorkCover NSW accepts.
- A self insurer must obtain and maintain unlimited reinsurance cover during the currency of the license. The reinsurance must be provided by an insurance company authorised by APRA.
- Self insurers are expected to comply with the statutory requirements of Chapter 3 of the 1998 Act regarding injury management. Applicants for license will be required to demonstrate that they have developed an injury management program for the timely, safe and durable return to work of injured workers. WorkCover conducts injury management audits on self insurers periodically.
- Self insurers must demonstrate that they have the capacity for injury and claims management. WorkCover will hold the licensee responsible for maintaining a satisfactory standard of injury and claims management and administration.
- A self insurer must demonstrate that its Occupational Health and Safety systems and practices comply with relevant legislative requirements. Self insurers are required to conduct self audits of their OH&S management systems and provide WorkCover with a report on an annual basis.
- Self insurers must provide WorkCover with monthly claim data in a form approved by WorkCover.

Issues

5.55 In her presentation to the Forum, Ms McKenzie outlined the importance of regulation with regards to self insurance. She said:

... the regulation of these arrangements needs to be carefully designed to ensure that the self-insurers are financially viable and strong in order to minimise the possibility of insolvency in the future which could potentially have an adverse impact on workers; that they are covered by adequate reinsurance arrangements that are appropriate for their workers compensation risks, and that is certainly an issue for us at the moment with problems in the international reinsurance market; that they are covered by securities that are adequate for their outstanding liabilities in the event of their insolvency; and that they are able to demonstrate that they have the capacity to undertake a Workers Compensation business, including experience in underwriting policy administration; and subject to the above, that they are able to conduct their business and operations with minimal restrictions and intrusions.¹⁴⁵

¹⁴⁵ Presentation by Ms Kate McKenzie, General Manager, WorkCover NSW, 15 March 2002, pp 6-7.

5.56 Issues and concerns have been raised by both Ernst & Young and the Self Insurers Association about aspects of the legislative and regulatory environment in which self insurers operate. These issues include:

- Applicability of APRA requirements,
- Commutation Restrictions,
- Minimum Numbers of Employees for Licenses,
- OH&S Regulations, and
- Benefits.

APRA Requirements

5.57 Self-insurers are single employer based and consequently have different prudential requirements. The risks for them of not being able to meet their employee workers compensation entitlements depend on their wider business activities and not insurance risks as is the case for specialised insurers and insurers licensed under the Insurance Act.¹⁴⁶

5.58 Ernst & Young highlighted areas of WorkCover's regulation of insurers where principles from the APRA requirements may be able to be applied. In particular the following areas are discussed:

- Margins,
- Review of Actuarial Reports, and
- Fit and Proper tests.

5.59 The applicability of APRA requirements to WorkCover is discussed in detail at Para 2.44 of this report.

Margins

5.60 In their third report Ernst & Young raise concerns about the effectiveness of the bank guarantee to protect workers' entitlements:

Self-insurers (excluding Treasury Managed Fund) are required to purchase a bank guarantee. In the failure of Pasminco, a licensed self-insurer, the bank guarantee did protect claimant's workers compensations entitlements. With the benefit of the failure of Pasminco and the introduction of APRA's higher standard of prudential requirements, WorkCover's Board may wish to assess the adequacy of the 30% margin.¹⁴⁷

¹⁴⁶ Ernst & Young Third Report, p 3.

¹⁴⁷ Ernst & Young Third Report, p 5.

Review of Actuarial Reports

- 5.61** Ernst & Young also indicate that there may be a case for WorkCover to further monitor self insurers through their actuarial reports:

We do not know if WorkCover asks its actuary to review the actuarial reports of each self-insurer and report the results to WorkCover. As part of its prudential supervision of self-insurers, WorkCover should have the actuarial reports of each self-insurer reviewed by an actuary it appoints at least once every three years and have the actuary report to it on the adequacy of the actuarial advice. There is a compelling argument for this given the substantial under reserving within the general insurance industry over the last few years even though actuaries reviewed most of the outstanding claims reserves of insurers. WorkCover may also wish to consider asking its actuary, Tillinghast to review the overall adequacy of central estimates for self-insurers as a prudent check on their adequacy. This would be assessed on a group basis not by individual self-insurer.¹⁴⁸

Fit and Proper Test

- 5.62** Further monitoring of the WorkCover Board has been identified as being beneficial. Ernst & Young state in their third report to the Committee:

We assume WorkCover and the Government already has a process through normal public sector employment processes that, implicitly or explicitly, applies fit and proper test to WorkCover's Board of Directors and senior management. WorkCover may wish to consider applying such a test to the relevant managers of each agent/insurers, self-insurer and specialised insurer.

- 5.63** Ernst & Young summarised the applicability of APRA by stating:

A prudent organisation would see the benefits of APRA's requirements for business plans, financial projections and a risk management strategy. In our view APRA's requirements in these areas are such that the Government or WorkCover if they follow a prudent level of management, should consider introducing... (for) each managed agent/insurer, self-insurer and specialised insurer.¹⁴⁹

- 5.64** For further information about APRA requirements please see Ernst & Young's third report to the Committee attached as Appendix 3.

Commutation Restrictions

- 5.65** Mr Ken Young, Executive Director, Self Insurers Association, raised concerns with the Committee about the applicability of broader workers compensation legislation to self insurers. In particular he raised concerns about the extent to which the new restrictions on commutations were appropriate for self insurers. In evidence to the Committee he said:

¹⁴⁸ Ernst & Young Third Report, p 6.

¹⁴⁹ Ernst & Young Third Report, p 8.

Number one on our list is the recent near abolition of commutations. Self-insurers do not support the abolition of commutations. We believe that self-insurers should have been exempted from the near abolition of these commutations. There is no means for a self-insurer these days under the reform to bring finality to a claim, so you are going to have ongoing costs until age 65 for workers and that increases costs all round for the self-insurer.¹⁵⁰

5.66 In response to a question from the Committee asking whether WorkCover could abolish commutations for everyone except self insurers, Mr Young responded:

Yes, we believe that is possible. I mean, there is already an exemption in the system through the coalmines insurance, which has its own Act. They are still working on redemptions under the old Act so the avenue is there to exempt self-insurers from a particular aspect of the scheme.¹⁵¹

5.67 Mr Young explained to the Committee why it was important that self insurers be allowed to commute claims. He said:

Once all the avenues for return to work, for partial or normal duties, have been exhausted there comes a point where a decision as to be made on the claim. You have discussions with the worker and you may find that it is in the best interests of the worker and the employer to allow the worker to get on with their life. They may want to move interstate. Some workers do not want to come back to work. In some cases employers may not be able to provide long-term suitable duties. That is another aspect that we have concerns with, the payment of difference play on suitable duties.¹⁵²

Minimum Number of Employees

5.68 As discussed earlier one of the licensing requirements for self insurers is that they have a minimum number of employees in NSW. Currently this minimum number is 500.

5.69 In response to a question from the Chair regarding the preferred level of employees required in order to be able to obtain a self insurance license, Mr Young responded:

We have been pushing to have zero employees for a number of years.¹⁵³

5.70 This would effectively remove the requirement for a minimum number of employees. An organisation of any size would therefore be able to self-insure provided the other requirements are met.

¹⁵⁰ Evidence of Mr Ken Young, Executive Director, Self Insurers Association, 6 March 2002, p 65.

¹⁵¹ Evidence of Mr Ken Young, Executive Director, Self Insurers Association, 6 March 2002, p 66.

¹⁵² Evidence of Mr Ken Young, Executive Director, Self Insurers Association, 6 March 2002, p 68.

¹⁵³ Evidence of Mr Ken Young, Executive Director, Self Insurers Association, 6 March 2002, p 72.

OH&S Regulations

- 5.71** Concerns were also raised by the self insurers about the fact that they are more stringently regulated when it comes to occupational health and safety than other employers. In evidence to the Committee Mr Ken Young outlined his concerns. He said:

To be honest with you, one of the areas that is of major concern to us is that through WorkCover, of course, we have to meet certain licensed conditions and one of those conditions, which has just recently been approved by the WorkCover board, is what they call the occupational health and safety audit. Now the audit is a means by which each self-insurer audits its own systems and provides a report to WorkCover and once every three years WorkCover comes out and audits the self-insurer on a number of elements. What they have been able to get through their own board is that in the future self-insurers will have to achieve what they call a level 4 out of a maximum level 7 to retain the license.

That application on self-insurers is totally discriminatory. It is an area that is not applied against any other employer in this State. If a self-insurer gave up their license tomorrow, they would not have to reach a standard of level 4 in what they call the audit plan. As required by every other employer in this State, they would be required to provide a safe and healthy workplace and look after the welfare of up a tough their workers. This OH&S requirement should not be part of our license. We are an insurer. Fund managers do not have that requirement placed on them, yet because we are a self-insurer WorkCover says, "You will reach a level 4, and if you do not reach and maintain a level 4 we will look at taking your license off you." That is crazy. What about the other 750,000 employers in this State? They have no requirement like that.¹⁵⁴

Benefits

- 5.72** Mr Young indicated to the Committee that another area that the Self Insurers Association is concerned about is that of make-up pay. In evidence to the Committee, Mr Young said:

The only other area I would like to comment on is the payment of make-up pay. We would like to see that only paid for a period of six months. That would create an incentive for the partially incapacitated workers to get back to normal duties. If they wished to maintain a particular level of payment, they would also have the option of applying for a higher position within the employer, to maintain that standard level of income. It will certainly have a reasonable effect on reducing costs to the self-insurer and to employers that are insured with the fund.¹⁵⁵

¹⁵⁴ Evidence of Mr Ken Young, Executive Director, Self Insurers Association, 6 March 2002, p 75.

¹⁵⁵ Evidence of Mr Ken Young, Executive Director, Self Insurers Association, 6 March 2002, p 76.

Conclusion 12

The role of self insurers in the scheme is important.

The Committee is concerned that a zero employee requirement may allow organisations to become self insured without the necessary infrastructure to guarantee their workforce's workers compensation benefits.

In light of the evidence received by the Committee in preparation for the third report, the Committee considers that the use of commutations generally needs to be reviewed.

Regulation of Other Parties/Providers

5.73 One of the criticisms of WorkCover's regulation of the Scheme, heard by the Committee, was that not all participants in the scheme are closely regulated. In his presentation at the Forum Mr Thomson indicated that he thought that WorkCover should more closely monitor other participants in the system in addition to insurers. He said:

... the insurer remuneration arrangements, have been developed in conjunction and consultation with the insurers and they have focused to a large extent on scheme outcomes and they have been defined in various remuneration measures. We believe that this approach needs to be expanded to cover some of the other service providers within the scheme so that their involvement is actually assessed on scheme outcomes and judged on that, so that they get a base fee for performance of certain aspects of their work, but then the other component of it is actually dependent upon the scheme outcomes we finally achieve.¹⁵⁶

5.74 Mr Fagan reiterated Mr Thomson's concerns and indicated that a lack of legislation can cause problems because it cannot be guaranteed that other groups are working in the best interests of the Scheme. In evidence presented to the Committee he stated:

One of the factors that is often missed is that injury management revolves around early collaboration with injured workers, doctors and employers. At the moment it is ineffective in only one party is being regulated, and that is ourselves. We are trying to be as effective as we can as a conduit between those parties to bring them together as quickly as possible to ensure proactive management of injured people. We spend time going through some of the minor process areas that restrict our effectiveness. As such, we need to ensure that we are allowed to be as flexible as possible in maximising the injury management, which is basically a subset of claims management.¹⁵⁷

¹⁵⁶ Evidence of Mr Robert Thomson, Manager Workers Compensation, ICA, 15 March 2002, p 24.

¹⁵⁷ Evidence of Mr Colin Fagan, General Manager of Workers Compensation, QBE Insurance, 6 March 2002, p 53.

5.75 Mr Doug Pearce, Chief General Manager, Commercial Insurance and Financial Services, NRMA Insurance, in his evidence to the Committee also raised concerns about inadequate provider regulation. He said:

... there has been a drain by service providers with incomplete regulation, and that is still the case.¹⁵⁸

and

It should be monitoring of the financial performance of the scheme, the guidelines and minimum performance, the requirements of the insurers and, for that matter, all of the stakeholders in the scheme and monitoring that performance.¹⁵⁹

5.76 Ms McKenzie explained to the Committee that WorkCover is limited in what it can do to regulate and manage the Scheme generally and participants in it:

I certainly think there are limitations associated with the current legislative framework and the powers that WorkCover has. In most cases we are one step removed: it is all care but no real control over what the players in the scheme do. In my view, we need to move in one direction or the other. We either say "Over to you" and set up a regime whereby people look after themselves in the scheme...¹⁶⁰

Conclusion 13

Insurers are not the only service providers in the Scheme. All participants need to be subject to sufficient regulation to ensure the objectives of the Scheme are met and that participants are committed to the Scheme.

¹⁵⁸ Evidence of Mr Doug Pearce, Chief General Manager, Commercial Insurance and Financial Services, NRMA Insurance Ltd, 21 November 2001, p 40.

¹⁵⁹ Evidence of Mr Doug Pearce, Chief General Manager, Commercial Insurance and Financial Services, NRMA Insurance Ltd, 21 November 2001, p 46.

¹⁶⁰ Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, 14 February 2002, p 32.

Chapter 6 Injury Management

Background

6.1 In 1997 the Grellman Report concluded that:

A significant factor contributing to the system's key cost drivers is the injury management process. Currently claims are managed by licensed insurers whose performance is regulated and monitored by WorkCover.¹⁶¹

6.2 Grellman found that there are a number of different parties which can have a large impact on the length of time that it takes to process a claim. The Report states:

These parties are employers, injured workers, insurers, lawyers, doctors, rehabilitation providers and WorkCover. Numerous submissions pointed out that there is insufficient contact between these parties and general lack of concern towards achieving a return to work objective.¹⁶²

6.3 The Grellman report concluded that:

An injury management process is recommended that focuses on early intervention and return to work. This can be achieved by implementing tight mandatory deadlines for claim reporting and establishing an injury management program with active involvement by WorkCover.¹⁶³

Current Injury Management and Claims Management Framework

6.4 Since the Grellman Inquiry in 1997 and to some extent since the Sheahan Inquiry in 2000 a large number of changes have been made to the workers compensation system to improve early reporting, injury management and consequently return to work rates.

6.5 The changes made to date have resulted in a workers compensation injury management system which is comprised of three main steps. These are:

- Pre injury planning – involving the development of the Injury Management Program by the Insurer and registration of this program with WorkCover NSW.
- Immediate post injury management – involving the determination of the Injury Management Plan by insurers in consultation with the employer, injured worker, and nominated treating doctor.
- Return to work – programs working towards helping injured employees to re-enter the work force.

¹⁶¹ Grellman Report, para 4.3.

¹⁶² Grellman Report, para 4.3.

¹⁶³ Grellman Report, para 6.4.

Pre Injury Planning - Injury Management Programs

- 6.6** According to Section 43 of the 1998 Act, an insurer must establish and maintain an injury management program and must revise its injury management program periodically or when WorkCover requests it.
- 6.7** The Injury Management Program is a coordinated management program that integrates all aspects of injury management for the purpose of achieving optimum results in terms of a timely, safe and durable return to work for injured workers.¹⁶⁴ Aspects of injury management likely to be incorporated into the programs include:
- treatment,
 - rehabilitation,
 - retraining,
 - claims management,
 - monitoring,
 - service provision, and
 - employment management practices.
- 6.8** The program serves as the blueprint for the injury management processes and procedures for that insurer.¹⁶⁵
- 6.9** Once developed the injury management program is lodged with the WorkCover Authority.

Immediate Post Injury Management

- 6.10** An injured worker must notify the employer that they have been injured at the workplace as soon as possible after the injury has occurred.
- 6.11** If the injury is not significant then the employer can notify the insurer within 7 days. If the injury is considered to be significant then the employer must notify the insurer within 48 hours of becoming aware that it has happened.
- 6.12** In situations where the injury is considered to be significant the insurer must initiate the development of an injury management plan within three days of being notified of the accident.¹⁶⁶

¹⁶⁴ 1998 Act, section 43.

¹⁶⁵ WorkCover NSW, *Outline of the Operation of the NSW Workers Compensation Scheme*, November 2001, p 11.

¹⁶⁶ A *significant injury* means- a workplace injury that is likely to result in the worker being incapacitated for a continuous period of more than 7 days, whether or not any of those days are work days and whether or not the incapacity is total or partial or a combination of both. (1998 Act, definitions)

- 6.13** The injury management plan will be consistent with and will essentially support the insurer's own injury management program. The plan aims to coordinate and manage those aspects of injury management that concern the treatment, rehabilitation and retraining of an injured worker. The intention is to achieve a timely, safe and durable return to work for the employee.¹⁶⁷ Ideally, the injury management plan will be developed in conjunction with the employee, the employer and the worker's treating doctor.
- 6.14** WorkCover's benchmark for the development of the plan is 20 days. WorkCover is not provided with the injury management plans as developed by the insurer, however, so is not in a position to ascertain with any certainty whether the benchmark has been met.¹⁶⁸

Return to Work

- 6.15** As provided for under Section 53 of the 1998 Act, WorkCover has a range of return to work programs which insurers can utilise in aiding an injured worker to return to work. Some of these include:
- Work Trials – the Work Trial program provides for short periods of work experience to aid an injured employee to regain skills or fitness in order to return to their original work place. Work trials are only provided where the employees original employer cannot find suitable duties for them.
 - Retraining – WorkCover is able to provide funding for retraining for injured employees. This program is available to injured workers unable to return to their pre injury job and who have no other marketable skills.
 - JobCover Placement program – The JobCover Placement program provides for a range of incentives for a new employer to employ a worker previously injured in the workplace. The incentives can include premium exemptions, allowances and exemption from costs associated with a second injury.¹⁶⁹

The Participants roles in injury management

- 6.16** The table on the following page summarises the key roles of the various stakeholders in the injury management process under the 1998 Act.

¹⁶⁷ 1998 Act, section 42.

¹⁶⁸ Evidence of Ms Mary Hawkins Manager Workplace Injury Management, WorkCover NSW, 6 March 2002, p 32.

¹⁶⁹ WorkCover NSW, *Training and Employment Programs for Injured Workers* – Pamphlet.

Table 6.1 - Stakeholders' Roles in Injury Management¹⁷⁰

WorkCover's Role	Insurers' Role	Employers' Role	Employees' Role
<ul style="list-style-type: none"> • Regulation of the activities of, insurers and to some extent workers, employers and medical officers, etc. • WorkCover receives Injury management programs – as developed by insurers. 	<ul style="list-style-type: none"> • 1998 Act states that all insurers have to develop injury management programs for workers who sustain a significant injury¹⁷¹ • Insurers need to keep employers up to date with the requirements of the insurers injury management program. • Insurers are required to contact the worker, employer and treating doctor within 3 days of notification – to develop an injury management plan. • Injury management plans are to be developed within 20 days of notification. 	<ul style="list-style-type: none"> • Employers are required to report a significant injury to their insurer within 48 hours of becoming aware of it. • Where an injury is minor the employer has to report within 7 days of becoming aware. • Required to provide suitable employment to the employee when fit. • Comply with their obligations under the Injury Management Program. • Employers with premiums over \$50,000 are also required to have a Return to Work Coordinator. 	<ul style="list-style-type: none"> • Report injuries to their employer as soon as possible after the injury. • Participate and cooperate in the establishment of an injury management plan. • Nominate a treating doctor.

Source: WorkCover NSW, "Outline of the Operation of the NSW Workers Compensation Scheme", November 2001, p 11.

¹⁷⁰ WorkCover NSW, "Outline of the Operation of the NSW Workers Compensation Scheme", November 2001, p 11.

¹⁷¹ A significant injury means a workplace injury that is likely to result in the worker being incapacitated for work for a continuous period of more than 7 days, whether or not any of those days are work days and whether or not the incapacity is total or partial or a combination of both: Section 42 (1) of the 1998 Act.

Early Injury Management

Importance of Early Reporting and Injury Management

6.17 The importance of effective early injury management in determining the length of time that an injured worker is away from work has been analysed in a number of national and international studies and was raised as an issue by a number of witnesses to the Committee's inquiry.

6.18 Last year a significant inquiry into the Workers Compensation Scheme in Western Australia was undertaken. One of the aspects of the workers compensation scheme considered in the study was injury management and the importance of early reporting in ensuring early return to work rates. The report concluded:

The literature also supports the proposition that early referral to rehab will achieve optimum results. The time line most frequently referred to is the first four weeks post disability. ComCare data confirms that costs of rehabilitation rise over time.¹⁷²

6.19 A Wisconsin study also found that a prolonged length of time off work due to an injury can have a range of impacts on the worker. The report concluded:

These findings about the long term impact of the speed of return to work reinforce the importance of policies that encourage and ease return as soon as is consistent with recovery from the physical effects of workplace injuries... Long absences from work are likely to have lasting consequences on these workers' future employment and unemployment and therefore on their future economic well being.¹⁷³

6.20 There was little dispute amongst witnesses to the Committee's inquiry that early return to work is of vital importance in injury management. In evidence given to the Committee Ms Kate McKenzie, General Manager, WorkCover NSW, stated:

I guess essentially the approach to injury management... is focusing on trying to get notification of the injuries at an earlier point in time, earlier contact with the parties, better communication between the injured worker, the employer, the medical provider and the insurer to try to minimise delays. We know that the more time it takes for those contacts to be made, the more difficulty there is in managing the injury.¹⁷⁴

¹⁷² Gunthrie, *Report on the Implementation of the of the Labor Direction Statement in Relation to Workers Compensation*, Western Australia, 2001, p 173.

¹⁷³ Galizzi M, *What are the most important factors shaping return to work? Evidence from Wisconsin*, Workers Compensation Research Institute, October 1996, p55.

¹⁷⁴ Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, March 6 2002, p 26.

- 6.21** Dr Olav Nielszen, Chairman of the Forensic Branch, RANZCP, also indicated to the Committee that he felt the costs associated with injury management were largely as a consequence of management at the beginning of the process:

(the) cost is very early on—the waste is in the injury management to start with. Indeed, if injuries were managed properly the number of people eventually found to be permanently impaired would be greatly reduced in my view.¹⁷⁵

- 6.22** The issue of costs to the Scheme as a consequence of early injury management, was also raised by Ms Nancy Carl, Industrial Relations Officer, Labor Council of NSW, in her presentation to the Workers Compensation Forum. She said:

An area which requires strategic and innovative approaches is the area of injury management and return to work. The number one cost driver is workers remaining on weekly benefits and not returning to work ...¹⁷⁶

- 6.23** In evidence to the Committee Mr Colin Fagan, General Manager, Workers Compensation, QBE Insurance, indicated that he thought improved injury management could also help reduce the number of disputes. He said:

I think there are ways to improve the whole system to minimise those aspects and to actually reduce the level and use of disputation as such. The opening aspects of a claim can minimise and reduce that, and that is the area to be focused on. What happens at the start of a claim drives the process of how a claim evolves over the next ensuing periods. So, what we do in those first few weeks, and that is all parties when I say "we", is the most effective.¹⁷⁷

Early Reporting and Injury Management performance

- 6.24** Despite the large number of changes put in place under the 1998 Act the Committee has received conflicting evidence about the extent to which these changes have improved return to work rates.
- 6.25** In November 2000 Mr Rod McInnes, Assistant General Manager of WorkCover NSW reported to the Eighth Accident Compensation Seminar that:

Since June 1996 there has been a levelling out of the proportion of workers still receiving benefits for at least 26 weeks. This trend may change in the future in response to recent initiatives aimed at improving injury management.¹⁷⁸

¹⁷⁵ Evidence of Dr Olav Nielszen, Chairman Forensic Branch, RANZCP, 7 March 2002, p 26.

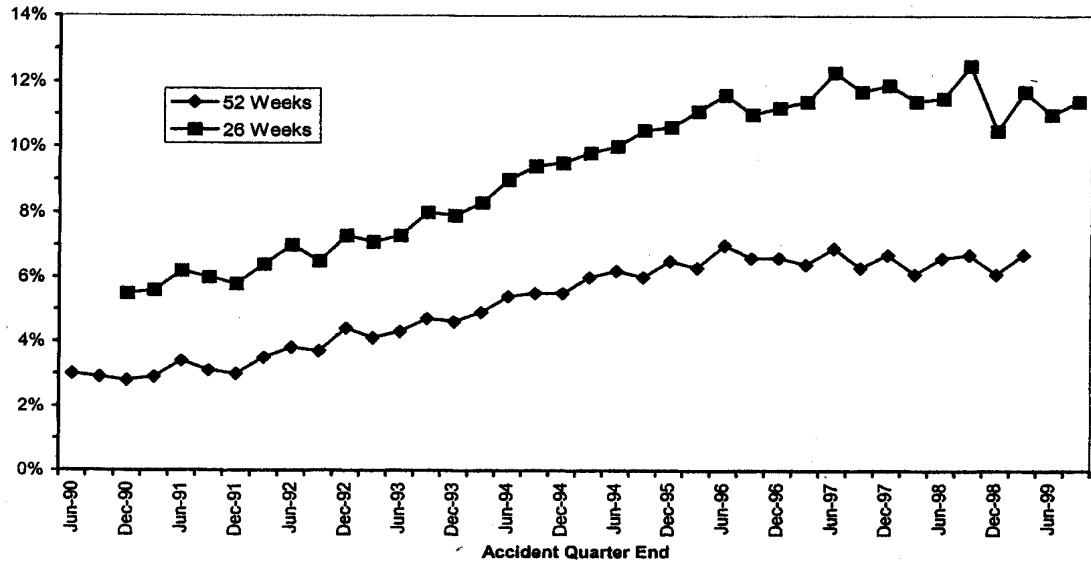
¹⁷⁶ Presentation by Ms Nancy Carl, Industrial Relations Officer, NSW Labor Council, 15 March 2002, p 34.

¹⁷⁷ Evidence of Mr Colin Fagan, General Manager Workers Compensation, QBE Insurance, 6 March, 2002, p 55.

¹⁷⁸ Mr Rod McInnes, Assistant General Manager, *The NSW WorkCover Scheme*, Eighth Accident Compensation Seminar, p 258.

6.26 Figure 6.1 illustrates the trend being described by Mr McInnes.

Figure 6.1: WorkCover Scheme: Proportion of Claimants still on weekly benefits after 26 & 52 weeks.



Source: *The NSW WorkCover Scheme, Eighth Accident Compensation Seminar, p 258.*

6.27 The Committee has not seen an update of the statistics presented at the Eighth Accident Compensation Seminar, however in evidence to the Committee, Mr Colin Fagan indicated that at QBE (contrary to Rod McInnes' expectations) the number of clients still receiving benefits after 26 and 52 weeks has been increasing. He said:

We are still seeing a slight deterioration in claims reaching those time periods. I think the new methods will help incentivise both ourselves but equally take some of the conflict out of the process of new claims management, which is one of the lead factors in creating claims that go from 26 to 52 weeks.¹⁷⁹

6.28 A Scheme summary paper provided to the Committee by WorkCover provides some figures published in a national survey of Workers Compensation Schemes. One of the statistics given stated that 76% of NSW injured workers had returned to work and were still working at the time of the survey, seven to nine months after making a claim (this compares to a national average of 74%).¹⁸⁰

6.29 In his evidence to the Committee Mr Daniel Tess, an Actuary with Pricewaterhouse Coopers indicated that compared to most states in the USA, return to work rates in NSW were relatively slow. He said:

... on the first measure, the time close to notification of claims and the first payment of claims, you will see that the first measure listed is the percentage of all claims which receive a payment—that is a payment for weekly benefits—within 21 days of injury. In the United States more than half of claims receive a weekly

¹⁷⁹ Evidence of Mr Colin Fagan, General Manager of Workers Compensation, QBE Insurance, 6 March 2002, p 63.

¹⁸⁰ WorkCover NSW, *Outline of the Operation of the NSW Workers Compensation Scheme*, November 2001, p 10.

benefit payment within three weeks of the injury. The New South Wales figure is about 14 per cent. That is not only a quantitative difference but a qualitatively different level of speed with which people receive benefits in this system.

Another way to think about speed of benefit payment is not to measure from the date of injury but to measure from the date of insurer notice because an insurer cannot begin to process a claim and make a payment until there is notification of a claim. Once again, almost 60 per cent of claims in the United States receive a benefit payment within two weeks of an insurer being notified. In New South Wales the figure is around 30 per cent. So, again, there is a real qualitative difference in the way the processing happens to work in this State.¹⁸¹

6.30 As a consequence of a lack of relevant and up to date data/information it is very difficult to ascertain quantitatively the status of return to work rates in NSW and whether or not they are reasonable given the experience of other jurisdictions. However, the Committee has received extensive qualitative evidence from participants in the inquiry that indicates that injury management could be improved.

6.31 The reasons given by participants as to why this aspect of the scheme is not operating optimally included:

- the performance of insurers,
- the role of other providers,
- the role of employers,
- education/communication, and
- benefit signals/processes.

Performance of insurers

6.32 A number of witnesses to the Committee's inquiry have raised concerns about the role that poor performance by insurers plays in the early management of injuries.

6.33 In evidence Dr Nielsen indicated that he felt more could be done in the early stages by insurers to reduce the time taken to assess claims. He said:

I think their duties should be increased, their duty is to take an active role in assessing a person early and making sure that they are getting treatment early, rather than sitting around for 24 and 30 months before they get assessed.¹⁸²

and

It very much falls on to the general practitioner to co-ordinate it, their nominated doctor to co-ordinate it, without getting much guidance or communication from

¹⁸¹ Evidence of Mr Daniel Tess, Director, Pricewaterhouse Coopers, 21 November 2001, p 15.

¹⁸² Evidence of Dr Olav Nielsen, Chairperson NSW Forensic Branch, RANZCP, 7 March 2002, p 26.

the insurance company. I think that is the problem. In my experience of treating patients who have been injured at work, they just sit around until the insurance company gets sick of them. Then the insurance company cuts them off and they are furiously angry and of course in difficulty, and then they are in an adversarial setting. They have never spoken to anyone from the insurance company except the person to whom they are submitting bills.¹⁸³

- 6.34** Mr John Walsh, Partner, PWC, indicated that he felt that the incentive structures up until recently had been wrong and hence insurers were not being remunerated to undertake early injury management properly. He said:

Finally, the incentive structures in the scheme, I think, have been poor, mainly fee for service, which really just encourages more service, and that means on behalf of providers repeat consultancies and on the part of insurers a process driven rather than an outcome based solution.¹⁸⁴

- 6.35** Mr Fagan indicated that he felt that the recent remuneration arrangement changes were helping insurers to improve on their injury management performance. In evidence to the Committee he said:

We found that being extremely flexible in the injury management process and allowing us to innovate and treat individual injured people as individual cases has increased the effectiveness of returning people back to work at an early stage.¹⁸⁵

Role of other providers (General Practitioners, Physiotherapists, Psychologists and others)

- 6.36** Mr Walsh indicated that he thought that the incentives for service providers (being doctors etc) needed to be looked at in relation to improving injury management. In his presentation to the Forum, he said:

...the incentive structures in the scheme, I think, have been poor, mainly fee for service, which really just encourages more service, and that means on behalf of providers repeat consultancies...¹⁸⁶

- 6.37** Mr Fagan was asked by the Committee whether he thought General Practitioners (GP's) were incentivised against aiding early return to work. He said:

My understanding is that doctors will be paid more in New South Wales if they were dealing with a worker's compensation claim as against a normal injury.¹⁸⁷

¹⁸³ Evidence of Dr Olav Nielssen, Chairperson NSW Forensic Branch, RANZCP, 7 March 2002, p 26.

¹⁸⁴ Presentation by Mr John Walsh, Partner, Pricewaterhouse Coopers, 15 March 2002, p 17.

¹⁸⁵ Evidence of Mr Colin Fagan, General Manager of Workers Compensation, QBE Insurance, 6 March, 2002, p 53.

¹⁸⁶ Presentation by Mr John Walsh, Partner, Pricewaterhouse Coopers, 15 March 2002, p 17.

¹⁸⁷ Evidence of Mr Colin Fagan, General Manager of Workers Compensation, QBE Insurance, 6 March, 2002, pp 57-58.

- 6.38** Mr Fagan said that he thought that in some ways doctors were misguided about keeping injured workers off work. He said:

I think also doctors have a client relationship and their belief sometimes is misfounded in the early stages of a claim on being conservative in respect to the treatment of an injury. So, in fact by keeping the person off work trying to look after their long-term position is actually often counterproductive as such.¹⁸⁸

- 6.39** Mr Fagan indicated that he thought providing incentives to doctors to ensure that workers returned to work early would be beneficial.¹⁸⁹

The role of employers

- 6.40** One of the other main participants in injury management are employers. The Committee has received evidence raising concerns about the role that employers currently play in the early management of injuries.

- 6.41** Mr Walsh said that in his presentation to the Forum that there are no incentives for employers to become more actively involved in injury management:

On the part of employers, the experienced premium creates diverse incentives to reduce the claims experience and the claims cost to a point in time and then really have no interest after that point in time and not carry out their responsibilities to injured workers.¹⁹⁰

and

I think there is a problem with the way the Australian health system is funded and delivered, in that we have a universal Medicare insurance system and private insurers who deliver and are paid for benefits independently of workplace involvement. So there is no real incentive for employers to create a nexus with their injured workers until an injury occurs, and as we have heard this morning, this can be once every ten or fifteen years. So there is no incentive to ongoing think about workplace safety and health.¹⁹¹

- 6.42** Ms Carl also raised the possibility of using both incentives and disincentives to encourage employers to provide suitable duties for injured employees. In her presentation to the Forum she said:

The number one cost driver in the scheme is employers failing to provide suitable duties. There must be financial penalties imposed and enforced on employers to fail to provide suitable duties to injured workers. There is provision in the Act for penalty, but this has not been introduced. Small employers should be offered

¹⁸⁸ Evidence of Mr Colin Fagan, General Manager of Workers Compensation, QBE Insurance, 6 March, 2002, pp 57-58.

¹⁸⁹ Evidence of Mr Colin Fagan, General Manager of Workers Compensation, QBE Insurance, 6 March 2002, p58.

¹⁹⁰ Presentation by Mr John Walsh, Partner, Pricewaterhouse Coopers, 15 March 2002, p 17.

¹⁹¹ Presentation by Mr John Walsh, Partner, Pricewaterhouse Coopers, 15 March 2002, p 18.

subsidies to take injured workers back on suitable duties, certainly for the first 4 to 6 weeks.¹⁹²

- 6.43** Mr Gregory McCarthy, Executive Director, Workplace Injury Management Services, also raised the issue of employers who have very few claims and hence have little understanding/knowledge of the importance of early injury management. In his presentation at the Forum he said:

I think early reporting is fundamental to any scheme's success. ... the vast majority of employers in New South Wales are small employers. They probably have claims once every few years, in some cases never, in some cases for ten to fifteen years, in many cases they don't ever think they are going to have a claim.

There are probably less than 500 employers in New South Wales who truly have the capacity and the knowledge to quickly respond to an injury when it occurs in the workplace. I think we need to look at a system which can assist those other several hundred thousand employers out there.¹⁹³

- 6.44** Mr Robert Thomson, Manager Works Compensation, Insurance Council of Australia (ICA), indicated that maybe employers were not aware that by being more involved in the injury management process they could save themselves money. In evidence presented to the Committee he said:

... engaging the employer and getting the employer to recognise in some instances that by being proactive, offering suitable duties, getting engaged in the process, it can be less costly than the other outcome.¹⁹⁴

Education and Communication

- 6.45** In many ways the concerns raised in relation to the performance of service providers and employers in injury management relates to a lack of understanding/knowledge of their responsibilities by these groups. It was suggested by some participants in the Committee's inquiry that this may be a result of a lack of education and/or a lack of communication between all the parties involved in injury management.

- 6.46** Mr Thomson indicated that he thought the proficiency and complexity of legislation made it difficult for stakeholders to understand the Scheme. In evidence given to the Committee, Mr Thomson stated:

You have currently got the situation where you have got the 1987 Act, the 1998 Act, the 2000 and 2001 Acts and the 2001 further amendment Act, and you have got the guidelines in relation to provisional liability in relation to permanent impairment, claims estimation manuals, legal costs regulations and a host of other regulations. The picture I am trying to draw is not just from our side but also from the injured workers' point of view and trying to know how to work within the

¹⁹² Presentation by Ms Nancy Carl, Industrial Relations Officer, NSW Labor Council, 15 March p 34.

¹⁹³ Presentation by Mr Gregory McCarthy, Executive Director, Workplace Injury Management Services, 15 March 2002, p 26.

¹⁹⁴ Evidence of Mr Robert Thomson, Manager Workers Compensation, ICA, 6 March 2002, p 51.

scheme. The same applies to employers in particular. You have actually got a heap of regulations and legislation approximately 20 centimetres high to try to work within and they are all intertwined with each other.¹⁹⁵

6.47 Mr Thomson also discussed the difficulties associated with trying to educate employers in particular about the Scheme:

The issue really is: how do you get the message through to those employers what they do with a claim if they get one? We have talked about the complexities, of the size of legislation and the rest that go with it. If you put that together with all the other Federal and State regulations for employers to try to deal with, workers comp probably is not one of the higher priorities for some of the smaller employers when they get a claim once every 10 to 15 years. We have to get the message across that if they get a claim they have to report it, to create the appropriate channels so that it is easy for them to do so. Provisional liability has made a step in the right direction by reducing the amount of information that required. It is not necessarily incumbent on the employer to notify; it can come from another source and then you can link back through to the employer. I think that will assist the process.¹⁹⁶

6.48 Prof Fearnside, of Westmead Hospital, highlighted the need to ensure that health workers are trained and kept up to date with changes in the workers compensation area:

... it is also critical to have ongoing training and continuing professional development for all the health workers who are involved in these areas.¹⁹⁷

6.49 Apart from the training required by the health profession, Prof Fearnside also indicated that education was an issue for employees. In his presentation he said:

So the issues in this, not to bring any condemnation on any particular group, but there is a lack of worker education. I think that is a problem for the unions, to provide education for their members. Secondly, he had great difficulty in accessing the workers compensation system, where to my simple mind it was basically pretty clear.¹⁹⁸

6.50 While discussing what the clinical objectives of the Scheme, should be Prof Fearnside indicated that prompt communication is important. He said:

... advice to relevant authorities on an injured person's return to work, and if that is not possible, then for their retraining; it is vital that both horizontal and vertical communication among health providers, case managers and third parties is prompt and efficient, and I might say that this has improved a great deal in workers compensation over the last few years.¹⁹⁹

¹⁹⁵ Evidence of Mr Robert Thomson, Manager Workers Compensation, ICA, 6 March, 2002, p 51.

¹⁹⁶ Evidence of Mr Robert Thomson, Manager Workers Compensation, ICA, 6 March 2002, p 51.

¹⁹⁷ Presentation by Prof Michael Fearnside, Westmead Hospital, 15 March 2002, p 29.

¹⁹⁸ Presentation by Prof Michael Fearnside, Westmead Hospital, 15 March 2002, p 31.

¹⁹⁹ Presentation by Prof Michael Fearnside, Westmead Hospital, 15 March 2002, p 29.

6.51 Mr Fagan also indicated that a focus on communication is important. In evidence to the Committee he stated:

... GPs do not necessarily know a lot about the workplace. So, as such they are talking only to the injured worker who is couching the functions of their role in a certain way. That is why I hone in on communication in the early stages. Equally, you cannot have an employer necessarily sitting in front of them saying, "I can change that role" or "I can't work with you in that way." We do not necessarily see them at fault as such as bringing them together so they can sit there and outline each other's position, the GP saying, "I am worried about a particular function exacerbating the injury" et cetera and an employer saying, "I think I can cater for that. I will have to make some changes" et cetera to bring people back to work.²⁰⁰

Benefit signals/processes

6.52 It was suggested during the Committee's inquiry that one of the reasons why early injury management is not working as well as it could was the benefits provided to employees do not change around the critical times when international research suggests it is best if the employee returns to work. Mr Goodsell, Director, NSW Australian Industry Group, raised this in his presentation to the Forum. He said:

... to realign the scheme and benefits, and benefit signals and processes, with the time lines that we understand international research suggests are critical in your average workplace injury, which really hinges around the concept of 6 to 9 weeks. That seems to be the critical point. If you don't get it done before that time then you are really turning that injury into something else, and you really are reducing the chances of somebody returning to work significantly.

But if you look at the benefit structure as it currently operates, there are no great signals around that period, you wait for 26 weeks before there is any significant benefit or process signal in relation to injury. So we just make that point, that if that still is a problem, that length of time with weekly benefits, then the solution in our view includes looking at how those benefits and benefit signals and process signals might be brought more in line with that objective assessment of injury management time lines.²⁰¹

6.53 In their report to the Committee (Attached as appendix 3), Ernst and Young has highlighted a number of reasons why early reporting is not working in NSW. He states:

There are significant barriers to the early reporting of claims including the operation of the health system in Australia, limited incentives on employers to report claims and process matters. There are many possible initiatives that could be employed to speed up the reporting of claims.²⁰²

²⁰⁰ Evidence of Mr Colin Fagan, General Manager Workers Compensation, QBE Insurance, March 6, 2002, p58.

²⁰¹ Presentation by Mr Mark Goodsell, Director NSW, Australian Industry Group (AIG), 15 March 2002, p20.

²⁰² Ernst and Young, Third Report, p 13.

Disincentives to Recovery

6.54 A recent report undertaken by the Australasian Faculty of Occupational Medicine, The Royal Australasian College of Physicians, entitled *Compensable Injuries and Health Outcomes*, analyses the contention that people who are injured and claim compensation for that injury have poorer health outcomes than people who suffer similar injuries but are not involved in the compensation process.²⁰³ The paper reaches the conclusion that:

Although most people who have compensable injuries recover well, a greater percentage of these people have poorer health outcomes than do those with similar but non compensable injuries. There is sufficient good quality evidence to show this to be true and significant agreement among practitioners in all relevant fields (medical, legal, insurance, government oversight bodies) to support the evidence and to suggest that a complex interaction of factors is responsible for this.²⁰⁴

6.55 In response to a question from the Committee about the extent to which this is the case in NSW, Ms McKenzie said:

... built into the system is some incentives for people not to recover. Obviously, you have to try to design those out to the extent you can.²⁰⁵

6.56 Mr Goodsell also raised concerns about the extent to which the benefit structure encourages employees to return to work. He stated:

We accept that the availability of alternative duties is an important factor. However they should be supported by benefit rules that encourage the employee to maximise their efforts to return in this period. Presently there are two problems in the benefit design that militate against this- the first is that the initial benefit "signal" is not until after 26 weeks, and the second is that for those who return to alternative duties there is little incentive to ramp up to full duties.²⁰⁶

Recent Relevant Changes

6.57 Recent initiatives undertaken by both WorkCover through the determination of guidelines and regulations as well as by the Government through the 2001 Act and the Further 2001 Act have been designed to improve early return to work rates and the broader area of injury management.

6.58 The Hon John Della Bosca, Minister of Industrial Relations, indicated in evidence given to the Committee that he expects these recent reforms will have a positive impact on injury management. He stated:

²⁰³ The Royal Australasian College of Physicians, *Compensable Injuries and Health Outcomes*, Sydney 2001, p 2.

²⁰⁴ The Royal Australasian College of Physicians, *Compensable Injuries and Health Outcomes*, Sydney 2001, p 36.

²⁰⁵ Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, 6 March 2002, p 39.

²⁰⁶ Correspondence from Mr Mark Goodsell, Director NSW, AIG, 14 March 2002, p 5.

... my expectation is that the scheme reforms are having two substantial effects. The first is that they have overall improved the prospect of good dispute resolution, rapid settlement of claims, better injury management.²⁰⁷

6.59 Mr Thomson agreed that recent reforms to the Scheme had the potential to improve the early reporting of claims. He said:

The reforms that came in on 1 January have the potential to have some impact. The level of that impact will depend on one of the key issues, early reporting of claims. That is probably the most significant driver within the scheme in whether the legislation—whether the old or the new—will work.

6.60 Some of the key reforms include:

- Provisional liability, and
- Insurer remuneration arrangements.

Provisional Liability

6.61 One aspect of the recent reforms highlighted by some stakeholders as aiding the early management of injuries were the changes made to Chapter 3 of the 1998 Act regarding provisional liability.

6.62 Guidelines outlining the details of how provisional liability will be managed in NSW were proclaimed to commence on January 1 2002 along with a large number of other reforms to the Scheme. The Guidelines state:

Provisional liability allows an insurer to make weekly and medical expenses payments without admitting liability. This enables an insurer to make early payments to the worker without delay.²⁰⁸

6.63 The Guidelines outline what procedures need to be followed once an initial notification is made of a workplace injury, what information the insurers have to collect in order to make payments and what is to occur should there be a disagreement about any aspect of the claim.²⁰⁹

6.64 Ms Carl indicated that she saw the inclusion of provisional liability in injury management as a significant improvement to the early reporting of claims. In her presentation at the Forum she said:

Provisional liability: The unions see this as a bonus, as a plus to the system. One of the fundamental aspects of any scheme working properly is the timely reporting and early intervention. Certainly one of the major criticisms in the past by unions and union members has been the delay in employers not only reporting injuries

²⁰⁷ Evidence of the Hon John Della Bosca, MLC, Minister for Industrial Relations, February 14, 2002, p 6.

²⁰⁸ WorkCover NSW Guidelines, Part 1 Initial notifications and provisional liability, effective 1 January, 2002, p 6.

²⁰⁹ WorkCover NSW Guidelines, Part 1 Initial notifications and provisional liability, effective 1 January, 2002, pp 4-20.

but certainly in the delay in payments being made to injured workers. On occasions injured workers have been forced to wait for up to six months for payment. There appears to have been very positive impact as a result of provisional liability, and the unions are hoping that this positive step will continue.²¹⁰

6.65 Prof Fearnside was also optimistic about the impact that the provisional liability provisions would have on the early reporting of injuries. In his presentation at the Forum he said:

There needs to be an early definition of goals and what needs to be achieved, together with a prompt assessment of liability, and I think that the provisional liability provision will go a long way to assisting this.²¹¹

6.66 In his presentation to the Forum, Mr Thomson indicated that he thought the move to provisional liability was in line with the aim of improving return to work. He said:

The next issue is trying to arrange realistic return to work duties We see that the provisional liability response will assist in that process and will take the focus off whether you are actually being paid to return to work. That really is in line with the appropriate incentives and disincentives of the key stakeholders within the scheme, so they can actually participate in an appropriate manner.²¹²

6.67 However, not all participants in the Committee's inquiry have been optimistic about the impact of provisional liability. In his presentation to the Forum, Mr Goodsell said:

We do have concerns, and our members have quite significant concerns, about provisional liability and how it will work, and whether its potential to undermine the other good things in your package is realised and that overcomes, or it outweighs, the benefits of the package to the point where the scheme does not improve or goes backwards because provisional liability does not work properly.²¹³

6.68 Mr Goodsell reiterated and expanded on these concerns in correspondence to the Committee. He wrote:

Employers consistently relate claims in the following circumstances:

1. Employees initially admitting to work colleagues or even supervisors that injuries were not work related, the subsequently claiming compensation when medical fees or lost time become excessive.
2. Employees claiming compensation after inquiring about their leave balance and being informed that they have no sick or other leave.
3. Employees claiming compensation immediately after being giving notice of termination, redundancy or performance counselling.

²¹⁰ Presentation by Ms Nancy Carl, Industrial Relations Officer, Labor Council of NSW, 15 March 2002, p 34.

²¹¹ Presentation by Prof Michael Fearnside, Westmead Hospital, 15 March 2002, p 31.

²¹² Presentation by Mr Robert Thomson, Manager Workers Compensation, ICA, 15 March 2002, p 25.

²¹³ Presentation by Mr Mark Goodsell, Director NSW AIG, 14 March 2002, p 20.

Our concern is that the WorkCover guidelines that regulate insurers claims management behaviour under the new provisional liability regime do not contain sufficient measures to take account of these factors.²¹⁴

6.69 The Self Insurers Association has also registered its objection to the provisional liability provisions with the Committee. In evidence Mr Ken Young, Executive Officer, Self Insurers Association said:

We strongly object to the new provisional liability payments.²¹⁵

and

There is no requirement on the worker to lodge a claim or a WorkCover medical certificate. Provisional payments must commence within seven days and, as Mr Pearce says, they may continue up to 12 weeks. We believe that from some of the feedback from a few of our members at our bimonthly meeting last week that they are experiencing an increasing trend in reporting. The seven days is too short to make a decision on a claim in the proper manner. And you do not have an informed decision to make that decision on. I cannot understand why we have not stuck with the notification which involved a WorkCover certificate and a claim form. It gives you all the evidence that you need to make a well-informed decision on the claim.²¹⁶

6.70 Mr Michele Franco, Solicitor and Adviser to the Executive Director of the Self Insurers Association indicated that he thought there was scope to abuse the provisional liability provisions. In evidence to the Committee he said:

There is certainly scope for abuse of provisional payments. Provisional payments are activated solely on the basis of notification. The criteria that need to be satisfied for provisional payments are modest criteria. It is open for individuals to notify of injuries, to take periods of time off work up to the maximum of 12 weeks, to come back to work without ever submitting a claim. That could go on ad infinitum.²¹⁷

Insurer/Agent Remuneration Arrangements

6.71 One of the key mechanism that WorkCover hopes will improve injury management by insurers are the new insurer remuneration arrangements. Although the broad outline of these arrangements has been agreed to the details are currently being finalised by WorkCover in consultation with insurers.

²¹⁴ Correspondence from Mr Mark Goodsell, Director NSW AIG, 14 March 2002, p 5.

²¹⁵ Evidence of Mr Ken Young, Executive Officer, Self Insurers Association, 6 March 2002, p 73.

²¹⁶ Evidence of Mr Ken Young, Executive Officer, Self Insurers Association, 6 March 2002, p 73.

²¹⁷ Evidence of Mr Michele Franco, Solicitor and Adviser to the Executive Director of the Self Insurers Association, 6 March 2002, p 74.

- 6.72** Mr Fagan indicated in his evidence to the Committee that the new insurer remuneration measures will aid claims management. He said:

... there is a definite claims cost incentive. Ensuring that you get people back to work as quickly as possible is the outcome that is wanted to potentially maximise income. It is a very simple equation. The cheapest claims are people who are back at work. Ensuring that the structure of the remuneration is set up to get people back to work as quickly as possible, perfectly aligns them. That is the role of insurers.²¹⁸

- 6.73** The impact of the new insurer remuneration arrangements is discussed in more detail in Chapter 4.

Other Recent Changes

- 6.74** Other administrative reforms and trials undertaken by WorkCover NSW which may aid injury management in the future have included new training schemes and injury management pilots.

Training/Education

- 6.75** As discussed earlier one, of the concerns raised by participants in the Committee's inquiry has been that medical professionals are not sufficiently aware of the injury management practices. It has also been suggested that perhaps an education program would go some way to improving this situation.

- 6.76** Ms Mary Hawkins, Manager of the Workplace Injury Management Branch, WorkCover NSW, in her evidence to the Committee, described the training program being put in place by WorkCover in order to aid early treatment. She said:

... we have commenced a large training program for physiotherapists, chiropractors and osteopaths, because they are the primary treating practitioners early in the life of a physical injury, which is the majority of injuries. We have developed an outcomes-based training program commissioned through the University of South Australia. It commenced in February and will run throughout the entire year. It will ensure that those practitioners who are treating injured workers within the New South Wales workers compensation system understand outcomes-based treatment, evidence-based practices, the amount of reasonably necessary treatment and their approach to treatment practices.

That program will be adapted for use by the rehabilitation providers. That type of work is already under way.²¹⁹

²¹⁸ Evidence of Mr Colin Fagan, General Manager Workers Compensation, QBE Insurance, 6 March 2002, p 53.

²¹⁹ Evidence of Ms Mary Hawkins, Manager, Workplace Injury Management Branch, WorkCover NSW, 6 March 2002, p 34.

Injury Management Pilots

6.77 Four injury management pilots commenced on 1 January 2001 and they were all completed in 2002. The pilots were as follows:

- Central West Injury Management Service (CWIMS),
- Warrakanji Care Integration,
- Employers Mutual Indemnity (EMI) /Pricewaterhouse Coopers (PWC)

The EMI project provided incentives to employers to report claims within a certain time period. Basically the incentive was that the employer were to receive a rebate on their excess if they reported the injury within a certain time frame.²²⁰

- QBE Insurance companies.

6.78 The objective of the pilots was to identify critical components of injury management, measure improved health and increased return to work rates, and establish benchmarks for injury and claims management.

6.79 In a media release from 12 December 2000, the Hon John Della Bosca, Minister for Industrial Relations stated:

If these pilot programs prove to be successful and can be extended around the State, it will benefit New South Wales employers by reducing disruption to their businesses when an injury occurs.²²¹

6.80 Ms McKenzie described the broad aims of the pilots as follows:

... the aim behind the pilots was to test a number of different approaches to injury management with the hope that, at the end of that pilot period, we would be able to make some judgments about what appeared to contribute to the injury management and what did not, so that we could formulate some views out of those experiences on what should or could be rolled out across the scheme in terms of driving some further improvements in injury management in the scheme.

Two of those pilots were contracted to external parties. One was based in the central west of New South Wales and that was run by Central West Injury Management Service and the other was based on an injury, the private hospitals and nursing home injuries, and that was run by Warranjki Care Integration. There were also insurer-based pilots, one run by QBE and one run by EML.²²²

²²⁰ Mr Robert Thomson, Manager Workers Compensation, ICA, 6 March 2002, p 51.

²²¹ Media Release Hon John Della Bosca, Minister Industrial Relations, *Injury Management Program*, 12 December, 2000, p 1.

²²² Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, March 6, 2002, p 26.

6.81 The extent to which the injury management pilots achieved their objective will not be fully known until the evaluations are complete in April 2002.

6.82 Mr Walsh was optimistic that the pilots would be successful in providing some options for improving injury management.

The injury management pilots of last year hopefully will teach some lessons on how to create the continuum of injury, to report, to treatment, to return to work.²²³

6.83 In addition to the injury management pilots WorkCover has also conducted a Medical Education Pilot Program. The program aims to ensure that medical practitioners are provided with the best and most up to date information on managing work injuries and can integrate the medical management of injury (MMI) with return to work activity.

6.84 In January 2001, WorkCover called for and appointed consultants to undertake two MMI projects- general practitioner education and marketing/incentives. The third project, involved development of education strategies and resources for consumers, employers and insurers to ensure alignment of the expectations of everyone involved in the management of an injured worker with acute low back pain.²²⁴

6.85 Ms McKenzie in her presentation at the Forum described the aims of the MMI pilots as follows:

The medical management pilots are aimed at best practice treatment and we are running a program now dealing with low back injuries, which are the most frequent injuries in the scheme, trying to make sure that the treatment that people get for those sorts of injuries is best practice, and we help doctors and patients to make decisions about appropriate health care.²²⁵

Conclusion 14

Irrespective of how well injury management is being undertaken in NSW currently, it is clear from the evidence received that there is room for improvement (with prompt action immediately when an injury occurs not six weeks later). The Committee notes that the introduction of provisional liability should significantly improve injury management.

6.86 Options for improving injury management are detailed in Chapter 8 of this Report.

²²³ Presentation by Mr John Walsh, Partner, PWC, 15 March 2002, p 18.

²²⁴ *WorkCover Annual Report, 2000-2001*, p 19.

²²⁵ Presentation by Ms Kate McKenzie, General Manager, WorkCover NSW, 15 March 2002, p4.

Chapter 7 Injury Assessment

Introduction

7.1 The new guidelines and scales for the determination of permanent psychological and physical injury were proclaimed to commence on 1 January 2002 with the *Workers Compensation Further Amendment Act 2001* (“The Further Amendment Act”).

7.2 The guidelines are issued under section 376 of the *Workplace Injury Management and Workers Compensation Act 1998* (“the 1998 Act”) for the purpose of assessing the degree of permanent impairment that arises from a work related injury or condition in accordance with section 322 (1) of the 1998 Act.

7.3 Although the aim of workers compensation legislation generally is to get employees back to work, where the injury is permanent the permanent impairment guidelines are used to determine the level of impairment. The forward to the guidelines states:

When a worker sustains a permanent impairment, ... these Guides are intended to ensure an objective, fair and consistent method for evaluating the level of permanent impairment.²²⁶

7.4 Where a worker is assessed as having a permanent impairment as a result of a workplace incident the employee is eligible for compensation from their employer under the provisions of the 1998 Act. Compensation is in the form of a lump sum under the statutory benefits. The assessment provisions also determine whether an injured employee is eligible to access Common Law, where this route is chosen.²²⁷

7.5 Both the guidelines for the assessment of permanent physical and permanent psychological injury are based on the American Medical Association’s (AMA) *Guides to the Evaluation of Permanent Impairment*, fifth edition. The forward to the AMA guides states:

The AMA guides are the most authoritative and widely used source for the purpose of evaluating permanent impairment.²²⁸

7.6 The AMA guidelines have been adjusted slightly to suit Australian clinical practice.²²⁹ The changes to the AMA guides were recommended by a group of medical specialists brought together by WorkCover to review the AMA guides.

7.7 Assessing permanent impairment involves determining:

- whether the claimant’s condition has resulted in impairment,
- whether the condition has reached Maximum medical Improvement (MMI),

²²⁶ *WorkCover Guides for the Evaluation of Permanent Impairment*, 1st Edition, December 2001, (“WorkCover Guides”) p 5.

²²⁷ Workers Compensation Legislation Amendment Act 2001, Section 66.

²²⁸ *WorkCover Guides*, p 5.

²²⁹ *WorkCover Guides*, p 5.

- whether the resultant impairment is permanent,
- the degree of permanent impairment that results from the injury, and
- the proportion of permanent impairment due to any previous injury, pre existing condition or abnormality, if any.

7.8 The guidelines are clear that only medical specialists trained in the use of the guides are to assess the degree of permanent impairment arising from a work related injury or condition.²³⁰

7.9 During its inquiry the Committee received evidence in support of the new assessment procedures as well as other evidence raising concerns. The concerns raised have mainly related to the assessment procedures for the measurement of psychological injuries.

7.10 In her presentation to the Forum, Ms Nancy Carl, Industrial Officer, NSW Labor Council, stated:

There is major criticism over the instrument and methodology being used to correct psychological and psychiatric injuries. The government has recently written to the Labor Council advising that a national reference group will be established to research and develop a nationally accepted appropriate instrument for assessing psychological and psychiatric injuries.²³¹

Permanent Physical Injury Assessment

7.11 Under section 66 of the 1987 Act, a worker qualified for compensation for permanent injuries if they could show that he/she could demonstrate a permanent loss as a result of a compensable work injury. The Table of Disabilities under the 1987 Act contained a list of injuries to various parts of the human body and used percentages to calculate what proportion of the maximum amount payable for any given loss would be awarded.²³² Under these guidelines not all work related conditions were covered, for example injuries to internal organs.

7.12 The new guidelines, as outlined in the *WorkCover Guides*, extend the provisions for permanent impairment benefits to a range of injuries that were not compensable under the previous system. The new guidelines also introduced a new method for determining the level of benefit available. This is now determined by utilising a percentage “whole person impairment” rating.²³³

²³⁰ *WorkCover Guides*, p 5.

²³¹ Presentation by Ms Nancy Carl, Industrial Officer, Labor Council of NSW, 15 March 2002, p 34.

²³² WorkCover NSW, *Outline of the Operation of the NSW Workers Compensation Scheme- Legislative Council General Purpose Standing Committee No.1*, November 2001, p 21.

²³³ WorkCover NSW, *Outline of the Operation of the NSW Workers Compensation Scheme- Legislative Council General Purpose Standing Committee No.1*, November 2001, p 22.

7.13 Ms Mary Hawkins, Manager, Workplace Injury Management Branch, WorkCover NSW, explained the changes made to the assessment of physical injury as follows:

I suppose we have gone from a totally unregulated environment into one where we expect there to be systematic and consistent assessments and reporting of the level of permanent impairment. So, it is kind of going from chaos, if you like, into a quite orderly system.²³⁴

7.14 Although the Committee did not receive extensive evidence in relation to the new method for assessing permanent physical injury, the following comments were made. Dr Jim Stewart, Chair of the Permanent Impairment Coordinating Group, said in evidence to the Committee:

There was no disagreement that I detected about using impairment guidelines and the American guidelines as the basis for what was being done. They were matters of detail about various things that we resolved very amicably, and the group worked well. ²³⁵

7.15 Ms Carl in her presentation to the Committee's Forum stated:

We have information that the guidelines seem to be inadequate for the assessment of injuries to lower limbs.²³⁶

Permanent Psychological Injury Assessment

7.16 Prior to the 2001 Act, psychologically injured workers in NSW were unable to access compensation for their injuries. Following the commencement of the 2001 Act, people with a psychological injury now have access to compensation.

7.17 A primary psychiatric or psychological impairment is one which arises from a condition to which the person's employment was a substantial contributing factor. The condition will result from specific incidents at the workplace. ²³⁷

7.18 A primary condition is distinguished from a secondary psychiatric or psychological condition which arises as a consequence of, or secondary to, another work related condition. An example of a secondary injury would be depression associated with a back injury which was caused by an incident in the work place.

²³⁴ Evidence of Ms Mary Hawkins, Manager, Workplace Injury Management Branch, WorkCover NSW, 6 March 2002, p 36.

²³⁵ Evidence of Mr Jim Stewart, Private Consultant, Chair of the Permanent Impairment Coordinating Group, 7 March 2002, pp 7-8.

²³⁶ Presentation by Ms Nancy Carl, Industrial Officer, NSW Labor Council, 15 March 2002, p 34.

²³⁷ *WorkCover Guides*, p 7.

7.19 No permanent impairment assessment is to be made of secondary psychiatric or psychological impairments.²³⁸

7.20 A psychiatric disorder is considered to be permanent if it is likely to continue indefinitely. When determining this the medical officer will consider:

- the duration of the impairment,
- the likelihood of improvement in the injured workers' condition,
- whether the injured worker has undertaken reasonable rehabilitative treatment, and
- any other relevant matters.

7.21 Access to common law or to statutory benefits will only be available to those with psychiatric or psychological injuries determined to be more than 15% of whole of body.

7.22 The Committee has received a great deal of evidence in relation to the Psychological Impairment Rating scale (PIRS) which is to be utilised for the assessment of psychological injury. The use of PIRS has generated a degree of controversy within the psychological and psychiatric professional bodies.

The Issues

7.23 A range of opinions were expressed about various aspects of the PIRS for determining permanent impairment. Areas discussed included:

- Utilisation of the median,
- The extent to which the scale has been tested,
- Its reliability,
- Its cost,
- Disputes between professions,
- Other.

²³⁸ *WorkCover Guides*, p 7.

Utilisation of the median

- 7.24** In determining the level of psychiatric or psychological injury under the PIRS medical officers are required to look at six areas of function. These areas look at normal behavioural attributes, for example- social functioning, social and recreational activity, self care, travel, concentration/adaptation of pace and employability.²³⁹
- 7.25** Impairment within each of the six areas of function is rated using class descriptors. The classes range from 1 to 5, taking into account mild, moderate and severe levels of injury within each function.
- 7.26** Rating the psychiatric impairment using the PIRS is a two step procedure involving:
- Determining the median class score, and
 - Calculating the aggregate score.²⁴⁰
- 7.27** To determine the median the six scores from the function areas are arranged in ascending order. The median is then calculated by averaging the two middle scores. For example:
- 7.28** The following example shows the impact of utilising the median instead of the mean.
- | | | | | | | |
|----------------------|---|---|---|---|---|---|
| Function Area | 1 | 2 | 3 | 4 | 5 | 6 |
| Score | 1 | 1 | 1 | 1 | 1 | 5 |
- In this example:
 The Median = **1**
 The Mean = **1^{2/3} and would round up to 2.**
- 7.29** The Guidelines state that:
- The median score method was chosen as it is not influenced by extremes. Each areas of function is assessed separately. While impairment in one areas is neither equivalent nor interchangeable with impairment in other areas, the median seems the fairest way to translate different impairments onto a linear scale.²⁴¹
- 7.30** However, this system for measuring psychiatric and psychological injury has been criticised by the psychologists and some in the psychiatric profession.

²³⁹ Summary of evidence provided by Dr Julian Parmegiani, Forensic Psychiatrist, 7 March 2002, p 1-2.

²⁴⁰ *WorkCover Guides*, p 57.

²⁴¹ *WorkCover Guides*, p 57.

7.31 In their submission to the Committee the Australian Psychological Society (APS) states:

Among PIRS's multiple serious defects, its method for scoring (involving the median) is the greatest defect. It is known to underestimate very seriously the impacts of injuries by ignoring or "muting" the worst areas of impairment. ... The use of the median in scoring is mathematically certain to reduce the likelihood that genuinely impaired people will qualify for benefits or common law access.²⁴²

7.32 This claim was affirmed by Prof Paul Martin, President, Australian Psychological Society, who said in evidence to the Committee:

We do have all sorts of problems with PIRS, that is for sure, but we want to emphasise that this issue about using the median, is, fundamentally, what we feel is the most inappropriate thing about it. The guidelines specifically say that the median class score method was chosen as it is not influenced by extremes. That is a problem with the scale.²⁴³

7.33 Mr Robert Wilkes, Psychologist, indicated in evidence presented to the Committee that he thought the use of the median would disadvantage injured workers with specific injuries:

... it was very clear at a practical level that a number of workers were massively disadvantaged by a median-based system, that is workers who had an injury that was, in a sense, narrow but very intense and occupationally debilitating.²⁴⁴

7.34 Dr Jack White, Psychologist, also criticised the use of PIRS as being unfair. In evidence to the Committee he stated:

... the median measure, and I guess this is ultimately what we consider to be a very major flaw with this particular instrument—although it has been argued it was the fairest approach, we would argue in fact that it is a very unfair approach because it has the potential to seriously distort the actual outcome.²⁴⁵

7.35 Psychologists also indicated that the use of the median was not consistent with the AMA Guides which indicates that a high rating in one function area may be significant enough to severely impair an injured worker. The publication *Master the MA Guides Fifth: A Medical and Legal Transition to the Guides to the Evaluation of Permanent Impairment, 5th Edition* states:

... if an individual has either an extreme impairment on one or more areas or a market limitation in two or more spheres, it is unlikely that the individual will be able to perform complex activities, such as work, without considerable support and accommodation".²⁴⁶

²⁴² Submission No 25, APS, received 4 March 2002, p 2.

²⁴³ Evidence of Prof Paul Martin, President, APS, 7 March 2002, p 15.

²⁴⁴ Evidence of Mr Robert Wilkes, Psychologist, APS, 7 March 2002, p 16.

²⁴⁵ Evidence of Mr Jack White, Psychologist, APS, 7 March 2002, p 17.

²⁴⁶ Submission No 25, APS, received 4 March 2002, p 11.

7.36 However, Dr Olav Nielszen, Chairman NSW Forensic Branch, RANZCP, disputed the contention that impairment in one area of function could be significant enough to severely impair. In evidence to the Committee Dr Nielszen said:

It is over a whole range of functions. It is not just in one area and I think you rarely get impairment in one area without significant impairment in the other areas. I think it is quite a reasonable way of assessing overall impairment. We are looking at permanent impairment and it should be in all areas. You will not get permanent impairment if you cannot get into a train to go to work—if impairment only in the area of transport, for example—and that is high because your anxiety is in that area. That is very likely to be treatable. They are very likely to recover. However, if you have impairment across all areas of function then it is more likely to be a permanent impairment. In scientific studies if you have an extreme result you often exclude that because it is not representative. I think the same perhaps applies in this type of assessment.²⁴⁷

Extent to which the scale has been tested

7.37 An advertisement published in the *Daily Telegraph* on 20 November 2002, by the Labor Council of NSW stated that the Workers Compensation Bill presented to Parliament on November 27:

... will impose an untested method for assessing psychological and psychiatric injuries.²⁴⁸

7.38 This contention was questioned by Dr Nielszen whom indicated to the Committee that one of the pros of the PIRS was that it had been tested. He said-

The pros of it are that, firstly, it has been produced through a very exhausting process for the Motor Accidents Authority ...²⁴⁹

and

The cons are that there is no perfect system, and I think this is the best we have come up with. It is based on very extensive and widely accepted American Medical Association guidelines of impairment, so it is not as though it has just been created out of the air last week.

²⁴⁷ Evidence of Dr Olav Nielszen, Chairperson Forensic Branch of the Royal Australian and New Zealand College of Psychiatrists (RANZCP), 7 March 2002, p 28.

²⁴⁸ Advertisement, by Labor Council of NSW and other Unions, *The Daily Telegraph*, Tuesday 20 November 2001, p 10.

²⁴⁹ Evidence of Dr Olav Nielszen, Chairman NSW Forensic Branch, RANZCP, 7 March 2002, pp 23-24.

Reliability

- 7.39** The APS has questioned the reliability of the PIR scale. In their submission to the Committee they wrote:

The PIRS does not classify people with a similar level of deficit in a similar way. To the contrary it often treats people with similar levels of impairment very differently

- 7.40** However, Dr Nielszen, in his evidence to the Committee said that the early indications are that it has been reliable. He said:

As I understand it, there was some assessment of its reliability, and the reliability was actually quite good. The early use of it has shown some satisfaction by the people using it; that is, the psychiatrists are quite pleased with the way it works, and, as I understand it, the consumers on both sides have been fairly satisfied with the outcome so far.²⁵⁰

Cost

- 7.41** In response to a suggestion from the Committee that WorkCover may have introduced the PIR scale to save money by reducing the number of injured employees that could be compensated, Mr Wilkes responded:

I would disagree very strongly that it saves WorkCover money. You can ask the Victorian WorkCover authority if that sort of approach has saved it money, because it has not. Their costs have blown out by billions. They have introduced the injury management system I mentioned, the *Sprains and Strains* model, which takes the complete opposite approach.²⁵¹

- 7.42** Dr Graham Edwards, Consultant Psychiatrist, indicated to the Committee in correspondence received on 28 March 2002, that the PIRS model was probably chosen because it was perceived to save the Scheme money. He states:

Some colleagues I have discussed this matter with, like myself, believe the AMA (5) is biased towards the insurer and is inadequate in portraying suffering, (such as chronic pain).²⁵²

²⁵⁰ Evidence of Dr Olav Nielszen, Chairman NSW Forensic Branch, RANZCP, 7 March 2002, pp 23-24.

²⁵¹ Evidence of Mr Robert Wilkes, Psychologist, APS, 7 March 2002, p 21.

²⁵² Correspondence received from Dr Graham A Edwards, Consultant Psychiatrist, Westmead Hospital, 28 March 2002, p 1.

Disputes between professions

7.43 Evidence was presented to the Committee indicating that the explanation for differences in opinion about PIRS was not as simple as differences in professions. Although it would seem from the evidence given to the Committee that the psychologists are united in their views on PIRS, there seems to be differences in opinion among psychiatrists, however the extent of these differences is unclear at this stage.

7.44 In evidence to the Committee Ms McKenzie indicated that she was aware that the psychiatrists did not uniformly agree with the PIR scale:

During the course of this we got a whole range of opinions expressed about the merits or otherwise of various aspects of the PIR scale. So, there probably was not just a completely neat split along demarcation lines between psychologists and psychiatrists, that is true.²⁵³

7.45 In response to a question regarding the reasons why there is dissent amongst psychiatrists about the validity of the PIRS Dr Nielssen stated:

I think one of the problems is that the wider group of psychiatrists are not familiar with it; it is only the forensic section, which is about 110-strong²⁵⁴

and

I suppose another con is that some people are not happy about it, but I think it is really a matter of coming to understand it and see that it is being used.

7.46 Differences in opinion between psychiatrists can be seen in the evidence given by Dr Nielssen and the correspondence received by the Committee from Dr Edwards.

Other

7.47 Dr White raised with the Committee a number of other objections held by psychologists to the PIRS. These included:

1. It does not implicitly ensure that the accident was a direct consequence of the impairment,
2. There are problems applying the computation for adjustment for pre-existing condition, so a person could have a pre-existing condition and it does not necessarily follow that it would be included in the calculation,
3. There are problems in taking into account the persons premorbid state,

²⁵³ Evidence of Ms Kate McKenzie, General Manger, WorkCover NSW, 6 March, 2002, p 35.

²⁵⁴ Evidence from Dr Olav Nielssen, Chairman of the NSW Forensic Section RANZCP, 7 March 2002, p 24.

4. The categories identified are continuous, although not logically balanced, for example, some categories had 3 per cent, some involved 6 per cent, others 19 per cent, 29 per cent and 39 per cent,
5. The conversion table proposed has no psychometric basis to it and is just a collection of numbers that have been put together without any scientific basis, and
6. There seems to be no statement about the duration that has elapsed since the accident.²⁵⁵

7.48 Professor Martin summarised the APS view on the utilisation of the PIR scale. He stated:

We also feel that PIRS is not the right instrument to use. We really feel that some injured workers will lose as a result. If we were involved, but the tool we had to use was this, we would find it a very difficult situation to be in. The PIRS, as it is, is a real problem—that is our judgment.²⁵⁶

Why the PIRS was chosen

7.49 In evidence presented to the Committee Dr Julian Parmegiani, Chairman of the Psychiatric and Psychological Working Group, outlined why the PIRS had been chosen as the appropriate scale for assessing permanent impairment:

First, we felt that in a forensic setting in an adversarial proceeding the normal scales that we use in private practice, which we all like and respect, were not appropriate because people had other incentives apart from getting better than to score highly on those scales.²⁵⁷

7.50 Dr Parmegiani indicated that PIRS was very good at separating out those seeking compensation because they were unhappy with the way had been treated from those with a genuine psychiatric or psychological injury. In evidence to the Committee he stated-

I do not think it is particularly good to make people who are angry go through the psychiatric gateway—it makes psychiatrists appear foolish, solicitors appear dishonest and judges seem not very wise. If a mental illness is not observable the community and relatives and friends of the person will see that he or she has nothing wrong but has made a psych claim and received \$15,000, \$20,000 or \$50,000. That sends the wrong message to the community and awards to people not suffering psychiatric illness money that they may or may not deserve.²⁵⁸

²⁵⁵ Summary of evidence provided by Dr Jack White, Psychologist, APS, 7 March 2002, p 7.

²⁵⁶ Evidence of Prof Paul Martin, President, APS, 7 March 2002, p 20.

²⁵⁷ Evidence of Dr Julian Parmegiani, Chairman of the Psychiatric and Psychological Working Group, 7 March 2002, p 1.

²⁵⁸ Evidence of Dr Julian Parmegiani, Chairman of the Psychiatric and Psychological Working Group, 7 March 2002, p 3.

Alternatives

7.51 The Committee has received evidence highlighting possible alternatives to the PIRS method chosen. In their submission to the Committee, the APS recommends the use of the AMA 5, Global Assessment of Functioning (GAF) measure. In support of their recommendation they write:

It is also clear that the GAF (when set within the context of multi-axial assessment, as the six step APS system uses it) is not only immediately available for use in NSW, but in fact has been widely used for many years in many contexts including impairment assessment.

7.52 In correspondence to the Committee, Dr Edwards supported the view of psychologists with regards to the GAF. He said:

I believe if a scale has to be used the GAF scale, as part of the DSM-IV Diagnosis (which we all make), is a sounder and fairer approach.

7.53 However, Dr Nielsen indicated that he did not think that the GAF was appropriate. He stated-

I do not see those huge differences in practice, to be honest. When you are in multidisciplinary teams you find that there is agreement. You mentioned that there is a sense of grievance about the choice of scale but I do not think that is a very important problem. I do not think the GAF is a suitable scale.

Assessment by Health Professionals

7.54 Under the workers compensation scheme as a whole both psychiatrists and psychologists play a role in treating injured employees for work related injuries.

7.55 However, under the *WorkCover Guidelines* only psychiatrists are able to perform the assessments of psychological or psychiatric injury.

7.56 The WorkCover Guides state:

Evaluation of psychiatric impairment is conducted by a psychiatrist who has undergone appropriate training in this assessment method.

and

The impairment rating must be based upon a psychiatric diagnosis²⁵⁹

7.57 The guides provide for an advisory role for psychologists and other allied health professionals, they state:

Medical reports, feedback from treating professionals, results of standardised tests, including psychometric testing performed by a qualified clinical psychologist and work evaluations may provide useful information to assist with the assessment.²⁶⁰

²⁵⁹ *WorkCover Guides*, p 53.

7.58 Ms Hawkins explained to the Committee the involvement of psychiatrists and psychologists in the scheme:

First of all, the PIR scale itself will be administered by a psychiatrist. Like the whole of the impairment rating system, that is all to be done by medical specialists. So, psychiatrists clearly is the group that will deal with people with mental and behavioural problems. The other allied health practitioners, such as occupational therapists and psychologists, will do their own individual assessments and that will contribute to the overall level of assessment that is done by the psychiatrist. Now, that is just in relation to permanent impairment. In relation to treatment, rehabilitation, return to work, those allied health practitioners will undertake their normal activities, that is, assessment of need, development of a program to meet those needs and then assistance of treatment or actual practical assistance in relation to occupational therapists in getting the person back to work.²⁶¹

7.59 In response to a question from the Chairman regarding the psychologists assessing an injury under the PIR, Ms Hawkins said:

Not on the use of the PIRS because the PIRS is the instrument. The same as it would be in the spine chapter of the AMA—the neurosurgeon or orthopedic surgeon utilises that scale, does the assessments and comes to their decision. But they will take account of the physiotherapists assessments and reports.²⁶²

Views on the Role of Psychologists

7.60 The Committee received differing views on the role that psychologists should play in the assessment of permanent psychological impairment.

7.61 In evidence presented to the Committee, one of the authors of the PIRS scale, Dr Parmegiani indicated that an argument could be mounted as to why psychologists as a profession could be included in the assessment of psychologically impaired injured workers:

One of the principles of the scale is that it should be fairly clear and transparent to solicitors who must handle the claims, to claims managers from insurance companies and ultimately to all parties involved. I think there is an argument that psychologists should be able to do the assessments. That is not a decision for me—although I have certainly been attacked a lot on that point.²⁶³

²⁶⁰ *WorkCover Guides*, pp 53-54.

²⁶¹ Evidence of Ms Mary Hawkins, Manager, Workplace Injury Management Branch, WorkCover NSW, 6 March 2002, p 35.

²⁶² Evidence of Ms Mary Hawkins, Manager, Workplace Injury Management Branch, WorkCover NSW, 6 March 2002, p 35.

²⁶³ Evidence of Dr Julian Parmegiani, Chairman of the Psychiatric and Psychological Working Group, 7 March 2002, p 5.

7.62 Dr Parmegiani later clarified his evidence to the Committee, stating:

It is my belief that psychiatrists and psychologists' skills are complementary, but not interchangeable. Unfortunately, the representatives of the Australian Psychological Society adopted a different position. They insisted psychologists should be able to perform impairment assessments independently, and they did not consider a medical degree to be useful.²⁶⁴

7.63 Dr Stewart explained to the Committee why he thought WorkCover had decided not to involve psychologists in the assessment of permanent injury. He stated:

WorkCover has decided that the people who will do these assessments in every area have to be medical specialists so you would be varying from that if you let psychologists apply the scale. I think psychologists in many cases could apply the scale sensibly, just as general practitioners could apply the scale for impairment of the back, the knee or whatever it might be. I think they have gone that way to keep parity with the rest of the system that they have introduced.²⁶⁵

7.64 Dr Nielssen indicated that he felt that generally psychologists should not be involved in the assessment of permanent impairment. In evidence presented to the Committee, he stated:

I do feel for them. They do have a very valuable role to play but it is not in the assessment of permanent impairment. That has to be the domain—it always has been in the past—of medical specialists.²⁶⁶

7.65 However, Dr Nielssen qualified this statement later by indicating that highly qualified psychologists on a panel would be capable of undertaking assessments. He stated:

Yes, the highly qualified ones on a panel. I think perhaps a psychological opinion as well could be quite valuable.²⁶⁷

7.66 In his correspondence to the Committee, Dr Edwards supported the involvement of psychologists by highlighting the importance of their expertise in injury assessment generally. He said:

Finally, the importance of having psychologists included in the impairment assessment process must be emphasised. Detailed cognitive impairment can only be done by a competent qualified psychologist. In the case of head injury for example, a battery of psychological tests designed specifically for use in such disorders is frequently necessary. Disorders in abstract reasoning, planning, problem solving, word finding, memory difficulties and impaired speed of information processing can only be tested by appropriately trained psychologists.

²⁶⁴ Correspondence to the Committee from Dr Julian Parmegiani, Forensic Psychiatrist, received March 13 2002.

²⁶⁵ Evidence of Dr Jim Stewart, Private Consultant (co-author of PIRS), 7 March 2002, pp 8-9.

²⁶⁶ Evidence from Dr Olav Nielssen, NSW Forensic Section, RANZCP, 7 March 2002, p 26.

²⁶⁷ Evidence from Dr Olav Nielssen, Chairman, NSW Forensic Section, RANZCP, 7 March 2002, p 27.

7.67 Prof Martin also said that he felt that there are groups within the psychology profession qualified to undertake permanent impairment assessments:

Are psychologists qualified to do impairment assessments? We would not claim that all psychologists are. We are a diverse group. We have psychologists working in the arenas of sport and industry, for example, and not all of them would be qualified to do impairment assessments. However, some of our members—clinical psychologists, for example—certainly would be. Clinical psychology programs give quite extensive training in psychiatric diagnosis, the use of DSM-IV and so on. In fact, many clinical psychologists in the public and private sectors use these sorts of assessments all the time.²⁶⁸

7.68 Prof Martin indicated that attitudes towards the broader group of allied medical professionals had changed and that there was now more justification for other professionals to be involved in the assessment permanent injury generally. He stated:

Many years ago you could justify the notion that there were doctors, medical practitioners and then the rest, and the rest were at a very much lower level but that cannot be sustained today. The health care system more and more has recognised that there are now a whole range of highly trained professions and they operate in a complementary way. Each has something to contribute.²⁶⁹

7.69 In their submission to the Committee, the APS points out that in the United States under AMA 5 psychologists are allowed to undertake assessments.

The assessment of permanent impairment in the United States is not confined to medical practitioners. Nearly all states and the District of Columbia allow medical impairment ratings to be performed by medical doctors, osteopathic physicians, dentists, psychologists and podiatrists.²⁷⁰

7.70 Mr Wilkes drew on his experience from the Victorian Workers Compensation Scheme to explain why he feels it is inevitable that the NSW WorkCover Authority will eventually be forced to include psychologists in the management of the Scheme:

... when the Victoria WorkCover system was set up in 1985 psychologists were precluded not only from assessment but from treatment. Within a year that was seen as untenable and psychologists were included in the treatment role. Psychiatrists were the only ones able to deal with assessment under the Act. To a degree that proved untenable also in that it started off with a narrow demand for neuro-psychological assessments where there was a head injury case, and specific skills of a neuro-psychologist in psychometrically quantifying the brain damage and the functional loss of the individual with a head injury. It just proved essential as no other profession could provide that service.

²⁶⁸ Evidence from Professor Paul Martin, President, APS, 7 March 2002, p 14.

²⁶⁹ Evidence from Professor Paul Martin, President, APS, 7 March 2002, p 17.

²⁷⁰ Submission No 25, APS, received 4 March 2002, p 10.

So the demand grew for psychologists to do assessments. There was a trickle in, starting with myself. ... Then the inevitable happened: the WorkCover Authority agreed to establish a formal system of having psychologist assessors, and to amend the legislation accordingly.²⁷¹

7.71 Mr Wilkes continued to discuss how the Victorian WorkCover Authority chose to include psychologists in the assessment of permanent impairment. He said:

The path they chose to go though, was to do it on a case-by-case basis to establish a panel of psychologist assessors who, in practice, tended to be people with clinical qualifications or with clinical neuro-psychologist qualifications on the whole, with a few exceptions.²⁷²

7.72 One issue may be that there are not enough psychologists available to undertake the assessments. In evidence presented to the Committee Mr Wilkes stated:

To be brutally pragmatic there is a workforce numbers issue here. There are only so many psychiatrists in Australia, some 2,200 I understand, of which 400 or 500 are in New South Wales. In Victoria the situation was—and this was another force which led to psychologists being included as assessors—there simply were not enough psychiatrists to do the assessments with the rapidity which is required and the various deadlines under the system. That was actually a major factor for psychologists coming into the system.²⁷³

7.73 In response to this suggestion Dr Nielszen said:

I guess there might be in regional areas. A lot of people do come from the country for reports. ... I think there are enough psychiatrists. I cannot think of any psychiatrist who is fully employed doing this sort of thing, and neither should they be.²⁷⁴

7.74 The Committee notes that not being allowed to undertake permanent impairment assessment may impact on psychologists' income and professional status.

Conclusion 15

The Committee is concerned at the level of dissent with regards to the appropriateness of the PIRS method for assessing permanent psychological and psychiatric impairment. The Committee also notes the PIRS scheme has just been introduced and needs time to become established and be assessed.

²⁷¹ Evidence of Mr Robert Wilkes, Psychologist, APS, 7 March 2002, p 20.

²⁷² Evidence of Mr Robert Wilkes, Psychologist, APS, 7 March 2002, p 20.

²⁷³ Evidence of Mr Robert Wilkes, Psychologist, APS, 7 March 2002, p 20.

²⁷⁴ Evidence from Dr Olav Nielszen, Chairman of the NSW Forensic Section, RANZCP, 7 March 2002, p 26.

- 7.75** In view of the different, strongly expressed views in relation to PIRS, the Committee considers that there is a need for a working party comprised of representatives of the various interest groups to resolve these issues. The Committee will give further consideration to this in its final report.

Chapter 8 Options

As indicated in previous interim reports, this third report outlines some options for further reform of the Scheme. These options have been developed in consultation with the Committee's consultant actuaries, Ernst & Young ABC, and take account of issues raised during the Committee's public hearings and Forum.²⁷⁵ These, and other options identified by the Committee, will form a basis for the Committee's recommendations in the fourth report, due to be tabled on 3 September 2002.

The Committee welcomes feedback from stakeholders and other interested persons on any of the options contained in this chapter. Your feedback will be taken into consideration by the Committee in developing its recommendations.

8.1 In her presentation to the Forum, Ms Kate McKenzie, General Manager, WorkCover NSW summarised the key directions of the Government's recent and future reform of the Scheme:

The main key directions were: identification of further measures to increase the focus on injury management and early return to work; review of dispute resolution processes and structures and improved dispute prevention measures; development and implementation of medical treatment protocols; development of market incentives to reduce workplace injuries and encourage insurer and employer participation in injury management and early return to work programs; development of strategies to meet scheme participants' need for accurate and timely information, enabling them to fulfil their obligations; also additional measures to control professional fees and ensure the scheme and its participants were getting good value for money; development of mechanisms to gradually remove existing cross-subsidies within the premium rates; assessment of the use of industry-based schemes and self-insurance to achieve better outcomes; and development of strategies to target compliance. As you can see, it is quite a comprehensive list of potential reforms to the scheme. A number of those have been progressed and are being implemented currently. A number of them still require further development in the future. In addition, the Minister also signalled the need to have new corporate governance arrangements and a review of the scheme's design.²⁷⁶

8.2 Areas of particular significance for future reform were identified by Ms McKenzie:

I think the areas that are of particular significance to future review of the New South Wales scheme are: scheme service provider involvement; premiums. I think the focus at the moment for us is a concentration on information technology and data management, which has been problematic for the scheme in recent years; and the role of self-insurance in the scheme.²⁷⁷

²⁷⁵ For further detail of Ernst & Young's suggested options, see Part 3 of their third report to the Committee, appended at Appendix 3.

²⁷⁶ Presentation by Ms Kate McKenzie, General Manger, WorkCover NSW, 15 March 2002, p 3.

²⁷⁷ Presentation by Ms Kate McKenzie, General Manger, WorkCover NSW, 15 March 2002, p 5.

8.3 Ms McKenzie did stress, however, that the Government's present aim is to allow the recent reforms time to "bed down" before further reform is undertaken:

There is still a lot more work to do. Consolidation and review of the scheme's design I think is something that we are concentrating on at the moment. We have introduced a range of significant reforms over the last 18 months and I think we are forming the view at the moment that it is going to be very important to bed down those recent reforms and let the scheme stabilise before we rush off into too much major reform.²⁷⁸

8.4 Options for further Scheme reform are presented together according to the area of the Scheme upon which they focus. Broadly, the following areas have been identified as having scope for further reform:

- Scheme ownership and accountability;
- Early reporting of claims;
- Premium system and employer incentives;
- Incentives for claimants to return to work;
- Management of the Scheme's tail, and
- Scheme management, regulation and governance.

8.5 Overriding all of these areas is a need to improve WorkCover's data and information management systems.

Scheme ownership and accountability

8.6 The problems inherent in a lack of Scheme ownership and financial accountability for the Scheme's finances have been discussed at length in this report and the Committee's second interim report. Ernst & Young discussed some options for improving ownership and accountability in their third report to the Committee:

3.19 Many Scheme stakeholders believe there is a lack of clarity around Scheme ownership and believe the lack of financial accountability for the Scheme is a key issue. These issues were drivers for many recommendations in the Grellman report in 1997. Five years on the same issues remain unresolved. Any lack of ownership and financial accountability will have an adverse impact on decision making and the ability to effectively manage the Scheme's financial situation.

3.20 These issues are difficult to address in the absence of private underwriting which the Government has excluded from possible consideration.

²⁷⁸ Presentation by Ms Kate McKenzie, General Manger, WorkCover NSW, 15 March 2002, p 4.

- 3.21 The NSW Auditor General's view of including WorkCover's' Managed Fund balance sheet on the NSW Government balance sheet does not in his view solve the issues of Scheme ownership and accountability. We agree with this view.
- 3.22 The Government has clear responsibility for Scheme design including benefit design and delivery. It also sets the premium rate and the design of the premium system and consequently is seen by many stakeholders to be accountable for the Scheme's financial status. This creates political difficulties for any Government especially as workers compensation is a politically sensitive issue at the best of times.
- 3.23 An option the Government may wish to consider can be modelled on the Federal Government's approach to setting interest rates by the Reserve Bank. In that model the Reserve Bank has responsibility for setting interest rates independently of the Government. That is the Government can not over rule or force the Reserve Bank to set interest rates at a certain level.
- 3.24 The interest rate model could be applied to the setting of premium rates for the WorkCover Managed Fund as follows:
- Set up an independent body to set premium rates and possibly the rating structure and system.
 - The body would set rates each year without recourse to the Government.
 - Public hearings could be part of the process.
 - The independent body could have boundaries set including:
 - requirement to be provided with actuarial advice
 - Scheme deficits/surpluses to be taken into account in setting rates (eg fund deficits over no more than 5 to 10 years)
 - premiums rates to be fully funded
 - setting stable premium rates (ie limit increases/decreases in a year)
 - Accountability for the Scheme financial status.²⁷⁹

Early reporting of claims

- 8.7** Mr Greg McCarthy, Director, Workplace Injury Management, suggested to the Forum a central telephone system may assist the early reporting of claims:

I think with early reporting there needs to be a system forward to make it simple. I have suggested something as simple as the telephone system, "If you have an injury just ring this number", and then experienced people can move in to take control and in giving directions to mobilise management to take place.

I have also suggested that there should be, I have said community based in my slide but I really mean centrally based, and not individually based with each insurer. It could be a collective run by agents or insurers. I think the reasons for

²⁷⁹ Ernst & Young Third Report pp 12-13.

that are it is much easier for a central body than I guess WorkCover or its agents collectively to advertise to the community on a continuing basis²⁸⁰

8.8 Another suggestion by Mr Colin Fagan, General Manager, Workers Compensation, QBE Insurance, involved providing incentives to employers to ensure that claims are reported quickly. In his evidence to the Committee he said:

I would suggest that there is a mixture of incentivisation and disincentivisation. The suggestion of paying back excesses if claims are reported within a certain period I think is a very positive idea. On back of the envelope calculations, I would suggest that it is cost effective, but equally I think in a disincentivisation if there is too long a delay, particularly delays around rating periods.²⁸¹

8.9 Mr Fagan also suggested the involvement of general practitioners may assist in the early reporting of claims. He said:

I do not necessarily accept centralisation but some of the best reporting systems in the world are where the doctor reports because you need that first certificate for the claim to initiate. It could be a method.

8.10 Ernst & Young identified the following options to assist the early reporting of claims:

- Providing financial incentives to employers for early reporting of claims. This could be done through lower premiums or other ways
- Provide financial incentives to Doctors to report claims earlier to insurers
- Provide Doctors access via computer to WorkCover to report claims earlier
- Better educate employers to report claims earlier
- Set up a Scheme based call centre – so that employers, workers and Doctors can report claims earlier. This could be set up by WorkCover or by agents/insurers, self-insurers and specialised insurers.²⁸²

²⁸⁰ Presentation by Mr Gregory McCarthy, Executive Director, Workplace Injury Management Services, 15 March 2002, p 26.

²⁸¹ Evidence of Mr Colin Fagan, General Manager of Workers Compensation, QBE Insurance, March 6, 2002, p 58.

²⁸² Ernst & Young Third Report p 13.

Premium system and employer incentives

8.11 WorkCover issued a Green Paper on possible changes to the premium system in September 2001. The Green Paper contained a number of options for improving the premium system.²⁸³ This would result in less leakage from the system and greater fairness between employers. Ernst & Young have summarised the options proposed in the Green Paper:

- Option 1.** A proposal to remove the uncertainty regarding contractors/deemed workers by defining all individual contractors as deemed workers unless they employ labour or have a workers compensation insurance policy.
- Option 2.** A proposal to remove the uncertainty regarding contractors/deemed workers by defining all individual contractors as deemed workers but allowing them to opt out if they satisfy strict criteria, including having appropriate insurance.
- Option 3.** A proposal to remove the uncertainty regarding contractors/deemed workers by defining individual contractors who meet the ATO 80% test as 'deemed workers'.
- Option 4.** A proposal to remove the uncertainty regarding contractors/deemed workers by amending the legislation to require sole traders and partnerships to obtain workers compensation insurance.
- Option 5.** A proposal to address non-insurance or the under-declaration of wages by sub-contractors by making principal contractors responsible for ensuring that their sub-contractors are properly insured under the correct tariff classification and that the sub-contractor has declared the correct wages.
- Option 6.** A proposal to address non-insurance / under-declaration by the introduction of a requirement that the employer's full legal name and workers compensation insurer be shown on the worker's pay slip and that the employer notify the worker in writing if the employer changes.
- Option 7.** A proposal to address premium avoidance through company splitting by the introduction of grouping provisions to enable premiums to be assessed at a group level (ie all related employers to be considered together for assessing premiums).
- Option 8.** A proposal to reduce premium avoidance by expanding the related corporations provisions to non-corporate trusts, partnerships and other business arrangements.
- Option 9.** A proposal to address premium avoidance by company splitting by amending the application of the 'two times' rule so that it does not apply to related corporations.
- Option 10.** A proposal to address the under-declaration of wages by the introduction of a requirement that employers provide their workers compensation insurer with a monthly list of the names of all the employer's workers.

²⁸³ In evaluating the options raised by WorkCover in the Green Paper the Committee will be referring to the submissions from stakeholders.

Option 11. A proposal to address premium avoidance by requiring employers to provide full and complete information to insurers for the correct allocation of industry classification and the calculation of premium, and to enable insurers to retrospectively amend incorrect allocations and recover underpaid premium.²⁸⁴

8.12 Ernst & Young identified the following additional options to improve the premium system:

- A thorough review of the premium formula especially for small to medium sized employers. In 2001 the Victorian workers compensation scheme initiated a thorough review system of its premiums system and we expect to see the results of the review rolled out later this year and into future years.
- Amending the premium formula to deal with employers who consistently have significantly poor or better claims experience relative to their industry average
- Require WorkCover or an independent agency to set the ANZSIC code for each employer to stop incorrect coding and premium leakage from the systems.²⁸⁵

Incentives for claimants to return to work

8.13 A suggestion received from Mr Mark Goodsell, Director NSW, Australian Industry Group, was that the benefit scale could be changed to encourage return to work:

It may be necessary to provide for a benefit/process signal at 12 weeks at the latest, in recognition of this as a critical period in the return to work timeline.²⁸⁶

It may also be wise to provide an employee on alternative duties should receive a graduated scale of benefits that encourages return to full duties as soon as possible.

8.14 Ernst & Young pointed out in relation to small business owners, that:

Some participants at the Forum believe it is much more difficult for smaller employers to find alternative duties for injured workers. There are less financial incentives for smaller employers through the premium system to find alternative duties for injured workers. Providing more return to work incentives will reduce the size of the tail. Most schemes in Australia and overseas have found it extremely difficult to provide incentives to smaller employees using scheme wide initiatives. WorkCover introduced the premium discount scheme aimed at providing small to medium sized employers with incentives to reduce the incidence of accident. It is too early to assess its success. Some schemes have tried to introduce premium incentives using claims experience. These attempts have not been successful since small employers will on average only have one claim every 10 to 15 years providing little incentive for small employers to reduce incidence

²⁸⁴ Ernst & Young Third Report pp 14-15.

²⁸⁵ Ernst & Young Third Report pp 15-16.

²⁸⁶ Correspondence from Mr Mark Goodsell, Director NSW, AIG, 14 March 2002, p 5.

and cost of claims. Most small employers are not in existence for 10 to 15 years and will never have a workers compensation claim.²⁸⁷

8.15 Options to improve claimants' return to work identified by Ernst & Young revolve around making suitable duties available to injured workers and include:

- Group schemes for small employers for suitable duties. These could be arranged by industry or by geographic area.
- Industry based group schemes for large and small industries.
- Utilising employment agencies to find suitable duties.
- Educating employers especially small ones about the benefits of finding suitable duties for injured workers.²⁸⁸

Management of the Scheme's tail

8.16 Ernst & Young made the following comments in relation to the Scheme's tail:

WorkCover defines the tail as long-term claims that have been open for more than two years. Long term claims make up most of the Scheme's outstanding claims liability represent nearly 75% of the Scheme's claims liabilities. Commutations were introduced as a way of managing the tail but now have a much more limited role. Insurer's remuneration is partly based on their performance in managing tail claims.

Many stakeholders believe there needs to be a clear tail management strategy and pro active management of the tail by WorkCover and agents/insurers. A robust and clear strategy, and proactive management has the potential to substantially improve the financial status of the Scheme.²⁸⁹

8.17 Options identified by Ernst & Young that could be considered in managing the Scheme's tail include:

- A special project to tackle recoveries that agents/insurers, self-insurers and specialised insurers have not identified or pursued even back to 1987.
- Reintroduction of limited commutations with a clear strategy set by WorkCover on their use. WorkCover Board would have the power to change the strategy and limit or expand access to commutations so that effectiveness could be properly managed.
- Set up a specialist organisation(s) separate to current agents / insurers to manage claims that are over 3 years old and not included in an employer's premium calculation.

²⁸⁷ Ernst & Young Third Report p 16.

²⁸⁸ Ernst & Young Third Report pp 16-17.

²⁸⁹ Ernst & Young Third Report p 17.

- Amend the premium system so that claims in excess of 3 years impact employer's premiums. For example extend the period to 5 years. This will give employers more incentive to return these claimants to work.
- Set up return to work initiatives by geographic area or at an industry level using suitable duties. See the discussion above on incentives for claimants to return to work.²⁹⁰

Scheme management, regulation and governance

8.18 Mr Howard Harrison, Partner, Carrol & O'Dea Solicitors, gave his views to the Forum on Scheme governance:

Mr Chairman, in relation to governance, we need one strong body at the top of the whole system, the buck stops there. That body should have the capacity to run the WorkCover scheme as you would run an economy. We believe that WorkCover has done a terrific job in many respects but that in the long term there are too many players, there are too many Committees, there are insufficiently clear arrangements for governance, and as suggested in my paper, we would suggest that in the long term the complexity of managing the WorkCover scheme needs to be acknowledged and that you need a small robust group with significant responsibility and accountability and significant power.²⁹¹

8.19 Ernst & Young indicate in their third report to the Committee that the separation of functions performed by insurers could improve the delivery of claims and injury management. Options identified by Ernst & Young include:

- Have different organisations manage some or all of the above functions. For example specialist investment managers including or excluding current agents/insurers could have the mandate for the investment management. Similar examples could apply to the other functions.
- It may be possible to split up claims management into short term and long term claims each going to different agents. This would be easier if there was one central computer system.
- How WorkCover should manage agents/insurers and what contractual arrangement should exist between WorkCover and the agents/insurers.

8.20 If the functions currently performed by WorkCover were to be separated, Ernst & Young suggested separating the following functions:

- Scheme regulation, providing Government policy advice and monitoring and management of the Scheme
- OH&S

²⁹⁰ Ernst & Young Third Report p 17.

²⁹¹ Presentation by Mr Howard Harrison, Partner, Carrol & O'Dea Solicitors, 15 March 2002, p 10.

- Insurance including claims management, premium system, licensing of agents/insurers, self-insurers and specialised insurers and injury management. This could exclude or include monitoring and management of agents/insurers

8.21 The options for separation include:

... having separate Government bodies manage each or a few of the above functions. Other states in Australia have different models with a few such as Queensland workers compensation and South Australian CTP separating the regulatory functions from management of the scheme.

8.22 Ernst & Young concluded that:

There is general agreement amongst Scheme stakeholders that WorkCover does not manage agents/insurers. That is it appears that no one is managing the Scheme or insurers.

There is no contractual agreement between WorkCover and agents/insurers. Each agent/insurer is licensed and subject to WorkCover's licensing criteria. Licensing criteria is normally focused on high-level requirements and compliance with legislation and do not necessarily consider detailed performance by an agent/insurer. Licensing is an all or nothing approach with disciplinary options in between the agent/insurer being licensed or not. Licensing is probably best viewed as a left over from when insurers were involved in underwriting the workers compensation risk.

Contractual agreements are normal when agency arrangements are in place. A contractual agreement between WorkCover provides greater flexibility for it to require detailed performance from agents/insurers and may be a better option to improve the operation of agents/insurers and consequently the scheme performance.

South Australia and more recently Victoria have abandoned the common remuneration of Managed Fund agents/insurers and instead went through a detailed tender process. Our understanding is each agent set out in the tender how they wished to be remunerated. There were contractual agreements between WorkCover in South Australia and Victoria.²⁹²

8.23 Ms McKenzie indicated to the Committee the separation of these functions already occurs to some extent:

Some have separate contracts with external providers to help them with the injury management side of it, but certainly it is the responsibility of the insurers. We provide the framework and the overarching rules but they do the actual injury management.²⁹³

8.24 Mr Wilkes in his evidence to the Committee also indicated that the separating out the management of claims and in particular the management of the more difficult claims could be beneficial to injury management. He said:

²⁹² Ernst and Young Third Report p 18.

²⁹³ Evidence of Ms Kate McKenzie, General Manager, WorkCover NSW, 6 March 2002, p 25.

In Victoria, ... insurance companies are required to set up management teams which are quasi-independent within insurance companies, staffed by allied health professionals, doctors and somebody with a legal background and an overall team manager to take cases which are likely, on the basis of statistical predictors, to prove difficult, and handle those cases more intensely early to try to normalise the function of those people, keep them job-focused, et cetera, to deal with the real core problem, which is the institutionalisation that occurs when somebody is involved in a compensation system.

That step of having the independent injury management teams for difficult cases can be taken a step further. I guess the end point to that is to have injury management teams which are separate from insurers, which are relatively un-influencable by the short-term, cost-cutting mentality that sometimes pervades insurance companies.²⁹⁴

Data and Information Management

8.25 During the Committee's Forum, options for the improvement of WorkCover's data and IT management were raised. Many of the participants were of the opinion that a centralised system was essential to improve the data management problems currently being experienced by the Scheme. Some of the comments included:

8.26 Mr McCarthy stated:

[I]f we take the view that it is going to be a centralised managed fund, in my view that is one insurer and as one insurer we should have one central computer system to administer that. Certainly the agents could have their systems that sit on top of that.²⁹⁵

8.27 Mr McCarthy continued:

So I am very firmly of the view that it does require a centrally based system, and as I said, the agents could have their own front end integrated with that electronically.²⁹⁶

8.28 Ms Carl shared a similar opinion with the Forum:

The current reporting mechanism we say must be streamlined. It is the union's view that there should be a centralised system, one database for collecting and disseminating information and maintaining information. There needs to be integration of accident reports, injury notification reports, and complaints. Currently there are a number of different systems.²⁹⁷

²⁹⁴ Evidence from Mr Robert Wilkes, Psychologist, APS, 7 March 2002, p 18.

²⁹⁵ Presentation by Mr Gregory McCarthy, Executive Director, Workplace Injury Management Services, 15 March 2002, p 28.

²⁹⁶ Presentation by Mr Gregory McCarthy, Executive Director, Workplace Injury Management Services, 15 March 2002, p 28.

²⁹⁷ Presentation by Ms Nancy Carl, Industrial Officer, Labor Council of NSW, 15 March 2002 p 34.

8.29 Some of the suggestions made by Ernst & Young in relation to improving data and information management include:

- Creating a data warehouse for the scheme's data to improve access to data for stakeholders and improve monitoring of scheme's performance,
- Expanding the list of data items collected,
- Expanding the source of data included on WorkCover's database and data warehouse (eg. from lawyers, injury management consultants, etc).²⁹⁸

8.30 Ernst & Young concluded:

It is essential for WorkCover to have a long term IT plan for the Scheme and to do so requires a long term robust strategy for the whole Scheme. There is a huge amount of work and cost to the scheme pursuing all these matters and they will take many years to address. For this reason WorkCover's Board needs to prioritise work on IT.²⁹⁹

²⁹⁸ Ernst & Young, Third Report pp 11-12.

²⁹⁹ Ernst & Young Third Report p 12.

