



PRODUCTIVITY COMMISSION INQUIRY – NATIONAL FRAMEWORKS FOR WORKERS' COMPENSATION AND OHS

SUBMISSION

**AUSTRALIAN INDUSTRY GROUP SUBMISSION – PRODUCTIVITY COMMISSION INQUIRY
INTO NATIONAL FRAMEWORKS FOR WORKERS’ COMPENSATION AND OHS**

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1.0 – Introduction & Executive Summary

1.1 Introduction

Ai Group welcomes the opportunity to participate in the Productivity Commission Inquiry into National Frameworks for Workers Compensation and OHS.

The Industry Commission's reports in 1994 and 1995¹ identified the need to streamline regulation and overhaul co-operative arrangements between Governments. The Inquiries also identified problems of excessive legislation, inflexibility of regulation and inconsistency between jurisdictions as issues in Workers Compensation and Occupational Health and Safety ("OHS"). The recent House of Representatives Standing Committee report: *Back on the Job: Report on the inquiry into aspects of Australian Workers Compensation* added to this view when it said

*"The Committee believes that greater co-operation and liaison between the various partners would enable a number of improvements to workers' compensation, which would result in a simpler, more efficient and effective rehabilitation of injured workers, and at the same time reduce or eliminate fraudulent activities and the associated costs"*²

There have been a number of regulatory changes in the State and Territories as well as the changes identified in Point 4 of the Terms of Reference of this Inquiry. We agree that it is indeed timely to review these findings and assess future directions with a view to improving the operation and the outcomes in Workers' Compensation and OHS.

¹ Report No 36 Workers Compensation in Australia (4 February 1994) and Report No 47 Work, Health and Safety (11 September 1995)

² Back on the Job: Report on the Inquiry into Aspects of Australian Workers' Compensation Schemes, House of Representatives Standing Committee on Employment and Workplace Relations (June 2003)

1.2 Ai Group

Australian Industry Group is a national industry association with 9000 members concentrated in the manufacturing, engineering, construction, telecommunication, IT, call center and related sectors. Nationally, our members employ over a million Australians, turnover more than \$100 billion per year and export \$25 billion. Ai Group has been an active participant in public debate on workers compensation across the country. Workers Compensation is a key cost in most sectors Ai Group represents. Our members are concentrated in the manufacturing and construction sectors. These sectors are typically medium to high-risk industries. Managing Workers Compensation and OHS is a critical part of the business strategy of our members in these sectors. Many of our manufacturing members are exposed to the competitive forces of a global market where competitors are often not subject to similar regulatory requirements. Nevertheless, companies pursue the objective of a safe workplace as part of their responsibility as an employer. In short, the management of the safety and welfare of employees in these sectors is crucial to competitive performance.

1.3 Executive Summary

1.3.1 Key Principles

Ai Group is committed to improving outcomes in Workers' Compensation and OHS for our members.

Our members are a mixture of larger companies who operate in more than one State and smaller companies who operate in a single State. This produces different interests in looking at national policy settings on workers compensation and OHS. However, the interests are largely united in seeking workable regulation, sustainable costs and decent levels of support for injured workers.

With this range of interests in mind, our members have endorsed a clear set of principles to guide this submission:

In order to support a 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

A new national scheme or a uniform legislation model would require either the co-operation of all the States and Territories or constitutional reform. A new national scheme would be problematic in that there is little incentive for the Commonwealth to take over current schemes given 8 out of the 10 schemes have significant financial issues.

These are significant hurdles and are not likely to be overcome in the short or medium term. We cannot support a national scheme or a uniform legislation model at this stage despite some of the benefits a national scheme would offer. We are hopeful that in the longer term if some of these issues can be addressed there will be room for consideration of a financially stable, best practice scheme that applies consistently across Australia.

Consistent with the principles endorsed by our members in the Executive Summary, we are however, optimistic that best practice reform can be achieved by pursuing national consistency in a number of areas. A combination of the models of national co-operation and mutual recognition could be used to achieve the majority of recommendations in our submission.

Our recommendations have been formed with this view.

1.3.2 Recommendations

- R1: Self-insurance licenses should be awarded on consistent criteria across jurisdictions. They should be awarded on the basis of the organisations ability to nationally meet its financial obligations and on its national OHS, Injury Management and Workers Compensation systems. If employee numbers are used, total national employees should be used rather than State or Territory based numbers.***
- R2. Reform to enable NOHSC the power to accredit national companies in OHS. Accreditation would be based on the employer being able to demonstrate best practice systems.***
- R3. Recognition by the State and Territory jurisdictions that accreditation by NOHSC would satisfy the respective State and Territory regulatory systems. An audit by one central body such as NOHSC or a nominated state authority would be the requirement for compliance.***

- R4. A consistent approach across the different systems for:**
- **Notification of injuries**
 - **Definition of pre injury weekly earnings. We have made separate recommendations about the level of benefits in Section 6 of this submission.**
 - **Consultation mechanisms including:**
 - **Posting of the policy and legislation details;**
 - **Establishment of safety committees.**
- R5. Assistance is given to employers in understanding different requirements in different States. Funding should be allocated to employer awareness and education of the different requirements.**
- R6. A nationally consistent test of what constitutes a worker. The test should include an employment test that is consistent with other areas of regulation such as employment and taxation law. Any deemed worker provision should be limited to workers where the employer can be assessed to have adequate control of the risk.**
- R7. We do not support the inclusion of journey claims in any jurisdiction. We do recognise most jurisdictions do include journey claims in some form. If they are to be included we recommend that they have nationally consistent definitions of their limits, should contain exclusions for negligent behaviour, should not be included in an employers' individual claims experience and should be subject to ongoing monitoring to guard against abuse.**
- R8. A nationally consistent structure of benefits to apply in workers compensation. The structure should:**
- **Be based on ordinary weekly earnings and not include overtime or shift allowances**
 - **Have a step down provision at 12 weeks**
 - **Provide incentives for workers to move from suitable or light duties back to full duties**

- R9. We oppose commutations being freely available in any move to national consistency. There are a number of criteria that would need to be met if commutations are to be included in some form:***
- There needs to be no access to common law remedies***
 - Any commutation would have to pass a test as to whether it is in the interests of the scheme.***
 - The employer must consent to the commutation.***
- R10. Common law claims should not be included in any moves to national consistency.***
- R11. Establishment of a consistent test of work being the major contributing factor to the illness or the injury in a national framework for consistency;***
- R12. Medical providers be required to contact the workplace to verify the “work relatedness” of the condition in all jurisdictions.***
- R13. Research be commissioned into the interface between workers compensation, the social security system including Medicare and other forms of insurance.***
- R14: Research be commissioned to examine the potential for greater incentives to be provided for small business to participate in return to work and rehabilitation programs. The research would need to include a cost benefit analysis of measures such as providing smaller employers a subsidy for providing suitable duties.***
- R15. Allocation of funding for employer awareness and education emphasising early return to work and effective methods of rehabilitation.***
- R16. Dialogue be commenced with the providers of medical education to develop appropriate educational resources for occupational medicine. This should include***

resources available during the training of doctors and support for continuing education of existing medical providers.

R17. Return to work plans need to be structured in a way to clearly define outcomes aimed at return to work rather than more general outcomes about the workers welfare.

R18. In any move to nationally consistent arrangements dispute resolution should incorporate the following principles:

- The authority should screen and stream the disputes.*
- The tribunal should utilise binding medical panels with no legal representation.*
- Enhanced conciliation processes that minimise the participation of legal representatives.*
- Strictly limited legal cost regimes for matters determined by the tribunal.*

R19. All State and Territory systems give at least three months prior notice of annual premium rates.

R20. All States and Territories align their practices regarding the number of premium assessments in one year.

R21. If a new national scheme was to be designed or new measures for greater national consistency is implemented we recommend that consultative mechanisms with industry be put in place with regards to the setting of premiums.

R22. We recommend that mechanisms be in place to assist employers in understanding how they can control premiums.

R23. Privatisation of Workers Compensation is neither a necessary nor a sufficient component of a best practice scheme.

R24. We recommend the adoption of Recommendation 4 from the Back on the Job Report.

2.0 - National Self Insurance

Self insurance has been described as a system where:

*"An employer substantially meets the cost of its Workers' Compensation claims on a pay as you go basis"*³

The Report further states that:

*"In practice, self insurers often take out some form of "catastrophic" insurance to limit their total liabilities. They may also be required to contribute to a "nominal" insurance fund that meets specified prudential and claims handling requirements"*⁴

Ai Group's experience is that self-insurance offers the greatest incentive for employers to manage their own risks. The advantages of self-insurance are well recognised. It provides strong incentives for employers to provide safe workplaces, since a greater proportion of the costs are borne internally. It encourages ownership of the process of rehabilitation and return to work and facilitates the development of an internal culture that prioritises safety, minimising work related injury and illness.

Most jurisdictions offer some form of self-insurance provided a company can meet certain standards, financial and risk management criteria and an employee numbers threshold. Problems arise where the standards differ from state to state or where thresholds or criteria are applied on a state, rather than a national, basis.

One large employer in the manufacturing industry gives this example:

³ Report No 36 Workers Compensation in Australia (4 February 1994)

⁴ Ibid

We currently self insure in NSW, Victoria and Western Australia.

Despite meeting the eligibility criteria in these States we cannot obtain a license to self-insure in Queensland, Northern Territory, ACT or Tasmania based solely on the issue of "employee numbers". There are minimum employment thresholds before self-insurance is possible, and the threshold requirements vary in each jurisdiction. It is interesting Western Australia has no "employee number" threshold. Our company is committed to the concept of self-insurance and believes it promotes best practice approaches to OH&S, Injury Management and Workers Compensation. We employ 8400 employees nationally.

We are forced to commercially insure in these states and the additional cost to the business is estimated at \$500,000 per year.

Another example:

We hold a self-insurance license in Western Australia. One criteria of this license is that the person determining workers compensation liability must live and work within the state of Western Australia. We have a very small portfolio of claims in WA and accordingly pay an external consultant (who lives in the state) approx \$25,000 per year to manage these claims. A Claims Manager in another state could easily perform this role with no additional cost to the business. Safety and Injury Management resources are naturally maintained within the state.

While self-insurance requires strong prudential controls to ensure appropriate rehabilitation standards are maintained and that outstanding claims provisions are fully secured, there is considerable scope to improve consistency in these arrangements across the country.

We recommend:

R1: Self-insurance licenses should be awarded on consistent criteria across jurisdictions. They should be awarded on the basis of the organisations ability to nationally meet its financial obligations and on its national OHS, Injury Management and Workers Compensation systems. If employee numbers are used, total national employees should be used rather than State or Territory based numbers.

3.0 – The OHS Model

The National Occupational Health and Safety Commission (NOHSC) was established by National Occupational Health & Safety Commission Act 1985.

The objects of the establishment of the Commission are outlined in the Act as:

“(a) the development among the members of the community of an awareness of issues relevant to OHS matters and the facilitation of public debate and discussion on such issues;

(b) the provision, in the public interest, of a forum by which representatives of the Government of the Commonwealth, the Governments of the States and of employers and employees may consult together in, and participate in the development and formulation of policies and strategies relating to, OHS matters; and

(c) the provision of a national focus for activities relating to OHS matters”⁵.

Subsequently NOHSC, have developed a number of model Regulations and Codes with the intention of them being adopted by the various jurisdictions.

As illustrated in the Annual Situation Reports for each of the Priority National Standards there are varying levels of adoption across jurisdictions.

These variations are influenced by, among other things:

- Varying priorities within the jurisdictions
- Legislative restrictions on justification of regulations (e.g. the Victorian Subordinate Legislation Act 1994 requires the development of a Regulatory Impact Statement)
- The nature of consultation requirements within the jurisdictions; and

⁵ National OHS Act 1985 Section 7

- The existence of tripartite regulatory bodies in some jurisdictions.

In recent times NOHSC have fallen behind the developments in some jurisdictions and have recently implemented processes for reviewing a number of the Priority Standards.

Recent moves by NOHSC, supported by the Workplace Relations Ministers Council (WRMC) have lead to the development, and adoption by all jurisdictions, of the National Improvement Strategy (NIS). The structure established to have various jurisdictions take a “lead” role in developing strategies for the National Priorities is in its infancy and it is too soon to tell whether it will have an impact on driving national consistency.

Through NOHSC and the WRMC, a more cohesive approach has been achieved. However, with the current constraints of state and territory jurisdictions, national consistency remains a goal that is out of reach.

Going forward there could be a number of improvements made to the national co-ordination of OHS. NOHSC has made a valuable contribution in publishing research on the respective systems. This contribution is however limited to the ability to comment on respective State and Territory systems rather than directly influence them.

A number of large national members of Ai Group have expressed the view that their current internal OHS systems are considerably more advanced than any of the State or Territory based regulatory systems. They have taken a best practice approach to OHS across the country and established internal systems that meet or exceed the highest requirement in any State or Territory. They have done this both for internal advantages of managing only one system and as a result of having in some cases a better understanding of the practice of safety management than the respective regulatory authorities.

While this approach offers benefits within the company for internal management efficiencies and better safety outcomes, these efficiencies are offset by the cost of regular auditing by the relevant

State or Territory based schemes. The more jurisdictions a company operates in the more onerous this requirement becomes.

Therefore we recommend:

- R2. Reform to enable NOHSC the power to accredit national companies in OHS. Accreditation would be based on the employer being able to demonstrate best practice systems.***
- R3. Recognition by the State and Territory jurisdictions that accreditation by NOHSC would satisfy the respective State and Territory regulatory systems. An audit by one central body such as NOHSC or a nominated state authority would be the requirement for compliance.***

4.0 - Regulatory Burden and Compliance Costs

In relation to this issue the impacts from workers compensation and OHS legislation are different, so they will be addressed separately.

4.1 OHS

OHS legislation around Australia is generally based on the concept of Risk Management. There is a legislative obligation on employers to identify hazards and assess risks; then implement control measures on the basis of a hierarchy of controls. Employers who operate across a number of jurisdictions are able to establish a system of risk management that ensures general compliance with these issues.

However, specific state-based requirements can complicate the process. For example:

- In Victoria the Manual Handling Regulations require that an employer identify “hazardous manual handling”. This is a terminology that is not included in other jurisdictions.
- Victoria are soon to implement new Regulations for Prevention of Falls from Heights that require certain actions once work is undertaken above two metres; some other jurisdictions establish different levels of action at different heights, whilst others have not specifically addressed this issue at all.
- Queensland have recently passed legislation specifically stating that, in most cases, the responsibility for ensuring the safety of plant rests with the owner of that plant. This will have a significant impact on the relationship of labour hire companies and contractors with host employers. This legislation is contrary to recent case law in a number of jurisdictions in Australia.
- Queensland legislation requires the employment of Workplace Health and Safety Officers (WHSOs) in larger organisations; In 1985, Victoria introduced provisions for the election of

health and safety representatives who have the right to issue provisional improvement notices and direct a cessation of work; New South Wales have had a requirement for safety committees to be in place for many years, but the concept of health and safety representatives is a new development.

- Each jurisdiction has different requirements for training of representatives, WHSOs and committees including prescribed and/or approved courses.

What is the regulatory burden and what are the compliance costs?

It is difficult to quantify the specific costs for employers operating across more than one jurisdiction. However the more obvious costs include:

- Employers need to seek information support that enables them to keep up to date with legislative changes; this generally requires subscriptions to an information service and involvement in relevant information networks.
- Employers need to maintain copies of all relevant legislation, regulations, codes of practice, advisory standards, guidance documents and workplace notices issued by the relevant authorities
- Employers need to be alert to differences between each of the jurisdictions and revisit this assessment every time there is a change in one of the jurisdictions
- In order to satisfy the requirements of all jurisdictions, employers have two choices:
 - Establish national standards that ensure the organisation is meeting the requirements of all legislation. This can be difficult in very competitive product markets and the potential arises for conflict between the national standard and what a single jurisdiction requires. Examples include licenses and plant certification.

- Establish a series of standards that are relevant to each jurisdiction. This approach creates significantly more work and may create confusion within the organisation, particularly when there are movements of staff between jurisdictions. The difficulty of this approach is visible in organisations that have the same people working in two jurisdictions, e.g. businesses based in Albury/Wodonga. This level of administrative complexity can also divert the attention and the resources of the organisation to the administration of the system rather than the practices that are required to develop safer workplaces.

We reiterate our earlier recommendation in Section 4 that NOHSC could play a role in accrediting national companies that would be recognised by the respective State and Territory systems.

4.2 Workers Compensation

In workers compensation an employer cannot choose to adopt the best standard. They must comply with the specific requirements of the legislation and establish administrative systems to track and monitor their compliance.

There are some similarities between the regulatory burden and compliance costs for workers compensation and OHS (items 1 and 2 below), but there are many additional costs.

- As with OHS, employers need to have information support that enables them to keep up to date with legislative changes. This generally requires subscriptions to an information service and involvement in relevant information networks.
- As with OHS, employers need to maintain copies of all relevant legislation and guidance documents issued by the relevant authorities.

- Finance, accounting and payroll systems have to be designed to clearly identify remuneration payable in each jurisdiction, and to tag the remuneration items that are to be included for each jurisdiction.
- Definitions of pre-injury average weekly earnings vary from one jurisdiction to the other, as do the benefit levels. Again, payroll systems have to be able to handle the various requirements and payroll personnel need to understand and apply these variations.
- Reporting requirements are different; New South Wales now require that the insurer be advised within 7 days of a serious injury. In Victoria, if an agent receives advice of a claim that is below the employer's excess they will return the claim to the employer, telling them to send it in again if the claim exceeds their liability.

Greater national consistency could significantly simplify the task for employers that operate in more than one state.

We recommend:

R4. A consistent approach across the different systems for:

- ***Notification of injuries***
- ***Definition of pre injury weekly earnings. We have made separate recommendations about the level of benefits in Section 6 of this submission.***
- ***Consultation mechanisms including:***
 - ***Posting of the policy and legislation details;***
 - ***Establishment of safety committees.***

R5. Assistance is given to employers in understanding different requirements for both OHS and Workers' Compensation in different States. Funding should be allocated to employer awareness and education of the different requirements.

5.0 - Access and Coverage

In addressing this issues we have taken coverage to be the broad question of who the Scheme should apply to and access to mean the circumstances under which a person who is covered can receive the benefits of the scheme.

5.1 Coverage – Who should be covered by the Scheme?

Generally speaking 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.

The House of Representatives Report *Back on the Job* explores these issues at Clauses 2.16 – 2.27⁶. It recommends at paragraph 8.19:

“that the Minister for Employment and Workplace Relations request that the Workplace Relations Ministers’ Council conduct a study to identify the extent to which workers are currently not covered by any workers’ compensation system, with a view to adopting a national standard that covers the widest possible number of workers”

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

^{6 6} Back on the Job: Report on the Inquiry into Aspects of Australian Workers’ Compensation Schemes, House of Representatives Standing Committee on Employment and Workplace Relations (June 2003)

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.

A manufacturing facility could generally be characterised as under the control of its owner or operator. There are restrictions on access to the site and people who work on the site are generally under the direction of the owner or operator. There are usually induction and training processes that are required to be completed prior to access to the site being granted.

Contrast this circumstance with an employer who rents its business premises in a large CBD office block owned by a third party such as a property trust. The employer engages subcontractors who they, will not generally have the same degree of control over, as their employees. Examples could include the IT contractor or electrician who works on parts of the building that are not controlled by the business (eg running data cable through the roof and wall cavities).

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 recommend:

R6. A nationally consistent test of what constitutes a worker. The test should include an employment test that is consistent with other areas of regulation such as

employment and taxation law. Any deemed worker provision should be limited to workers where the employer can be assessed to have adequate control of the risk.

5.2 Access – When Does the Scheme Apply?

Generally the same principle about disconnection of risk and liability can be seen to apply. Across the different jurisdictions the contentious part of access usually is where the injury does not occur at the workplace. Journey claims are typically example of that highlights this point.

Ai Group opposes of the inclusion of journey claims in workers compensation on the principle that the employer can generally not adequately control the risk associated with the journey. There are adequate forms of protection in motor vehicle accident and public liability insurance covering these risks.

Currently most jurisdictions include some recognition of journey claims. We recognise that other stakeholders argue that there is some public utility in covering certain types of such claims.

In consultations with our members we note that there is lowering of resistance by employers to journey claims where costs from the claims are contained to reasonable levels (ie fraud is monitored and contained), there are clear exclusions if the worker is found to be negligent in some way (eg drink driving), the claim is not counted as part of an employers' individual experience in calculating premiums and there is clear definition of what constitutes a journey.

R7. We do not support the inclusion of journey claims in any jurisdiction. We do recognise most jurisdictions do include journey claims in some form. If they are to be included we recommend that they have nationally consistent definitions of their limits, should contain exclusions for negligent behaviour, should not be included in an employers' individual claims experience and should be subject to ongoing monitoring to guard against abuse.

6.0 - Benefit Structures/Common Law

There are three issues we have considered in looking at this issue:

- Appropriate weekly benefit levels
- Commutations
- Common Law

6.1 Weekly Benefit Levels

Ai Group is supportive of Workers Compensation schemes that fairly compensate employees who are injured at work. However, we are mindful that the levels of weekly benefit need to be consistent with the following objectives:

- Weekly benefit levels should reflect real injury outcomes in terms of expected average timeframes for return to work (ie the level of benefit is relative to the time since the injury)
- Weekly benefits should not be structured to encourage employees to elongate the time on benefits where return to work is feasible.
- Weekly benefits should not encourage partial recovery in favour of full recovery.

Each jurisdiction currently has different points at which weekly benefits decrease or step down. The Heads of Workers' Compensation Authority publication *Workers' Compensation Arrangements in Australia and NZ Jurisdictions*⁷ conveniently summarises the latest reportable differences at pages 18 – 30. Only Victoria, Tasmania and Western Australia have provisions that could be reasonably held to reflect average injury outcomes. Most injury research suggests that for all but the most serious injuries, return to work is usually completed within 9-12 weeks from the injury date. Indeed, experience suggests that the likelihood of a return to work is significantly reduced past this point,

⁷ Workers Compensation Arrangements in Australia and New Zealand – Heads of Workers' Compensation Authority (1 November 2001)

regardless of the severity of the original injury. It would be logical to develop a benefit structure, which provides incentives for workers to return in this time.

Weekly benefits should be based on ordinary time earnings. Overtime and shift rates are compensation for a disadvantage, not being incurred whilst a worker is at work.

When a worker participates in a return to work or alternate duties program, weekly benefits should be stepped up from the prescribed injury rate to closer to the pre injury income. In this way the worker has the opportunity to increase their income by participating in the program or increasing their hours.

At the moment most systems have the ability for a worker to be penalised where they fail to cooperate with injury management plans by suspending weekly benefits. Insurers and regulatory authorities have been reluctant to impose this penalty and in many cases the workers behavior continues unabated and effectively undermines the whole injury management process.

An additional remedy would be to require workers to participate constructively and cooperatively in their own return to work process as a precondition to commencing legal proceedings. Further if they are judged by an independent party such as an Injury Management Consultant or rehabilitation provider to have failed to cooperate, their final settlement will be reduced by a fixed percentage for refusing to take up opportunities (such as retraining) to mitigate their loss.

This concept is in use in the NSW Compulsory Third Party Motor Accidents Scheme where the settlements of claimants who failed to wear a seat belt are automatically reduced by fifteen percent

We recommend:

R8. A nationally consistent structure of benefits to apply in workers compensation. The structure should:

- Be based on ordinary weekly earnings and not include overtime or shift allowances***

- *Have a step down provision at 12 weeks*
- *Provide incentives for workers to move from suitable or light duties back to full duties*

6.2 Commutations

Commutations are generally considered to be a lump sum “settlements of future entitlements to weekly benefits”

Commutations are afflicted with a very difficult contradiction. On the one hand they are a sound proposition, in financial terms, when dealing with a claim as an isolated case. The idea of rolling future weekly benefits into a lump sum has great appeal as an exercise in providing a benefit for the injured worker that can be used pay mortgages or invest for future earnings.

The difficulty lies that where lump sums are available there seems to be change in claimant behavior. The statistics leading to the recent reform process in NSW clearly indicated that claimant behavior was affected by the pursuit of the lump sum over return to work. This development of a lump sum culture can severely distort outcomes and lead to unnecessary cost blowouts in schemes.

The experience of employers in South Australia confirms this proposition in a counter intuitive way. Generally South Australian employers hold that commutations do not pose the same problems as they do in other States. One clear difference with South Australia is the lack of common law remedies contributing to a lump sum culture.

Similarly, the experience of self-insurers and our larger members is instructive when considering commutations. Generally, our larger members and self-insurers favour commutations. The reason for this is that because larger employers and self-insurers generally have sophisticated claims management systems that ensure only workers with extremely serious injuries, where return to work is no longer possible, are considered for a commutation. The vast majority of smaller

employers do not have the same ability to manage claims in such a rigorous way. Insurers, not the employer, make decisions on commutations.

We therefore recommend:

R9. We oppose commutations being freely available in any move to national consistency. There are a number of criteria that would need to be met if commutations are to be included in some form:

- ***There needs to be no access to common law remedies***
- ***Any commutation would have to pass a test as to whether it is in interests of the scheme.***
- ***The employer must consent to the commutation.***

The differences between the jurisdictions currently on the issue of commutations do not generally impose a great burden on employers. Commutations do not occur with every claim so dealing with differences in their application across jurisdictions does not pose significant administrative and compliance costs. The main concern is where they contribute to the lump sum culture as identified above. For this reason we have no submission on the issue of nationally consistent arrangements and commutations.

6.3 Common law

In order that workers are adequately protected, all workers' compensation schemes in Australia operate on a "no-fault" basis. For the "no fault" principle to work effectively it must be shown that the injury or illness truly arose out of or in the course of employment, or that the employment played a significant part in the development of the injury or the disease. 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%⁸. 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.

Justice Sheahan's Commission of Inquiry into Workers Compensation Common Law Matters⁹ in NSW addresses these issues in a more thorough way.

R10. Common law claims should not be included in any moves to national consistency.

⁸ Figures are derived from WorkCover NSW Workers' Compensation and Workplace OHS Council of NSW Agenda Papers 10 (June 2003)

⁹ Justice Sheahan – Commission of Inquiry into Workers' Compensation Common Law matters

7.0 Cost Sharing and Cost Shifting

Our current workers compensation legislation has not changed significantly since its initial introduction in the early 1900s. Yet the nature of work and the nature of society have changed significantly.

Those drafting legislation in the early 1900s are not likely to have foreseen the current level of *gradual onset musculoskeletal disease* being compensated by our schemes, nor the increasing occurrence of stress claims in most jurisdictions.

The issue of cost sharing and shifting is usually viewed in the context of the costs of work related illness or injury being shifted onto the social security system, Medicare or other forms of insurance.

This concern was identified in Recommendations 5 and 6 of the House of Representatives Inquiry: Back on the Job Report.¹⁰

Ai Group is however is concerned about cost shifting the other way from external sources to the workplace.

Workers Compensation legislation does state that work must be a “significant” or “major” contributing factor or other similar terminology, for a claim to be accepted. However, it is clear that these definitions are applied very loosely; there are numerous examples of people with degenerative diseases receiving compensation because work resulted in an “aggravation, acceleration etc.”

Similarly, stress claims have been accepted when the relationship between work and the conditions is highly questionable and the circumstances would indicate that family and personal issues played a far greater role in the development of the condition. It is not enough for an

¹⁰ Back on the Job: Report on the Inquiry into Aspects of Australian Workers’ Compensation Schemes, House of Representatives Standing Committee on Employment and Workplace Relations (June 2003)

employer to demonstrate that all the other employees are performing satisfactorily in similar conditions; if that individual is stressed by their work, an entitlement exists.

This increasing tendency for “social” issues to be covered by our workers compensation schemes means that employers are paying for the ills of society generally, shifting the cost from the social security system to the premium of the individual employer.

Acceptance of such claims is not in itself a problem. It is the linkage between the acceptance of a claim and the “punishment” imposed on employers by an increased premium, which creates the discomfort with the system as a whole.

In light of the changing nature of injury and disease that is blurring the line between work and home life, consideration needs to be given to a review of our current legislation within the social context of equity.

If we have two people that are suffering stress for a broad range of reasons, is it reasonable to treat them differently simply because one is in paid employment whilst the other is maintaining the home?

The difficulties of answering this question lead to a degree of cynicism from employers who are faced with employees who are caught in this grey area attempting to reweight the cause of their condition to the workplace rather than the external factors that may also be causing the condition. The more perverse outcome is that the Workers’ Compensation systems provide an incentive for a worker to pursue this reweighting because the benefits available are greater than those from the social security system.

Ai Group recommends that any national scheme or attempt to achieve greater national consistency must have more robust mechanisms to address the issue of whether a condition is genuinely work related. We recommend:

- R11. Establishment of a consistent test of work being the major contributing factor to the illness or the injury in a national framework for consistency;*
- R12. Medical providers be required to contact the workplace to verify the “work relatedness” of the condition in all jurisdictions.*
- R13. Research be commissioned into the interface between workers compensation, the social security system including Medicare and other forms of insurance.*

8.0 - Early Intervention, rehabilitation and return to work

All stakeholders consider early intervention, effective rehabilitation and the earliest possible return to work to be the holy grail of workers' compensation. The theory is if these things occur, the rest of the problems with the system fall into place.

One analogy that is often quoted by various stakeholders is the sporting injury. When a professional sportsperson is injured, treatment and rehabilitation begin practically at the same time the injury occurs. The injury is iced, immobilised or in some cases kept warm so the sportsperson can continue on in their game or race. In team sports the injured player is required to attend training with the team, only being separated from the particular sessions that they cannot participate in. Return and participation in full activity occurs as soon as is medically possible.

There is an obvious parallel with a work related injury. Often it can facilitate earlier complete recovery if the worker is in fact at work participating in suitable work for their condition. One fact that is often overlooked, is that it, may, in many instances, be preferable if a worker is at work performing suitable duties in a controlled environment where their condition can be monitored and the risks to aggravation can be controlled. Rest at home, in an uncontrolled environment, is not always the best solution.

For these reasons, development of written return to work plans is a focus of many jurisdictions to facilitate early intervention. Where this requirement is understood, it is often seen as a compliance issue, rather than a legitimate part of the rehabilitation process.

8.1 Small Business

The key issue in early rehabilitation is to develop the structures that will support an employer when a claim occurs. It is often smaller employers who have difficulties dealing with this issue, particularly when they have their first claim.

Return to work and rehabilitation are more likely to fail in small business. A worker returning to partial duties in business is a greater relative cost for a small business than a larger business. It can be difficult for a small employer with a limited range of tasks in their workplace to offer genuine suitable duties.

The experience with measures designed to assist small businesses with return to work, suitable duties and rehabilitation have been disappointing. Programs designed to match small employers with large employers who can offer suitable duties have not been taken up widely.

Greater incentives are needed for small employers to engage in return to work programs. These subsidies may be less than the cost of having workers on full weekly benefits. We recommend:

R14: Research be commissioned to examine the potential for greater incentives to be provided for small business to participate in return to work and rehabilitation programs. The research would need to include a cost benefit analysis of measures such as providing smaller employers a subsidy for providing suitable duties.

Education programs are important in assisting companies' regain some sense of control of their workers compensation. Ai Group's participation in the NSW Premium Discount Scheme has been a positive example of how education combined with incentive can assist employers in getting better Workers Compensation outcomes. Assistance from government in education and awareness is greatly valued by industry in Workers Compensation. We recommend consideration of:

R15. Allocation of funding for employer awareness and education emphasising early return to work and effective methods of rehabilitation.

8.2 The Medical Profession

The role of the medical profession needs to be considered in an examination of effective workers compensation system.

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 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 the insurer or scheme, indirectly 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.

We reiterate recommendation 12. We further recommend:

R16. Dialogue be commenced with the providers of medical education to develop appropriate educational resources for occupational medicine. This should include resources available during the training of doctors and support for continuing education of existing medical providers.

8.3 Rehabilitation Providers

Rehabilitation providers usually play a constructive role in return to work programs of injured workers and we strongly support their role in the process.

The problems our members experience with rehabilitation providers, though generally not as often, are usually similar to those they face with medical practitioners in the type of patient-provider relationship that is developed. There are two additional problems that commonly arise when utilising rehabilitation providers:

- There is no check or balance on over-servicing. A third party is funding the patient. There is no financial incentive for the patient to rehabilitate to a point where they either reduce or cease treatment.
- Our members have observed tendencies from employees to begin to believe that rehabilitation treatment is a substitute for an actual return to work strategy. The attendance at physio becomes an end in itself rather than the return to work.

We recommend:

R17. Return to work plans need to be structured in a way to clearly define outcomes aimed at return to work rather than more general outcomes about the workers welfare.

9.0 - Dispute Resolution

Our members experience with dispute resolution has been coloured by the ineffectiveness of dispute resolution in the New South Wales schemes prior to the recent reforms. Generally, there was a widespread view amongst employers that the previous process was unwieldy, overly legalistic and changed claimant behaviour to pursue the settlement as an end preferable to rehabilitation or return to work.

The new system, which provides a more streamlined approach with an emphasis on conciliation and mediation and less room for pointless disputes about differing medical opinions, promises an improvement. It is too early to tell in NSW whether this promise has been fulfilled.

In making submissions to the NSW Government on the changes Ai Group outlined a number of principles for a Dispute Resolution model. Our recommendations remain for any nationally consistent model:

R18. In any move to nationally consistent arrangements dispute resolution should incorporate the following principles:

- ***The authority should screen and stream the disputes.***
- ***The tribunal should utilise binding medical panels with no legal representation.***
- ***Enhanced conciliation processes that minimise the participation of legal representatives.***
- ***Strictly limited legal cost regimes for matters determined by the tribunal.***

Given the vast majority of claims do not end in a dispute we do not see as much utility in having nationally consistent arrangements in dispute resolution as in other areas. There are gains to be made in the area but they do not form as high a priority because of the limited incidence of disputes as other areas identified in our submission.

10.0 Premium Setting

Employers will always have strongly held views regarding the appropriateness of the premium that is applied to them. There are however some consistent themes that could be addressed in a national scheme or a move to greater national consistency between the schemes:

- The level of consultation and notice about the setting of premiums;
- The transparency of the premium setting process;
- The level of cross subsidy that is desirable in the system.

We have considered these issues in turn:

10.1 Consultation and Notice

On 12 June 2003 WorkCover NSW issued the Insurance Premiums Order for 2003. It is effective from 1 July 2003. This has given employers' 12 working days to consider the effect of any increase, reduction or other change to their premium. This timeframe is too short. Other States report similar issues. There appears to be no reason that premiums could not be set earlier than this point. While there would need to be appropriate adjustments to actuarial calculations about how much a particular classification goes up or down based on the prior figures this would only need to be done once to set up an earlier pattern. This would help business allow for premium movements in their budgeting processes.

Victoria is currently undergoing a process to only have a single premium calculation each year. Employers have generally begun to favour this method. Other States have an initial and a hindsight calculation. There would be advantages in a nationally consistent practice in this area.

We recommend:

R19. All State and Territory systems give at least three months prior notice of annual premium rates.

R20. All States and Territories align their practices regarding the number of premium assessments in one year.

10.2 Transparency

The issue of transparency is highlighted when there are changes to the regulations involved in calculating premiums. Recent changes to calculations of premiums in New South Wales demonstrate this issue.

In NSW recent changes to the wages definition used to calculate premiums have led to a broader definition of wages with a corresponding decrease in average premiums. In this process there have been some winners and some losers in industry. The issue has however been complicated by other changes in the NSW system. The system was still in the process of undergoing a 3 year phasing in of a new classification system based on the ANZSIC industry codes. During the one premium round industry premiums are going up and down on three different criteria:

- The changes to the wages definition
- The phasing in of the ANZSIC changes
- The year on year changes to premiums based on the sectors improved or worsened experience.

Further, for individual companies, their premium may also be affected by further two factors:

- a reallocation from one industry classification to another; and
- movements resulting from experience rating.

With such a complex set of often competing factors applying it is extremely difficult for a business to predict with any precision what its premium will be for the next year and more importantly what behaviours by the company will lead to lower premiums.

All State systems profess to be based partially on the notion that premiums should act as an incentive to improve safety. For this to work, the factors affecting premium calculation should be transparent.

There are peculiar reasons for the amount of change in NSW with a significant reform process under way but the experience amplifies the point that in order for business not to become cynical with the broader system employers need a detailed understanding of the factors that affect their premiums so that they can take appropriate steps to manage their liability.

We recommend:

R21. If a new national scheme was to be designed or new measures for greater national consistency are implemented we recommend that consultative mechanisms with industry be put in place with regards to the setting of premiums.

10.3 Cross Subsidies

The issue of the extent to which some industry sectors cross subsidise other sectors is a point of active debate amongst employers. The debate however usually has at its heart the desire to shift costs from one sector to another.

As an organisation that represents a large group of employers Ai Group maintains that one of the fundamental points of insurance is that by its very nature it provides a degree of cross subsidisation. In short by all employers contributing to the fund individual employers are protected from the full cost of a particular claim.

On the other hand a business needs to be able to see a link between what they can control and the level of cost of their premium.

Our view is that cross subsidies between industries are acceptable to a level just short of what distorts price signals unacceptably.

R22. We also recommend that mechanisms be put in place to assist employers in understanding how they can control premiums.

11.0 -The role of private insurers in workers' compensation schemes

Many previous inquiries have investigated the role of private insurers in the workers compensation schemes. The Cooney Report in the mid 1980s set the scene for Victoria to move away from such a scheme.

Workers Compensation is a social system designed to provide workers with protection if they are injured at work. To protect small employers from the impact of a single very expensive claim, cross-subsidies need to be in place. Financial incentives are also needed to facilitate return to work and improved OHS performance. This cannot be achieved in a scheme that does not have central control over premium setting mechanisms.

R23. Privatisation of Workers Compensation is neither a necessary nor a sufficient component of a best practice scheme.

12.0 – Other Matters

There are some general observations and recommendations we would make that do not fit conveniently into the topics covered so far.

Recommendation 4 of the Back on the Job Report¹¹ said

“The Committee recommends that the Commonwealth Government:

- Examine the need to extend the National Data Set for Compensation based Statistics, to provide nationally relevant workers’ compensation data that assists meaningful interjurisdictional comparisons for policy analysis and contributes to the development of a national framework.*
- further investigate the implications and appropriateness of a national database on workers’ compensation claims which identifies injured workers, employers, service providers and insurance companies.*
- further investigate the implications and appropriateness of additional data matching capacity between Commonwealth agencies and the State and Territory workers’ compensation authorities.*

The Committee strongly believes that confidentiality should be exercised in relation to the use of these databases”

Employers of all persuasions across all States are concerned with the level of employee fraud in Workers Compensation. Measures to combat employee fraud have been to varying degrees in each jurisdiction, bolted on to the system rather than being an integral component. One consistent problem is that insurers and employers have limited ability to identify the risk of fraudulent claims.

¹¹ ¹¹ Back on the Job: Report on the Inquiry into Aspects of Australian Workers’ Compensation Schemes, House of Representatives Standing Committee on Employment and Workplace Relations (June 2003)

R24. We recommend the adoption of Recommendation 4 from the Back on the Job Report.