PRODUCTIVITY COMMISSION INQUIRY – NATIONAL FRAMEWORKS FOR WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY

RESPONSE TO INTERIM REPORT

AUSTRALIAN INDUSTRY GROUP RESPONSE TO INTERIM REPORT – PRODUCTIVITY COMMISSION INQUIRY INTO NATIONAL FRAMEWORKS FOR WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY

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Section 1 - Executive Summary

Ai Group welcomes the opportunity to comment on the Interim Report of the Productivity Commission Inquiry into National Frameworks for Workers Compensation and Occupational Health and Safety ("OHS").

Ai Group made an initial written and oral submission to the Inquiry. In it we relied on a number of principles to guide our recommendations. The principles are:

In order to support any new national scheme the scheme must meet the following criteria:

- It should not increase premiums for industry in any State or Territory;
- It must provide industry relief from regulatory burden and reductions in compliance costs;
- It should provide the ability to self-insure for employers who can suitably manage the associated risks;
- It should have ongoing mechanisms to maintain proper balance between benefits and costs;
- It should eliminate access to common law claims, have robust mechanisms to address fraud, have transparent premium setting mechanisms, facilitate effective rehabilitation and early return to work and clearly define and regulate the role of legal, insurance, medical and rehabilitation providers;

If a national scheme cannot be formed that meets these criteria then:

- There are real benefits for employers who operate in more than one State from greater national consistency and co-operation that should be pursued.
- Genuine competition between the systems should be maintained and increased. Self-insurance, the mutual recognition of State and Territory based schemes, the entry of a national scheme that can be recognised by the relevant jurisdictions are all ways of promoting this competition.
- The outcomes of the different systems be mapped and compared to identify best practice. An independent Commonwealth body may be required to facilitate this process.
- Following identification, standardise best practice across the different schemes.
- Reconsider the operation of a national scheme at this point

Ai Group's response to the recommendations of the Interim Report has been considered in light of these principles.

Ai Group's members consistently nominate Workers' Compensation and OHS as key areas of business regulation that are in most need of reform. Employers accept their responsibilities to employees who are injured at work and the social benefits of a modern workers' compensation scheme but there is significant dissatisfaction and cynicism from employers in dealing with these responsibilities in a number of the existing State workers compensation schemes. The dissatisfaction usually relates to the lack of an identifiable relationship between injury rates and premiums and concerns that the system is being unfairly accessed for injuries and illnesses that are not clearly work related or not related to the employment relationship that exists at their workplace. They welcome the opportunity for reform through the implementation of an alternate system. In OHS the driver for reform is usually a desire to make compliance more effective and efficient by having similar standards operating across the country. The recommendations in the Interim Report, subject to a number of matters of detail covered in this submission, generally represent a step forward. We will urge the various governments and stakeholders to use the recommendations as plan for reform in these areas.

OHS

Ai Group supports the movement towards a more consistent, preferably uniform, OHS regime as quickly as possible. Our preferred mechanism would be the development of a single national system but we recognise the obstacles, both legal and political, in achieving such an outcome. The recommendations in the Interim Report represent a dual pronged interim strategy to achieve greater national consistency and uniformity. In the absence of the possibility of one single nationally regulated regime for OHS we see the recommendations as a positive step towards such a goal.

The opportunity for national companies that apply for self-insurance licenses under Comcare or an alternate new national self-insurance system, to elect to use the Commonwealth OHS regime is a useful step. Appropriate consultative mechanisms need to be established with employers that elect to be regulated by the Commonwealth OHS regime.

We support the clear specification in the legislation of the objective of achieving uniform national OHS legislation and regulation across jurisdictions.

The development of an intergovernmental agreement to work parallel to the objective of nationally uniform legislation, regulations and codes is critical to its success. We intend to urge the States and the Commonwealth to invest the political capital in this process.

We have made more detailed submissions in Section 2 regarding the characteristics and priorities for what should be contained in nationally uniform system particularly regarding penalties; the role of OHS committees and representatives and how performance based legislation can be improved.

Workers' Compensation

The recommendations for workers' compensation concentrate on a staged implementation of competing national insurance scheme. We welcome the opportunity the recommendations provide for reform through the implementation of an alternate system. There are a number of matters of detail that require further consideration, which we raise in the main body of the submission. Subject to these details being addressed we support the opportunity the recommendations provide to drive reform of workers' compensation on a national basis.

Similarly, we support the parallel proposal for new national workers compensation body to drive national consistency of the existing State and Territory workers' compensation schemes.

The remaining parts of the submission (Sections 4 – 11) focus on elements that could be considered as part of the development of national scheme or elements to pursued in moves to greater consistency or uniformity in the existing schemes. They are not exclusive in their application to a new system or improving an existing scheme, they represent our broader views about how workers compensation schemes can operate in an equitable, efficient and affordable way.

Section 2 - National Frameworks for Occupational Health and Safety

National frameworks for Occupational Health and Safety

The Commission recommends that, for the proposed cooperative OHS model, there should be:

- a smaller NOHSC board of five to nine members appointed by the WRMC on the basis of their expertise and skills;

- clear specification in the legislation of the objective of achieving uniform national OHS legislation and regulation in all jurisdictions;

- an agreement that all jurisdictions adopt, by way of template legislation, the acts, regulations and codes as approved by the WRMC without variation;

- three committees to assist the WRMC:

    - a standing policy committee comprising the heads of State, Territory and Commonwealth departments responsible for OHS;
    - a technical committee of experts; and
    - an OHS advisory committee comprising representatives of employers and unions;

- specified timetables for WRMC review of proposals from NOHSC — the process to be prescribed in the legislation; and

- funding for NOHSC shared by the jurisdictions, together with a commitment to funding the research and data collection necessary to ensure the development of a best practice national OHS system.

The Commission recommends that the Commonwealth should amend the Occupational Health and Safety (Commonwealth Employment) Act 1991, to enable those employers who are licensed to self-insure under the Commonwealth's workers' compensation scheme (or, in a later phase, to insure under a national scheme) to elect to be covered by Commonwealth OHS legislation.

Ai Group supports a common OHS regime across Australia. Our members are globally focused with exports accounting for 25% of the manufacturing industry's income. For a national company to have to comply with more than one OHS system, in a relatively small nation, results in increased costs and difficulties in implementing risk management systems, for no apparent benefit.

The Interim Report canvasses the options of how a common regime could be achieved. In our initial submission we expressed reservations that the current arrangements, while useful in some aspects of data collection and comparison, had not delivered in any meaningful way on the goal on national consistency.

We strongly support the development of one single national regime to replace the State and Territory systems. However we agree that the achievement of such a goal has significant legal and political obstacles in the short and medium term. In the interim the recommendations generally represent a useful step in the longer-term pursuit of this goal.

Reform of NOHSC

In order to move towards greater uniformity the Report canvasses alternatives to a single national scheme. The recommended approach is termed the "co-operative template model" which restructures National Occupation Health and Safety Commission ("NOHSC") into a small, expert body responsible to make recommendations on national legislative frameworks to the Workplace Relations Ministers Council ("WRMC"). We support the recommendation.

Intergovernmental Agreement, WRMC Reforms and Funding

The Interim Report makes a number of related recommendations including the machinery to support moves to greater national consistency. The key element is the negotiation of an intergovernmental agreement where the States and Territories agree with the Commonwealth to adopt without variation the legislation, regulations and codes

recommended by NOHSC and approved by WRMC. This recommendation is supported by associated structural changes to the operation.

We support this recommendation and believe it is critical for the achievement of greater uniformity across the existing systems. We are mindful that the development of such an agreement, given the divergence of views on OHS regulation that has been expressed by the States and Territories and some stakeholders, may be a problematic process that will require a great deal of political energy, goodwill and leadership by the Commonwealth, States and Territories and stakeholders. We intend to urge the Commonwealth, States and Territories to make such an agreement a reality.

We support the recommendations regarding the supporting committees to the WRMC and the specific timetables for WRMC review of proposals from NOHSC. They represent a more streamlined decision making process that will aid the pace of reform towards national consistency.

Election into the Commonwealth OHS Regime

The Interim Report makes an alternative recommendation to amend Commonwealth legislation to allow employers who are to be encouraged to apply for self-insurance under Comcare to elect to be covered by Commonwealth OHS legislation. In Ai Group's view it makes good sense for employers who are covered by a single national workers compensation scheme to be covered by a single OHS regime. The recommendation is supported.

One matter of detail does arise. There are some private employers who are covered by the Commonwealth OHS regime. The implication of the recommendation is it would become possible for more private employers to be covered by the Commonwealth regime. Consideration needs to be given as to how those employers will be consulted in the development of OHS legislation, regulations and codes in the Commonwealth regime. An

appropriate mechanism needs to be developed to make sure private employers' views are taken into account.

Other Issues

The Interim Report canvasses some of the scheme design issues OHS regimes need to address. Ai Group made recommendations on some of these matters in our initial submission but the Report addresses a number that we did not consider. They are as follows:

Performance Based Legislation

The Interim Report considers the debate between performance based legislation and prescription based legislation. Some of our smaller members do report difficulty in those States where a performance based approach has progressed the furthest. They argue that the performance-based approach often leads to little or no guidance from the regulator as to how compliance can be achieved. Codes of Practice have generally been welcomed by industry as a workable solution to provide guidance in this area. One issue that has been raised by our members is that these codes of practice are not always expressed in ways that are easy for small business to comprehend. A reformed NOHSC should take such considerations into account. Consideration should be given to ensuring that the board and the management of NOHSC has people with appropriate expertise in small business issues.

OHS Representatives and Committees

The Interim Report examines the role of OHS representatives and committees. Ai Group believes that genuine consultation between employers and employees is a key strategy in improving safety outcomes. We have consistently supported a range of compulsory consultation provisions in a number of States. Ai Group is however firmly opposed to giving committees or individual employee representatives' powers to issue provisional improvement notices. Experience of Ai Group members is that the potential for abuse motivated by industrial relations objectives in some workplaces renders the potentially

beneficial aspects of the proposal unworkable. This part of regulation is better left to the independent regulator.

Penalties

The Interim Report also examines the various penalties under the different OHS Acts. Any review by a reformed NOHSC of the level and nature of penalties that should be applied on a nationally consistent basis would require careful consideration. Currently there is wide divergence between the various schemes on penalties. Some of the variances include:

- the maximum level of penalty for a breach;
- the type of criminal penalties for breaches e.g. industrial manslaughter laws in the ACT;

Ai Group opposes industrial manslaughter laws. We believe they are draconian and inconsistent with mutual obligation between employer and employee that is the cornerstone of good safety regulation.

There is considerable scope to improve consistency in the levels of penalties. The existing States and Territories have wide divergences in penalties for OHS breaches. Generally, employers recognise that fines need to act as a strong disincentive to unsafe behavior but this is balanced by the recognition that smaller companies should not be made unviable by the imposition of a fine. In short there needs to be a balanced approach. Moves to have a greater level of consistency will undoubtedly be opposed by the various stakeholders in each State. If penalties were to be raised to the highest standard across the board employers in other States would predictably protest. Similarly, if they were lowered employee representatives would also protest. This issue is unlikely to be easy to resolve in the short term. While we agree it should be addressed we believe it to be a second order issue in any reform process. The priorities should be on areas that foster administrative and compliance efficiency rather than enforcement.

One issue employers are constantly frustrated by is the way in which prosecutions are conducted. Inspectors often do not declare their intention when commencing investigations after serious incidents. The maximum timeframes for the prosecution to commence are, with few exceptions, utilised. This renders the employer's ability to defend the prosecution at a significant disadvantage because the passage of time often makes evidence more difficult to collect. It is common for a prosecution to be launched on the last day of a two-year period that the legislation allows for a prosecution to commence. This contributes to employer cynicism about the regulator's motives.

Section 3 - National Frameworks for Workers' Compensation

National frameworks for workers' compensation

The Commission recommends that the Commonwealth should develop a national workers' compensation scheme to operate in conjunction with existing State and Territory schemes by taking the following progressive steps:

- Step 1 —immediately encourage self-insurance applications from employers who meet the current competition test to self-insure under the Comcare scheme subject to meeting its prudential, claims management, OHS and other requirements;

- Step 2 — in the medium term, establish a national self-insurance scheme for all employers who meet prudential, claims management, OHS and other requirements; and

- Step 3 — in the long term, establish a broad-based national insurance scheme for all employers, which would be competitively underwritten by private insurers and incorporate the national self-insurance scheme established under step 2.

The Commission recommends that, independent of, and operating in parallel to, the progressive development of a national workers' compensation scheme, the States and Territories should join with the Commonwealth to establish a new national body for workers' compensation having the following features:

- the body would be established by Commonwealth legislation and would have a board of five to nine members with relevant skills and expertise in workers' compensation matters;

- the body would be directly accountable to the Workplace Relations Ministers' Council which would determine the priority areas requiring attention by the national body, make decisions on recommendations made to it, appoint members to the national body and oversight its performance;

- the body's main functions would be to develop standards for consideration by the ministerial council, collect data and undertake/coordinate analysis and research, and monitor and report on the performance of workers' compensation arrangements;

- the Commonwealth, States and Territories would retain responsibility for implementation, with a view to improving the performance of their respective schemes and, over time, achieving greater national consistency; and

- funding of the body would be shared by the jurisdictions.

The Interim Report combines two parallel approaches to move to more nationally consistent arrangements in workers compensation. Both the progressive implementation of a national insurance system and the continued development of co-operative frameworks to encourage the State and Territories to develop more consistent frameworks are supported. There are a number points regarding the detail of the proposals, we wish to submit, that would assist the employers in the industries we represent have confidence in, and ultimately choose, an alternate system.

Progressive Development of a National Insurance System

Step 1

The recommended first step is the encouragement of business that competes with Commonwealth Government enterprises or former Commonwealth Government enterprises to apply for self-insurance licenses under the Comcare scheme. We support this step but we think it unlikely to see a large take up of the offer by employers in the industries we represent. This is largely due to the vast majority not meeting the competition test. Others have expressed concerns over some aspects of the Comcare scheme, which is discussed more fully below.

Step 2

The second step is to develop a national self-insurance scheme for employers who meet appropriate prudential, claims management and OHS requirements. Potentially, a significant number of our larger members could be attracted to such an alternative. Those members who might consider applying for such a scheme have expressed reservations if the scheme was based on the existing structure of Comcare. The concerns are concentrated in the following areas:

Benefit Structures

The current Comcare benefit structures of 45 weeks full pay, followed by 45 weeks on half pay does not meet the principles Ai Group has advocated in this area. We prefer step down levels that are linked to timeframes that maintain adequate incentive to return to work. Twelve weeks is appropriate.

Dispute Resolution

Members have expressed concern in not having a specialist workers compensation tribunal handle the dispute resolution process. Ai Group supports specialist tribunals that have binding medical panels, no or limited legal representation, enhanced alternative dispute resolution measures and strict controls on legal costs arrangements and legal practitioner advertising.

Separation of claims management from other functions

Currently Comcare has a monopoly on claims management within the Comcare regime. The Interim Report recommends that a body with the relevant expertise should do it and this does not necessarily have to be the monopoly provider. We have supported the move to more competitive arrangements in this area in Victoria and New South Wales and would support it in any new system that is implemented by the Commonwealth.

Expertise in managing claims in heavy industry

Comcare predominantly caters for white-collar occupations. Employers in industries such as manufacturing and construction usually employ workers in occupations where the work can be heavier and subject to more robust OHS management regimes to manage the more significant risks. A significant majority of employees in these industries generally have lower education, literacy levels and a more significant representation of employees from a non-English speaking background than those in white-collar occupations. These two factors impact on the claims management process. Manufacturing and construction made up 30.6% of compensable injuries and incidents in 2001-2002[1]. This reflects the significant employment levels in these industries as well as higher risk profiles that result

[1] NOHSC – Compendium of Workers Compensation Statistics Australia 2001 – 2002 p11

in higher incidence rates. A new competing national workers compensation scheme will require a critical mass of employers to choose it to ensure viability. For employers in the manufacturing and construction industries to consider entry into a new scheme confidence in the ability of the claims managers to cater for their particular concerns is required.

Accordingly, a new system that is based on Comcare will require, either significant modification, or, the design of new scheme, to be attractive to employers in the industries we represent.

Step 3

The third step is a move to a national insurance system available to all employers who are constitutional corporations. We support the development of the model. We believe that the introduction of competitor scheme would have a positive impact for employers. However, there are a number of important concerns to be addressed before such a scheme could be implemented.

Cross Subsidisation

The first is the nature of cross subsidisation. A number of the existing schemes provide some level of cross subsidisation between industry groups. The nature of insurance itself encourages some cross subsidisation, at least within identifiable risk categories. If cross subsidisation was eliminated or limited to much lower levels in a national scheme than the respective State or Territory scheme it was competing with it is likely there would be some undesirable outcomes.

In States and Territories where a greater level of cross subsidisation existed towards higher risk companies than the competing national scheme, low risk industries would likely be attracted to enter the national scheme and high-risk companies would not. The converse effect would occur in State and Territories that have lower levels of cross subsidisation than the national scheme.

This has the potential to create a two-tiered structure that could lead to unsustainable short-term premium increases for medium to high-risk business as lower risk employers exist the State scheme leaving higher risk employers to fund the full cost of a relatively more expensive State scheme. This could be addressed in the short term by the State schemes charging an exit levy on employers who leave the State scheme which could be reinvested back into the scheme to offset any short term premium price hikes on employers who choose to remain in the scheme. The details of such schemes would need to be further developed to allay our members concerns in this area.

Benefit Levels

The second issue for a competing national insurance scheme is benefit levels. Superficially, employers may be attracted to a competing national scheme that offers what could be characterised as lower benefit levels. Conversely, it is likely employees and their representatives would not be attracted to a competing national scheme in such a circumstance. If the benefit levels were perceived as more beneficial to employees in the national system then the reverse argument would also hold true.

This possible difference leads to the undesirable potential for industrial relations conflict between employers and employees focused on an employer's choice of insurance system. This is further complicated by the existence of eight other competing systems. Care needs to be taken to design a competing national system that cannot objectively be characterised as either a second-class system or a first-class system on the question of benefits.

Balancing these issues will be critical for the success of otherwise of a competing national insurance system for workers compensation. We have reiterated our views on the constituent parts of this balance in the Section 7 - Statutory Benefit Structures of this submission.

Private Underwriting

Ai Group has been reluctant to support private underwriting in a number of the State and Territories where our members operate. This reluctance has occurred when there have been chronic financial difficulties with the particular scheme. Privatisation in such circumstances has been likely to lead to significant and for some employers, unsustainable premium increases.

We are not opposed in principle to private underwriting. In designing a new scheme there is an opportunity to balance benefit levels with low premiums with robust fraud mechanisms and effective and early return to work and rehabilitation. We have outlined the details of the measures we support to achieve this balance in our initial submission and in the appropriate sections of this submission.

Fraud

In any new scheme there should be robust mechanisms to address claimant fraud. While it is notoriously difficulty to quantify the level of fraudulent behavior in the existing Schemes our members over many years have identified either false or exaggerated claims as a constant source of frustration and unnecessary cost in workers' compensation. The perception of fraudulent behavior not being detected by the system has a disproportionate impact on the confidence employers have in workers' compensation schemes. Even though the incidence of outright claimant fraud may actually be relatively low, the impact it has on employers' view of the Scheme that they are funding is high. A multi faceted approach to treating fraud should be included in any new national system. The approach should include:

- Requiring medical and rehabilitation providers to initiate and maintain contact with the employer at the commencement and through the management of a claim;
- Publicity and education campaigns to alert medical and rehabilitation about the impact of claimant fraud and the penalties for assisting claimant fraud;
- Fraud detection systems similar to those used in motor vehicle property insurance. Generally these systems allocate a number of points for each potentially

suspicious characteristic. Once a level of points is achieved the claim is referred to an appropriately resourced specialist unit for investigation

- Development of a national database that identifies injured workers, employers, service providers and insurance companies. The House of Representatives Committee on Employment and Workplace Relations Report "Back on the job: Report on the inquiry into aspects of Australian workers' compensation schemes" [2] recommended further consideration of whether a database which identifies injured workers, employers, service providers and insurance companies should be implemented subject to appropriate privacy and confidentiality concerns. Ai Group supports the implementation of such a database.
- Regulation of legal representatives in the claims process.
- A statute of limitations on claims of two years.
- Strong sanctions including removal of benefit for claimants who refuse to co-operate with rehabilitation and return to work plans. Claimants who are judged independently to have failed to co-operate with rehabilitation and return to work plans could have their final payments reduced by a percentage. Similar measures operate in motor vehicle jurisdictions in areas like failing to wear a seat belt.

Continued Development of a Co-operative Framework between the Commonwealth and the States and Territories

The Interim Report makes a parallel recommendation to continue the development of a co-operative framework between the Commonwealth and the respective States and Territories. This recommendation appears to represent an extension of the work that the Heads of Workplace Safety and Compensation Australia ("HWSCA") has already commenced. There is some discussion about the role of the HWSCA, some of which reflects our own view that it has not delivered meaningful reform with the notable exception of co-operation achieved between some States on cross border arrangements.

[2] House of Representatives Standing Committee on Employment and Workplace Relations: Back on the job: Report on the inquiry into aspects of Australian Workers' Compensation schemes p 204

The proposed reform appears to replace or supplement the HWSCA with a smaller body with more responsive and flexible governance structure that has direct responsibility to the Workplace Relations Ministers Council. We assume that driving force behind the proposal is designed to provide a direct and more accountable link to the Ministers on the Council enhancing cohesive decision making. This is an admirable goal but not one without political obstacles that are seen all too frequently in any co-operative forum between the Commonwealth and the States and Territories.

We think these obstacles can be overcome by a concentration of the new body's energy on priority issues which are aimed at achieving consistency in the areas of workers' compensation that generate compliance costs for employers who operate in more than one state or territory.

We see the highest priority areas as:

- The development of a national data set on workers compensation.
- Uniform national definitions of "employer" and "employee". Our view on what these definitions should be is expressed in Section 4 – Defining and Coverage of this submission.
- Uniform national definitions of "illness and injury". Our view on what these definitions should be is expressed in Section 4 of this submission.
- Uniform national definitions of "work relatedness". Our view on what these definitions should be is expressed in Section 4 of this submission.
- Uniform national definitions of attribution. Our view on what these definitions should be is expressed in Section 4 of this submission.
- A uniform national approach to notification of injuries and incidents
- A uniform national definition of pre injury weekly earnings
- A uniform national approach to the role of consultation with employees including the posting of policies and legislation.

Issues for the medium term should include:

- Given the weaknesses we have expressed earlier in having competing systems of benefit levels, uniform national benefit structures including dealing with the issues of common law, commutations and journey and recess claims. We have made separate comments on these issues in our initial submission and the relevant sections in this submission

- Dispute resolution

The other areas such underwriting and premium setting should be considered in the longer-term context of developments in the workers' compensation area.

Section 4 - Defining Access and Coverage

Defining access and coverage

The Commission recommends the following as principles to use when defining an employee, to determine coverage under compulsory workers' compensation schemes:

- employer control, recognising that the common law 'contract of service' provides a solid basis for defining an employee in most situations;
- certainty and clarity, as coverage under workers' compensation should be clear to both workers and employers at the commencement of the work relationship. For certain groups of workers and types of work relationships, deeming may be necessary;
- administrative simplicity, to reduce the costs of administration and enforcement;
- consistency with other legislation, to capture significant informational benefits and cost savings; and
- durability and flexibility, to deal with a wide variety of, and changing, work arrangements.

The Commission recommends the following as principles to use when defining work-related fatality, injury and illness under compulsory workers' compensation schemes:

- definition of illness and injury should provide comprehensive coverage of recognised medical injuries and illnesses and include aggravation, acceleration, deterioration, exacerbation or recurrence of a medical condition;
- definition of work-relatedness should be in terms of 'arising out of or in the course of employment', as used by nearly all jurisdictions;
- definition of attribution, 'a significant contributing factor', which is used in a number of jurisdictions, should be a minimum benchmark, while 'the major contributing factor' would add greater clarity;
- coverage for journeys to and from work should not be provided, on the basis of lack of employer control, availability of alternative cover and the ability to be dealt with by enterprise bargaining; and
- coverage for recess breaks and work-related events should be restricted, on the basis of lack of employer control, to those at workplaces and at employer sanctioned events.

The comments in Sections 4 to 11 are made on the basis that the conclusions could be pursued in either the design of a national insurance scheme or in the co-operative model that has been recommended to run parallel with the progressive development of a national insurance scheme.

Employer and Employee

Ai Group made extensive submissions of the question of employer and employee definitions in its initial submission. Summarising those submissions, Ai Group supports a workers compensation scheme that provides coverage for people who are injured in the course of earning their living under a contract of employment or a contract for services where the relationship between the parties, as it bears on the risks of injury of work, is similar to that of an employment contract.

Under the existing schemes this is achieved in two ways:

- An employment test; and
- Depending on the jurisdiction various deemed worker provisions.

There are clear benefits in a greater level of consistency on this issue in terms of compliance cost and the administratively desirable outcome of the stakeholders understanding their obligations.

Our support is however tempered by a number of points:

- Our members' experience that the greater the disconnection between liability for injury or illness and the ability to control the risk of injury or illness, the more potential that exists for distorted outcomes.
- Our members' experience with the difficulties in controlling the activities of employees who could be characterised as highly skilled.
- Our members' difficulties in managing the risk of remote workers.

Whenever a scheme requires an employer to be liable for work that they cannot adequately control it has the potential for undermining the integrity of the Scheme.

It is manifestly unfair for an employer to be held liable for an injury where they had no control of the risk.

We welcome the recommendation in the Interim Report that recognises employer control, clarity and certainty, administrative simplicity, consistency with other legislative definitions and durability and flexibility.

Workplace and Work Related Fatality, Injury and Illness

Ai Group made extensive comments in our initial submission regarding work relatedness tests, attribution and journey and recess break claims.

To summarise, our submission has been guided by the principle that the greater disconnection of risk and liability the more potential is for distorted outcomes. We wish to add the following comments:

Journey Claims

We welcome the Interim Report's recommendation regarding journey claims. We do however take one issue with its construction. We believe the compelling arguments against the inclusion of journey claims under a workers' compensation scheme are those of employer control and the availability of alternative compulsory cover. The ability for employees and their representatives to pursue extra cover on journeys through enterprise bargaining does not sit comfortably with employers because their objection to journey claims are based on their inability to control the journey. The ability for trade unions to persuade some employers through their industrial strength to include such extra cover

does not alter this. We submit the recommendation should be modified to exclude the comments regarding enterprise bargaining.

Recess Claims

We welcome the Interim Report's recommendation regarding recess claims.

Definition of Illness and Injury

Generally, we accept the concept of a definition of injury that includes aggravation, acceleration, deterioration, exacerbation or recurrence. Similarly we accept the definition of work relatedness to be "arising out of or in the course of employment". Most existing jurisdictions in some form recognise these factors.

We do share the concerns expressed in the Interim Report regarding long latency and gradual onset injuries and illnesses and injuries and illnesses that have a number of contributing factors. The primary point that the Report makes is that it does not matter as much as to whether the attribution test is "significant contributing factor" or "major contributing factor" but the existence of different tests across the different schemes does not assist any of the stakeholders in clarifying their responsibilities. We agree with the call for national consistency and a common definition. We do however think it is important for the test to provide as much clarity as possible and therefore support the adoption of "major contributing factor" as the test for attribution.

More importantly, rigorous mechanisms to verify work relatedness must be implemented in any new scheme to ensure confidence in the scheme. We have addressed these mechanisms through the course of this submission.

Section 5 - Injury Management

Injury management

The Commission recommends the following as principles to use to facilitate durable return to work:

- early intervention, including the early notification of claims and the provisional assignment of liability;
- workplace-based rehabilitation where possible, at the pre-injury workplace; and
- return to work programs developed and implemented by a committed partnership of the employer, employee, treating doctor and rehabilitation provider (where required).

At a general level Ai Group supports the Interim Report's recommendations in designing a new national scheme or encouraging greater consistency between the existing schemes concerning injury management.

There are however a number of issues that should be addressed further:

Provisional Assignment of Liability

Currently, provisional assignment of liability has been implemented most notably in New South Wales. Ai Group has expressed concerns over a number of aspects of its operation including:

- The impact of granting liability on a provisional basis weakens the work relatedness nexus for claims. Employers consistently express frustration regarding claims that have a dubious connection to the workplace being accepted easily by insurers and regulators. This frustration translates into view that the some of the other faults of the

system translate into a situation where the problems associated with provisional liability outweigh the benefits.

- There have been examples in NSW where because of a combination of the availability of provisional liability and the ability for an employee, relative of the employee or a medical provider to notify a claim, employers have not been informed that a claim has been made. The employer can be left not knowing where the employee is until the first workers' compensation medical certificate arrives. Some employers' have commenced abandonment of employment processes after the employee has been absent for over a week without contacting the employer only to find a claim has been made without their knowledge and provisionally accepted allowing payment to the employee.

This situation is not satisfactory and caution should be exercised before making recommendations including provisional liability in any new scheme.

Labour Hire Workers and Return to Work

The section devoted to injury management in the Interim Report does not address the issue of labour hire workers despite the issue being considered in other parts of the Report.

Particular care needs to be taken in defining the pre-injury workplace for such employees. Currently there is application by the Labor Council of NSW before the Industrial Relations Commission of New South Wales for a test case that has the potential to oblige an employer to provide suitable duties for a labour hire worker (who is not their employee) injured in their workplace. We do not think it equitable to place obligations on businesses in respect of workers who are not a regular part of their workplace. This issue should be clarified in the recommendations of the Interim Report.

Workers who move from site to site including non-traditional workplaces

There are some workers who move from site to site, premises to premises in their work. An example would be a refrigeration mechanic that moves from site to site, some commercial, some domestic, some industrial premises during the course of their work. While engaged in their normal duties the employer will usually train and direct the employee to undertake some form of risk assessment as they enter the premises where they are to commence work. The risks are different in each environment. This usually works fairly well while normal duties are being performed. When there is an injury and the employee needs to participate in a return to work or rehabilitation program this issue becomes more problematic. Employers are usually reluctant to place an employee in uncontrolled environments where there is risk of exacerbating the injury or illness. Large employers can sometimes cater for this circumstance by providing alternate duties somewhere else in the operation. Small businesses often do not have this luxury.

Small Business

Ai Group identified some of the issues small business has in dealing with injury management in our initial submission. We are concerned that in the discussion in the Report and in the recommendations there is little recognition of these issues. If early intervention and rigorous return to work plans are keys to better outcomes in workers' compensation then it follows that employers who have the most difficulty in achieving these outcomes should have access to appropriate assistance. One item that a new national body for workers' compensation should consider as a priority is research into how small business can be assisted in making return to work and early intervention a practical reality and priority.

Medical and Rehabilitation Providers

The Interim Report briefly discussed the role of medical and rehabilitation providers but does not make any specific recommendations other than the general point about

partnership being required between employer, employee treating doctor and rehabilitation provider.

The basic model of private practice medicine is based on a two-way relationship with no real external stakeholders. As such medical practitioners will invariably pursue the sole objective of meeting the patient's medical needs. This is done on the basis that firstly the patient has no incentive to misinform the practitioner on the nature and extent of the injury and, secondly that no third party is affected by the quality of the diagnosis or cost of the treatment.

The same model is assumed to apply when the patient is being treated for a work related injury. However, workers compensation is effectively a public model of medicine where a third party provides the funding, directly through the insurer or scheme, indirectly by the employer. The flaw in this assumption becomes obvious when an employee is attempting to manufacture an injury, exaggerate an injury or try and pass off an injury as work related when it is not. The medical practitioner will invariably accept the word of the 'patient' in the normal way and will often not verify or be required by the system to verify the accuracy or otherwise of the employee's claims.

In order to encourage the partnership in the recommendation Ai Group supports measures such as requirements in any legislation or regulation developed under the co-operative model or for a national insurance scheme that:

- the treating doctor is to initiate and maintain contact the workplace at the commencement and throughout the treatment of the workplace injury;
- return to work plans be structured to emphasise return to work outcomes as part of patient welfare outcomes

Further, we submit that in any new national scheme or the co-operative national body proposed, a greater focus be given to providing the medical and rehabilitation professions greater initial and ongoing training in occupational medicine and the operation of

workers' compensation schemes.

Section 6 - Common Law Access

Common law access

The Commission recommends that common law should not be included in a national framework for workers' compensation on the grounds that it:

- does not offer stronger incentives for accident reduction than a statutory, no fault scheme;
- does not compensate seriously injured workers to a greater extent than statutory schemes;
- may over-compensate less seriously injured workers who, in the normal course of events, could be expected to be rehabilitated and return to work;
- delays rehabilitation and return to work (if there are psychological benefits to be derived from receiving a lump sum, this could be obtained through statutory benefits); and
- is a more expensive compensation mechanism that statutory workers' compensation.

If common law is to be included in a national framework, then access should be restricted to:

- the most seriously injured workers (subject to meeting a minimum impairment threshold. Impairment should be based on a consistent guide such as that published by the American Medical Association); and
- non-economic loss only.

We support the recommendation that any national insurance scheme should not include common law access.

Ai Group believes that common law has no part in a no fault workers compensation schemes for the following reasons:

- It is based on an adversarial system, which inhibits the rehabilitation process and the normal expectation of a return to work by encouraging both parties to become entrenched in their adversarial roles in order to achieve maximum gain;

- It includes a legal process of establishing fault, which is generally costly, and time consuming. The effective limitation of common law in New South Wales since the reforms that were effective from 1 January 2002 have reduced legal fees in the system by up to 23%. This represents a significant reduction in money spent on what is effectively administration of the system rather than delivering benefits to injured workers.

- Claims are often unrelated to the severity of the injury.

Section 7 - Statutory Benefit Structures

Statutory benefit structures

The Commission recommends that, in national frameworks which require the design of a new benefits structure, consideration should be made of:

- the incentives necessary to reduce the incidence of work-related fatalities, injuries and illnesses;
- to encourage early intervention rehabilitation and return to work;
- adequacy of benefits; and
- minimisation of the extent of cost-shifting away from workers' compensation schemes.

The Commission recommends the following as principles to use to determine a nationally consistent benefits structure:

- a benefits structure should provide sufficient incentives for injured or ill employees to participate in rehabilitation. Benefit step-downs and caps are appropriate mechanisms for providing these incentives;
- conversely, benefits should not be so 'low' as to result in workers bearing an unacceptably high burden of workplace injury or illness, or seeking income support from other sources. Income replacement should be based on pre-injury average weekly earnings, including any regularly received overtime;
- all reasonable medical and rehabilitation expenses should be reimbursed by the scheme; and
- access to lump sum payments, which are intended to compensate those suffering a permanent impairment, should be based on meeting minimum impairment thresholds. The impact of lump sum payments in delaying rehabilitation and return to work should also be considered.

The question of benefit structures in the context of the co-operative model that is proposed in the Interim Report is relatively straightforward. It is highly desirable that all the existing schemes adopt a uniform model of benefit structure. Ai Group has indicated in its initial submission that the preferred benefit structure should:

- Be based on ordinary weekly earnings and not include overtime or shift allowances
- Have step down provisions at 12 weeks
- Provide incentives for workers to move from suitable or light duties back to full duties
- Have the ability to, and the relevant agency the willingness to utilise, suspension of benefits where a claimant fails to co-operate in rehabilitation and return to work programs.

The question becomes more complex in the design of a competing national insurance scheme as discussed in Section 3 – National Frameworks for Workers' Compensation. Potentially, significant differences between the national scheme and a state or territory scheme could become the battleground for employers and their employees and representatives. This would not be a desirable outcome. The consultation process with stakeholders on this issue will be critical in the development of a national self-insurance system or a more general national insurance system.

One final note on the question of benefit structures that is covered in other contexts of the Interim Report is that of the ageing population. If the ageing population is considered to be one of the drivers of higher workers compensation costs despite an environment of less workplace injury and illness, consideration needs to be given to benefit cut offs for ageing workers. Any new national self-insurance scheme or general insurance scheme should carefully consider, if and what at level, there should be cut off age for workers' compensation payments. Generally, the most obvious point would be the age levels where superannuation or social security benefits become available.

Section 8 - Premium Setting

Premium setting

The Commission recommends the following be used as premium setting principles to meet the objectives of: the full funding of schemes; incentives to prevent workplace fatality, injury and illness and to promote rehabilitation and return to work; stability; and administrative simplicity for employers:

- there should be no cross-subsidisation between employers through premiums as it distorts pricing signals. If cross-subsidisation is to exist, it should be minimal and transparent;

- premiums for large employers should be based on experience rating. Premiums for small to medium-sized employers should be based on industry class rating (where the classes reflect common risk profiles) accompanied by explicit, cost effective financial incentives for preventing workplace fatality, injury and illness, and promoting rehabilitation and return to work;

- compliance by private insurers with relevant requirements under the Insurance Act 1973 (particularly the prudential standard governing liability valuation for general insurers) should ensure full funding of schemes. There should be separate but light-handed regulatory monitoring of the premiums set by private insurers; and

- premiums should be set by public insurers so as to achieve full funding, with independent monitoring by a separate body to ensure transparency of any differences between appropriate and actual premiums.

Full Funding

In the case of designing a new national insurance scheme we support the goals of full funding, incentives to prevent workplace fatality, injury and illness, administrative simplicity and the promotion of rehabilitation and return to work.

We are however more circumspect about what the implications are for employers in achieving these outcomes particularly full funding in the existing schemes. New South

Wales has recently been through a major reform process in which the chronic under-funding of the scheme was a primary driver.

The early actuarial signs in NSW are the scheme design reforms that have been implemented together with a further round of reforms that are currently before the Parliament are likely to correct the funding issues in the medium term. Ai Group has been generally supportive of the reforms, as a key outcome has been to maintain premium levels that are economically sustainable. South Australia appears to be at an earlier stage of a similar process.

If a new national scheme is to compete with existing State schemes the national scheme must be attractive to employers in terms of premium costs. If a fully funded national scheme has significantly higher premium prices than partially funded State schemes compliance cost incentives for national companies to make the switch will be significantly diminished. The best way for a new national scheme to make sure it is in fact competitive and fully funded is by careful scheme design. Benefit levels, administration costs, efficient claims management and inexpensive dispute resolution need to be carefully engineered to achieve both a competitive scheme and one that cannot be characterised as a second-class system by employees and their representatives.

Given this delicate balance we believe if the concept of the progressive development of a national insurance is accepted by the Commonwealth Government, further consultation with stakeholders about the design of the scheme is again critical to the success of the new scheme.

Cross Subsidisation

Cross subsidisation is afflicted by a conundrum. While it is clearly desirable that cross subsidisation does not exist to the extent that it distorts price signals this should be a guiding principle rather than a definitive outcome when considered in the context of the broader recommendations about workers' compensation contained in the Interim Report.

Some of the State schemes currently have a degree of cross subsidisation. Recent reviews of the NSW scheme and the move to the ANZIC classification system have moved to less cross subsidisation. This is consistent with trends in other States. In the move to the ANZIC system a three-year introduction period was introduced to ameliorate the impact on employers in higher risk sectors. The system while having less cross subsidisation still does have some and it does not pose great difficulty for scheme.

We submit as long as price signals are not distorted, some cross subsidisation has no real negative effect and has the real advantage of ensuring that no sector of industry feels victimised by a system that will from time to time have evidence of successful non-workplace related claims. These arguments have no less weight in the development of a national system.

The difficulty accentuates itself in a competitive environment. As stated earlier, if no cross subsidisation exists in a national scheme and some level exists in the competing State or Territory scheme then depending on the other parts of the overall scheme design the national scheme may not be attractive to the employer who is gaining the benefit of the cross subsidisation in the State or Territory system.

Again, we urge further consultation with the stakeholders about the overall design of any new national system before the question of cross subsidisation is concluded.

Experience Rating

Generally, employers have supported the notion that small employers should be protected from the full cost of a single isolated expensive claim. Industry rating for smaller business moving to experience rating for larger business has achieved this aim.

The main concern all but the smallest employers have had, is in environments of under funding that many of the State and Territory schemes have experienced, that the levels at

which the experience rating becomes more significant cut in earlier than they did in previous years. As wage levels rise more employers move to a heavier experience component in their premium. Without adjustment a phenomenon not unlike bracket creep in the taxation system occurs. Essentially it is not a question of whether the system is the right one but more a question of making sure that system is adequately maintained and adjusted for changing circumstances.

There are two mechanisms that could be used to address this issue. Firstly, and our preference, is indexation being built into the scales used for experience rating in any new system. Alternatively, the independent body that monitors premiums could be required to consider this element in their reviews.

Section 9 -The Role of Private Insurers

The role of private insurers

The Commission recommends the following regulatory framework which would allow licensed insurers to provide coverage under all schemes:

- in privately underwritten schemes, it should be sufficient for insurer licensing requirements to rely on APRA authorisation under the Insurance Act 1973 as evidence that prudential concerns are satisfied;

- in publicly underwritten schemes, competitive outsourcing to appropriately skilled and resourced service providers should be supported by carefully designed and monitored contracts;

- a national policyholders' support scheme to deal with insurer insolvency as proposed by the HIH Royal Commission should be established; and

- were the Commonwealth to establish a national insurance scheme as an alternative to existing schemes, it should be privately underwritten by insurers authorised by APRA under the Insurance Act 1973.

Ai Group has no further submissions on this section.

Section 10 - Self Insurance

Self-insurance

The Commission recommends the following principles for assessing self-insurance licence applications for a Commonwealth national scheme:

- self-insurers should demonstrate appropriate prudential and claims management requirements, to ensure that they can adequately fund and manage claims;
- prudential requirements should be based on financial capability (including actuarial evaluation of claims liability), bank guarantees and reinsurance policies;
- remaining risks could be reduced further by considering additional risk management instruments, such as making provision for a post-event levy;
- OHS requirements should apply equally to all employers; and
- there should be no explicit minimum employee requirement as it adds no prudential or operational value.

Self-insurers under the Commonwealth national scheme should withdraw from, rather than be recognised under, any or all other schemes.

Ai Group is supportive of the recommendations regarding the licensing of self-insurers. We have made detailed submissions about the proposed self-insurance scheme in Section 3 – National Frameworks for Workers' Compensation of this submission.

Section 11 - Dispute Resolution in Workers' Compensation

Dispute resolution in workers' compensation

The Commission recommends that mechanisms to manage and resolve disputes about claims in an equitable and effective manner should:

- be tailored to deal with the disputes arising from the specific workers' compensation scheme it supports and the broader dispute resolution culture of the jurisdiction within which it operates;
- be supported by claims handling methods that minimise the likelihood of disputes arising in the first place. These include:
    - the provision of information about the scheme to stakeholders which explain their benefits and rights;
    - informed initial claims decisions based on an early exchange of all available information; and
    - use of provisional liability/payments for a limited period;
- screen applications and use the least invasive methods first. These include:
    - a requirement for claims managers to provide for, and injured workers to first use, internal review procedures;
    - use of alternative dispute resolution procedures involving mediation/conciliation and arbitration, with incentives for the use of the less invasive;
    - identifying and, as appropriate, rectifying informational and power imbalances;
    - allowing appeals to a suitable court on points of law; and

Ai Group supports the recommendations regarding dispute resolution. We have made more detailed submission regarding the development of a national self-insurance scheme and general national insurance scheme and the role for dispute resolution in Section 3 of this submission.