Your Ref:

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The Chair
Workers & Compensation and OHS
Productivity Commission
P O Box 80
BELCONNEN ACT 2616

Dear Chair

WORKERS' COMPENSATION INQUIRY

The Interim Report is currently under consideration by the Society and the following submissions are provided for consideration by your Commission prior to the appearance of Society representatives before you on the 4th December 2003 in Sydney.

More comprehensive submissions will reach you prior to 30 January 2004 for your consideration prior to the final report. The Society has commissioned independent actuarial advice on certain key elements identified as supporting your interim recommendations and hopefully this advice will be available for incorporation in the final submissions prior to end January 2004.

The Society is concerned that the current report adopts the unhappy path of earlier reports addressing the same issues. It is less than dispassionate in the treatment of a number of key issues. The apparently intentional omission of significant facts contrary to the interim recommendations creates a serious imbalance which may lead to a false perception that there is adequate justification for certain key recommendations. The Society does not believe that to be the case.

This submission will only deal with what the Society sees as the three principal issues namely:-

- The National Self-Insurance Models (ABCD)
- Common Law Access
- Dispute Resolution

The National Self-Insurance Models (ABCD)

Sections 4.1 and 4.2 outline the Commission's reasoning for its recommendations (Section 4.3) for a National Workers' Compensation Scheme by way of self-insurance for employers to self insure under Comcare extending in due course to a broad class of self-insuring employers and ultimately to a national scheme for all employers underwritten by private insurers.

In formulating these proposals the Commission commissioned two actuarial reports; one by the Australian Government Actuary to identify the risks facing the Commonwealth and the second by Taylor Fry Actuaries to identify consequent risks to existing State schemes.

The Interim Report at Section 4.2 endeavours to elicit from these actuarial reports some support for the Interim Recommendations. It is the submission of the Society that these reports cannot be construed as providing any or any adequate support for the massive re-casting of national workers' compensation risks as proposed by the Interim Recommendations.

The common features of the actuarial reports are gross uncertainty, grave warnings and observations which are clearly contrary to the Commission's preferred course.

It is submitted that any corporate board of a licensed Australian insurer relying on these reports to engineer changes as comprehensive and risk prone as those recommended by the Commission may be exposed to litigation by shareholders and more serious sanctions brought by APRA and by ASIC.

Risk to the Commonwealth – The AGA Report

Every page of the AGA Report is dotted with cautions and guarded or qualified statements on key issues relevant to the Recommendations. Few of those qualifications or cautions are addressed by the Commission and those which receive comment are diminished to insignificance without justification.

Risk to the Commonwealth

The AGA Report identifies real if latent risk to the Commonwealth which is suggested in the Interim Report to be remote and inconsequential. The full extent of the potential risk to the revenue (the taxpayer) in these proposals is clearly most significant. Factors such as employer liquidation or licence revocation, employer fraud in respect of reinsurance (or other failure of reinsurance eg insolvent insurer), employer fraud in respect of obtaining and retaining bank guarantees could all lead to devastating unfunded losses for seriously injured workers. The AGA points out that many benefits under the Scheme are payable for life and self-insuring employers could ultimately carry liabilities of 50% of their gross payroll in relation to their expected claims experience. Balance Sheet compensation liabilities will materially impact employers' bottom line and potentially the viability of the employer.

The AGA observes that while there may not be a direct risk to the Commonwealth (and the taxpayer) there is nevertheless a very real risk that the Commonwealth will have to assume a risk in response to the expectation of severely injured workers against an insolvent Scheme to ensure that the Scheme's liabilities are satisfactorily discharged.

Australian taxpayers would have a justifiable apprehension that they will be called upon to bail out an insolvent self-insurer as recent history readily discloses. It is, with respect to the Commission, no sensible answer to suggest that such risks can be obviated by new strict and comprehensive prudential guidelines to be actively and thoroughly enforced by the appropriate regulatory bodies.

There is an unhappy plethora of recent examples of gross failure by prudential and corporate regulators in Australia. The public impression is that when such failures lead to substantial loss government action to treat that loss (both in assuming and paying and in subsequent recovery) is whimsical. It is fair to suggest that government approaches seem shaped by lobby groups, family ties or pragmatic political decisions.

Examples that may have come to the attention of the Commission would include the FAI/HIH debacle incurred on the watch of both APRA (and its predecessor) and ASIC. In that case government mounted a massive rescue plan applying hundreds of millions of dollars inequitably in that many claims were paid in full while other classes of claimant were classified (by policy statement and press release) as ineligible for any relief. Little or no effective recovery of taxpayer funded expenditure in this exercise was achieved.

The Ansett employee benefits rescue provides another example of a Commonwealth assuming the risks of a failed corporation (relevantly in the case of this corporation, one which would be welcomed aboard as a national self-insurer under the Interim Recommendations of the Commission). The hundreds of millions of dollars expended in that case were recovered by the Commonwealth by the simple and pragmatic decision to impose a levy upon all air travellers within Australia. If there is an equitable justification for forcing that group to pay employee benefits for a poorly regulated insolvent company, it is not immediately apparent.

Another example pertinent to these issues is the failure of the unregulated medical defence fund United Medical Protection. That fund failed not through negligent administration but through knowing and intentional under-provisioning for incurred but unreported losses. The failure was a direct result of falsely maintaining inadequate premium structures to the real and immediate benefit of the group insured by UMP. A total failure of the insuring entity would have left that group and those patients disabled by medical negligence without insurance cover, not only for current claims but for past claims. The Commonwealth bail out of the scheme has permitted the company to survive but taxpayers' funds remain depleted by payments to the order of $400m and endeavours by the Commonwealth to recover its payments from the principal beneficiaries (the insureds) have been deferred or abandoned as a result of political pressure.

Examples of the type identified above regrettably abound and the Society cannot accept the confident diminution by the Commission of the risks identified by the AGA nor can it accept the bold display of new faith in a comprehensive fierce and error-proof prudential and corporate regulatory regime.

If the Commonwealth goes down the path recommended by the Commission it will face real risks and in the submission of the Society the Interim Report does not adequately address those risks.

Risks to the States

The actuarial advice of Taylor Fry on the potential impact to State and Territory schemes of permitting eligible employers to self-insure under Comcare is, like the AGA Report referred to above, a guarded report with very strongly qualified assumptions which could not be construed as providing comfort to State and Territory scheme managers or justification for the Commission's Interim Recommendations.

The Report commences by disclosing that the necessary data to form meaningful assumptions is not available and the data relied upon by the actuaries comes not from State and Territory schemes but from other sources not directly related to workers' compensation. The Report sets out in blunt terms the problems of endeavouring to develop meaningful assumptions on the corrupted or imperfect data available.

The Report observes that the likely costs facing self-insurers will exceed those under other existing schemes, in part due to the absence of common law finality and the cost of a mature claims liability when whole of life pension-based payments must be borne by employers (where workplace injury occurs through no negligence of the employer).

Common Law Access in a National Framework

The Society is disappointed if not surprised by the Commission's treatment of common law access (Page 182, Section 7.4) and by its recommendation that common law should not be included in a national framework. The brief (one page) explanation for the recommendation avoids all contrary arguments and is misleading. The Society will address the shortcomings of the Interim Report in more detail but it registers its concern that the arguments and evidence previously submitted find no adequate recognition in the Report.

It is observed that other material, clearly pertinent to the Report but contrary to the grounds relied upon for the Recommendations of the Commission are not mentioned or discussed.

The attention of the Commission is directed to the Comcare Annual Report 2002-2003 published shortly before the Interim Report. That Report contains the most recent national data for all State, Territory and Commonwealth workers' compensation schemes. It is suggested that those seeking to benefit from a reading of the Report could reasonably expect to see that data referred to to permit a more informed assessment of the risks of implementing any of the Commission's recommendations. The following examples are drawn to attention.

- Pages 13 and 14
  These graphs disclose increase in claim frequency and average claim size with significant increase in specific claim areas where benefits are markedly above the average cost of claims under Comcare

- Average premium rates – Graph 3
  The graph discloses the lowest premium rate of all States and Territories applies in Queensland where full common law remedies are available to injured workers. That rate, 1.48% is effectively identical with the Comcare rate, 1.44% and well below the Australian average of 2.4%.

  The same graph discloses that those States which have abrogated or severely restricted common law remedies in favour of whole of life pension plans impose the highest premiums (New South Wales exceeds 3% of payroll).

- Direct Compensation Paid – Graph 5
  The graph discloses that direct compensation paid as a proportion of total expenditure is highest in Queensland, exceeding all States, Territories and Comcare.

- Legal Costs as a Percentage of Total Claim Costs – Graph 7
  The graph discloses that, contrary to the assertions at Page 182 of the Report, Queensland with full common law remedies enjoys the second lowest rate of legal costs as a percentage of total claim costs at 7%; that is the same rate as the Comcare rate.

- Ratio of Assets to Liabilities – Graph 9
  The graph discloses that Queensland, fully-funded with additional prudential and catastrophe reserves at 127% is the best funded of all State, Territory and Commonwealth schemes while State jurisdictions which have abrogated or grossly diminished common law remedies in favour of deferred long-term pension liabilities are under-funded (technically insolvent) by up to 35% of gross liabilities.

The Society repeats that these matters cry out for balanced discussion in any report which is intended to serve as justification for the comprehensive re-engineering of national workers' compensation recommended by the Commission.

Disputation Procedures

It is suggested with respect that the Administrative Appeals Tribunal is a most inappropriate forum for the reconciliation of disputes between injured workers and employers (including employers as self-insurers). The Queensland procedures are effective, inexpensive and it is unlikely that a diligent Queensland Government would be a party to forcing Queensland workers to depart that effective scheme.

The attention of the Commission is referred to Graph 10 "Disputation Rates" in the 2002-2003 Comcare Annual Report mentioned above. When the Commission has considered the gross dissimilarities in the statistics for satisfactory resolution of disputes as between the different State and Territory and Commonwealth schemes, it may be minded to make further enquiries before persisting with its Interim Recommendations on this and other matters.

Conclusion

The submissions are intended to draw attention to relevant matters which have not been addressed or adequately addressed in formulating the Interim Recommendations. Careful consideration of the matters raised would hopefully lead to significant changes to those recommendations.

Yours faithfully

Glenn W Ferguson
President