NATIONAL WORKERS COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS

January 2004

Australian Business Limited submission on the Productivity Commission Interim Report

INTRODUCTION

Australian Business Limited (ABL) is a member of the Australian Chamber of Commerce and Industry (ACCI) and generally supports its comments on the Productivity Commission's Interim Report, as provided in its submission to the Commission and at public hearings.

The following comments bring forward issues which are of particular concern to ABL members. They are informed by our experience in New South Wales, both through feedback from our members and as a member of the NSW and Commonwealth peak OHS and workers' compensation council's.

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 Workplace Relations Minister's Council (WRMC) on the basis of their expertise and skills;

ABL RESPONSE: DISAGREE

The proposal does not appear to guarantee industry representation. ABL has concerns as to how a two-way conduit to industry, to facilitate industry's input and the dissemination of information, would be established, if there is no industry representation or none tied to a peak industry organisation.

The proposed move away from a tripartite Commission to a small 'expert' board would downgrade the participation of industry which currently plays an active and constructive role in developing national policy, national standards and the national strategic direction of OH&S in Australia through the National Occupational Health and Safety Commission (NOHSC) and importantly to distribute OHS information to the employer network. ABL considers that industry engagement at the highest levels is essential to obtaining improved workplace safety outcomes. Industry involvement must go beyond compliance with policy and legislation: industry must continue to be able to inject its knowledge and experience obtained 'at the coal face' at the level of strategy and policy *development*.

Further information about the proposal is also considered necessary, including:

- The structure and membership of such a board and how members would be appointed;
- The effect of the new board structure on industry representation on the wide range of other NOHSC tri-partite committees; and
- The interaction of the board with the Workplace Relations Minister's Council and the NOHSC secretariat.

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

ABL RESPONSE: AGREE IN PART

Another option would be to include national consistency as a function of the Commission in the NOHSC Act.

It is however imperative that the Workplace Relations Minister's Council re-endorse and reinforce its commitment to national consistency and distribute this commitment in writing to the relevant WorkCover Authorities and to ensure that the commitment is supported by co-operative action at federal and state/territory level.

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

ABL RESPONSE: AGREE IN PART

ABL recommends that rather than the adoption by jurisdictions of template legislation without variation, a national package should be developed including:

- model regulations and Codes of Practice; and

- a suite of industry sector risk/hazard guidance materials.

ABL supports the development of a national regulatory framework that is adopted consistently by the nine jurisdictions through nationally adopted standards, supported by 'national codes of practice' and underpinned by guidance materials. This material must be such that it encourages compliance through reduced costs. This will lead to improved OHS performance. It is the cost of compliance that is of particular concern to our members.

The framework would be further improved where the jurisdictions regulate OHS matters through only one recognised agency in each of the States/Territories. For example in the case of chemicals a number of agencies are involved in their regulation.

- 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;

ABL RESPONSE: DISAGREE

This recommendation would appear to remove the authority of the NOHSC in providing advice to WRMC on OHS and related issues.

ABL has concerns that these three committees will increase the advice channels for WRMC from one (NOHSC) to four which seems likely in practice to reduce the opportunity for coordinated and cohesive advice to Ministers. The committee structures as proposed would also downgrade and in practice disenfranchise industry and reduce the role of industry to one of advice rather than direct input to policy direction. As noted above, ABL considers that effective policy and practical approaches to improving workplace safety necessarily involve industry input and buy-in at the highest levels.

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

ABL RESPONSE: AGREE IN PART

ABL supports the proposition that WRMC deal quickly with OHS issues however this should not be at the expense of the quality of the content or merit of the proposal or an appropriate considered decision making process.

- 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.

ABL RESPONSE: AGREE IN PART

The current funding arrangement whereby the Commonwealth funds NOHSC direct has many advantages including:

- Federal government funding demonstrates its commitment to OHS at the national level;
- A level of independence from the jurisdictions;
- Isolation from the possible vagaries of political change and possible conflict on the levels of funding and payment arrangements of shared funding arrangements;

- Equality of representation by the members, which is not affected or perceived to be affected by different levels of financial funding arrangements between the jurisdictions; and
- A level of certainty over funding arrangements from one source, the Commonwealth.

Where NOHSC-initiated projects cannot be funded within the NOHSC budget, special shared funding arrangements (including in-kind support) would be an effective approach. Primary funding for NOHSC should however remain with the Commonwealth.

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.

ABL RESPONSE: AGREE IN PRINCIPLE

This recommendation requires further explanation to address a number of issues:

- The position of national companies which are not eligible to elect the Commonwealth OHS option; and the
- Complications of interpretation and lack of consistency where businesses are operating on the same site but are subject to different OHS regulatory frameworks.

Consideration should also be given to whether the policy intent could be met by achieving national consistency, which would avoid creating the potential anomalies outlined above.

Whilst this would increase the number of workplaces covered by Commonwealth OHS regulations in any one jurisdiction, the number would actually be quite small as there is a relatively small number of major corporations spread across Australia.

WORKERS' COMPENSATION FRAMEWORK

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.

ABL RESPONSE: AGREE IN PART

ABL supports the development of a mechanism by which those organisations that operate nationally can, if they wish, move to a nationally consistent approach to the management of their workers' compensation needs.

The methodologies proposed in the Interim Report provide such a mechanism but we have considerable reservations about some aspects of the Interim Recommendations.

Steps 1 and 2, whereby eligible employers may opt to take self-insurance coverage under the Comcare Scheme, have some appeal however as the Commission has been advised in submissions and in evidence, the appeal of this strategy is not likely to be universal for all eligible or potentially eligible businesses.

There are at least two aspects of multi-state coverage that are of concern to national businesses. Firstly there is the issue of compliance costs for the maintenance of self insurance licensing and/or a combination of self-insurance and statutory scheme participation. Secondly, the costs associated with maintaining corporate knowledge of several systems and the processes associated with those diverse systems.

The adoption of Steps 1 and 2 has the potential to address both these areas of concern however the ultimate cost may be prohibitive for many businesses, and the strategy could well fail.

The Comcare Scheme has benefit structures that are generally substantially in advance of those available under State schemes. Consequently the costs of adopting national

self insurance under Comcare may well overwhelm compliance and administrative cost savings associated with a transition to a single scheme.

It seems most unlikely that agreement could be reached on a common benefit structure across jurisdictions within the foreseeable future. Consequently it can be argued that using the Comcare Scheme as a vehicle is the only readily available option and it is reasonable to create the opportunity and then let individual businesses decide what they might do according to their own assessment of the impact on their businesses.

An alternative approach would be to accept that there will be continuing differences between States, let businesses that operate across jurisdictional boundaries self insure nationally, but still apply the provisions of the relevant jurisdiction for purposes of workers' compensation benefits. This outcome could be achieved by jurisdictions agreeing to recognise self insurance arrangements in other jurisdictions. For example a business with its principal operations in NSW and self insured under NSW arrangements would be recognised as a self insurer in other jurisdictions notwithstanding the fact the businesses operations in other States may not meet self-insurance requirements in those States. Any claims paid by the business would be under the relevant state legislation.

This approach, like Steps 1 and 2 in the Interim Recommendations has limitations and difficulties:

- The potential savings available to participating businesses would be limited to compliance costs;
- From an individual scheme perspective there may be concerns about jurisdiction shopping with some businesses basing their self insured status in the jurisdiction with the lowest qualification requirements; and
- It may be very difficult to obtain agreement for mutual recognition across jurisdictions.

Notwithstanding these substantial challenges the attractiveness of such an approach may be greater than one which is based on the Comcare Scheme as it currently exists.

ABL does not support Step 3. We can see no valid reason for competition between national and state based schemes within a single jurisdiction. The vast majority of Australian businesses operate within one jurisdiction, most are small businesses. Small businesses present workers' compensation schemes with particular challenges. For most small businesses workplace injuries are an unusual and irregular event. They do not and are unlikely to ever have the systems and approaches necessary for effective post injury management. As a consequence they are particularly reliant on the support available via the formal system, be that from the statutory authority, licensed service providers or others. We would be particularly concerned that this support, and the development of additional assistance to smaller businesses and their employees would be dissipated if spread across two jurisdictions.

ABL would also be concerned that a competitive environment may result in unhelpful comparisons being made between the relative costs of the State and national schemes. As the Commission has noted the major determinant in scheme performance over time appears to be how the scheme is managed rather than the underwriting model. On balance we believe there would be a real risk that price differentials between the two systems will focus attention on the superficial differences between the schemes rather than the underlying cost drivers.

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.

ABL RESPONSE: AGREE IN PART

As outlined above ABL does not support the introduction of a generally available national workers compensation scheme as proposed in the Interim Report. Noting this, our comments in relation to the above recommendation concerning a smaller NOHSC board (p2) also apply to this recommendation. In particular, it is our strong view that any such body should ensure the representation of industry, as essential to achieving improved workplace safety and rehabilitation outcomes.

It is also clear that there is a lack of information and independent research on workers compensation matters in Australia. Some years ago there was an attempt to create a body similar to the Workers Compensation Research Institute in the United States, in Australia. That initiative failed for a number of reasons. We believe the need for such a body remains in Australia. However it is critical, in our view, that it be independent of government and is free to conduct that research that it deems relevant without having to take into account political and other pressures that arise from time to time.

We also believe that this body could over time generate sufficient support from industry and other interested parties to be self sufficient. However its capacity to generate that support is likely to take time, consequently it would benefit from a reasonable level of seed funding which will also give it sufficient time to establish its credentials. This, in our view would be a legitimate application of public monies, particularly as the commitment would be limited both in quantum and time.

The contribution that such a body could make to the development of an informed and constructive debate on workers' compensation in Australia, and as a consequence, the evolution of appropriate and affordable workers' compensation systems, is in our view considerable and likely to be greater than that of a statutory body.

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.

ABL RESPONSE: AGREE IN PART

ABL agrees that there needs to be clarity and certainty as to coverage under workers' compensation laws. ABL agrees that the common law "contract of service" should be used for this purpose.

We do not agree that the definition should be modified to accommodate specific groups of workers and types of work. Where groups of workers or types of work relationships exist or emerge which do not properly fit the common law definition of "contract of service' then, in our view the parties to those arrangements should bear the responsibility of ensuring appropriate arrangements are made to protect their interests including purchasing appropriate levels of income protection and related insurances.

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
- 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.

ABL RESPONSE: AGREE IN PART

Definition of illness or injury

The intent of this recommendation is not immediately apparent. It could be argued that the recommendation would act to limit, to an unknown degree, scheme responsibilities only to those injuries and illnesses that are 'defined' in the medical literature. While this may be a desirable outcome it is also possible that, at the margin, workers compensation could become the battle ground for establishing new and novel medical conditions.

It is also unclear as to the significance of the inclusion of the word "comprehensive" in the definition of injury or illness. In our view the definition should be simply cover "medical conditions" without the inclusion of the qualifying words "recognized" or "comprehensive".

Work relatedness

The requirement that the injury be "arising out of or in the course of employment" should be a minimum requirement

Attribution

The requirement that work be a "significant contributory factor" should be the minimum requirement. It would be clearer and in our opinion fairer that work relatedness be subject to the requirement work be a "major contributory factor" in the injury or illness. The need for this stricter definition is becoming more apparent with an aging population and the increasing propensity for the community to look for someone to blame for outcomes that may be the result of complex reasons including circumstances that

cannot be reasonably held to be within the control or influence of the employer, for example, lifestyle choices, family circumstances.

Journey claims
Employers should not be held accountable for events that cannot be reasonably held to be within their control. Consequently we agree with the recommendation that coverage for journeys to and from work should not be a statutory obligation. Employers' liabilities for journey claims should only occur when the journey is at the direction of the employer and the employee has not materially added to the risk of that journey by some deviation or other act not sanctioned by the employer.

Recess and employer sanctioned events
For the same reasons as above recess claims should only be admitted where the claim arises from an event at the employer's premises.

With respect to employer sanctioned events it is unclear if the recommendation relates to employer sanctioned events at the workplace or if the intention is to include events away from the workplace that are employer sanctioned. With respect to the latter we believe that employers would agree that employment related activities away from the workplace, for example training courses, should be admitted where attendance is a work requirement or has been funded by the employer. However there are social and other events where employers may encourage employee participation by the provision of funding and/or other actions. In these circumstances we believe employers should *not* be liable for any injuries or illnesses arising from these events.

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).

ABL RESPONSE: AGREE IN PRINCIPLE

Early intervention
ABL believes that early intervention is the cornerstone of any effective injury management regime, with the quality and effectiveness of that intervention being critical. A mechanistic approach that is not built on appropriate targeting and response strategies may produce a system which appears to be compliant but does not produce the required rehabilitation and return to work outcomes.

The provisional acceptance of claims seems to be working in NSW. The evidence suggests that provisional liability provisions are facilitating earlier interventions and return to work. It is still relatively early days in the NSW experience and there is undoubtedly a learning curve when systems change. Consequently employers remain concerned that over time there may be an increase in short term claims. Effective use of provisional liability requires the application of appropriate systems and processes to manage potential abuse.

Early intervention is also predicated on the speed with which injuries are reported to the employer and to insurers. The obligations of injured workers for early reporting must be emphasised.

Workplace-based rehabilitation

Workplace-based rehabilitation is the preferred approach when managing workplace injuries. However regard has to be given to structure of businesses in Australia. Most enterprises are small and are not necessarily able to accommodate return to work initiatives. There will be a proportion of cases that require different management strategies. Consequently it is important that any system design parameters must include sufficient flexibility to enable those alternative strategies when they are required.

ABL understands that in the NSW Scheme rehabilitation is likely to be an issue in about 30% of cases. In NSW about 40% of claims do not involve time off work and another 30% are back at work on normal duties within 5 working days, so it is the remaining 30% that require assistance. The challenge is to be able to identify those cases that are likely to require assistance and to then target that assistance so as to facilitate the best possible outcome consistent with the nature of the injury and the capacity of the employer to participate in the rehabilitation.

Return to work programs

The success of return to work programs is dependent on a number of factors, only one of which is the nature of the injury.

The notion of a committed partnership is laudable, and one to which ABL would subscribe, however it is apparent to us that achieving such an outcome is not necessarily easy and would require considerable effort in terms of the legislative framework and also in setting a supportive climate within the system generally.

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.

ABL RESPONSE: AGREE IN PRINCIPLE

ABL supports the recommendation that common law access should be excluded from workers compensation for the reasons outlined by the Commission in the Interim Report. If common law is to be included, it should be restricted to the most serious cases with severity determined against robust thresholds that are capable of withstanding dilution over time. Where common law access is available damages should be restricted to non-economic loss and capped.

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.

ABL RESPONSE: AGREE IN PRINCIPLE

The ultimate cost of a workers compensation system is the aggregate cost of each claim. It is clear, based on experience in NSW that systems design has to have regard to how each and every claim is managed. Consequently ultimate scheme cost, in both human and economic terms, is the result of the complex interaction of the multiple elements in the scheme. Benefit structures are an important, but not the only factor influencing claim and scheme outcomes.

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.

ABL RESPONSE: BROADLY AGREE

Experience rating is, among other things, intended to be a primary motivator of employer performance, rewarding those employers who have lower claims cost and penalising those whose performance is poorer.

The effectiveness of this mechanism is predicated on the credibility and transparency of the experience rating system. NSW experience has shown that where the premium formula is complex and poorly communicated the focus can move from a primary objective of reducing claims and improving injury management to administrative solutions which may reduce/manage premium costs at the individual employer level without a corresponding reduction in cost to the scheme. As a consequence the cost burden is shifted from some employers to others in their industry classification or the scheme generally. The design, communication and credibility of experience rating systems are critical.

Small businesses present different problems. The Commission has recommended there be explicit financial incentives for smaller businesses for prevention and post injury management activity. For smaller businesses industrial accidents are infrequent events and it may be difficult to differentiate "good luck" from "good management." From a scheme perspective the difficulty is developing a reward system for preventative action that can be shown to generate savings to meet the cost of the rewards. On the assumption that loss ratios for small businesses tend to be higher than for larger businesses we believe there is opportunity to develop reward systems that are at least self funding if they are focused on *post* accident behaviour that increases the prospects for earlier sustainable return to work and lower claims costs.

With respect to privately underwritten schemes we have reservations regarding the recommendation that regulation or premiums should be light handed. While it can be argued pricing provides an efficient mechanism for competition it is also clear from recent events in other insurance markets pricing is not necessarily driven by the fundamentals in the market. It can also be argued that this is a matter for individual insurers. In extreme circumstances aberrant behaviour can lead to collapse and strong market readjustment.

Workers' compensation insurance is a statutory requirement. Most employers are not able to choose whether or not they will assume the risk within the business or the extent to which they will insure the risk. The obligations of employers are also subject to external determination via the political process.

In our experience one of the key issues for employers with respect to workers' compensation premiums is predictability and stability. We believe most employers would prefer a stable premium environment that remains fairly constant over time rather than one which is highly volatile where premiums may be low for a period but then high as insurers seek to recover losses and restore profitability. Consequently we believe regulatory control over premiums has to be such that aberrant unsustainable market behaviour is absent or substantially minimised.

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.

ABL RESPONSE: AGREE IN PART

ABL supports the first two Interim Recommendations.

With respect to the recommendation concerning the establishment of a policyholders' support scheme we suggest the need for such a recommendation is substantially diminished if the regulatory control over premiums is sufficient to manage non-sustainable behaviours.

ABL does not support the creation of national insurance scheme however in the event such a scheme was to be created we remain to be convinced that a privately underwritten model is appropriate. ABL conditionally supported the move of the NSW Scheme from a publicly underwritten model to a "file and write" privately underwritten scheme as proposed in the Grellman Report. Our support was conditional on the insurance industry demonstrating that it could deliver efficiencies and savings at least equal to the additional premium costs that would inevitably arise from the need to service the capital requirements of private underwriting. The industry was not able to satisfy us that those savings would be forthcoming and we withdrew our support. Further, we are not aware of any compelling evidence to suggest that the underwriting model is the primary determinant of scheme performance, rather how the scheme is structured and managed seems to have more influence on the scheme results.

The main reason the Commission seems to favour such an approach is to isolate the Commonwealth, and taxpayers, from the financial risks of workers' compensation claims. Publicly underwritten schemes have the capacity to redress scheme shortfalls via the imposition of additional premiums on participating employers. They also have the capacity to remedy scheme problems over time provided they are cash flow positive.

It may be argued that such strategies result in intergenerational cross-subsidies, however we would ask how different is such an outcome to a circumstance where private insurers seek to recover past losses through increased premiums.

Given workers' compensation insurance is a statutory obligation we believe every possible step should be taken to deliver that insurance at the lowest possible cost and that this is most likely in a properly structured and managed publicly underwritten model, not a privately underwritten scheme.

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.

ABL RESPONSE: AGREE IN PART

The key issue for self-insurance is the financial strength of the employer and its capacity to effectively manage it workers' compensation matters. We can see no good reason for the maintenance of minimum employment requirements as part of the qualifying criteria.

The introduction of a post-event levy would in our view act as a deterrent to potential self-insurers. While the failure of a self-insurer is always a possibility, that risk should be substantially reduced by establishing appropriate prudential requirements in the first instance and then ensuring the regulator takes a pro-active approach to monitoring relevant issues within self-insurers.

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
– use of independent medical panels to provide final and binding determinations on questions of medical opinion.

ABL RESPONSE: AGREE