ACT GOVERNMENT SUBMISSION

NATIONAL WORKERS' COMPENSATION & OCCUPATIONAL HEALTH & SAFETY FRAMEWORKS

A. INTRODUCTION AND OVERVIEW

Occupational health and safety

1. In the ACT, work health and safety is regulated under the *Occupational Health and Safety Act 1989*. The Act covers all employees within the ACT other than federal Government employees. The Act establishes health and safety duties for employers and employees, workplace consultative arrangements and provides for a range of compliance measures.

2. The ACT Occupational Health and Safety Commissioner and inspectors employed by ACT WorkCover administer the Act, and are responsible for providing information and education to employers and employees about their obligations under the Act.

3. The Act establishes the ACT Occupational Health and Safety Council as the peak advisory body to the Minister on matters relating to occupational health and safety and workers compensation. The Occupational Health and Safety Council includes representatives of employees, employers and the Government.

4. The Council is currently reviewing the scope of structure of the Occupational Health and Safety Act, with a view to modernising and streamlining the Act. The Government has also recently announced that it will shortly introduce amendments to improve the compliance model established under the Act.

Workers compensation

5. ACT workers are covered by two different workers' compensation schemes. Compensation and injury management for work-related death, injury and illness in the private sector is provided for under the *Workers Compensation Act 1951*.

6. ACT Government and federal Government employees are covered by the Commonwealth's Comcare scheme, established under the *Safety, Rehabilitation and Compensation Act 1988 (Cth)*.

7. This submission deals with workers compensation arrangements for the private sector, regulated by ACT legislation.

8. The Occupational Health and Safety Council has legislative responsibility to advise the Minister on matters associated with workers compensation. The Council has established a subcommittee to assist it with this function, the Workers Compensation Advisory Committee. The Workers Compensation Advisory Committee includes representatives of approved workers compensation insurers, employer groups, unions, medical practitioners, rehabilitation specialists and the legal profession. The Master of the Supreme Court chairs the Workers Compensation Advisory Committee.

9. The Workers Compensation Act was substantially reformed by the *Workers Compensation Amendment Act 2001*, which commenced operation on 1 July 2002. These amendments modernised the scheme, introducing new provisions to ensure early intervention, injury management, and sustainable return to work for injured workers. The Commission's interim recommendations relating to injury management and benefit design (see interim recommendations 4 and 6) have already been implemented in the ACT.

10. The ACT workers compensation scheme is a privately underwritten workers' compensation scheme, with eight approved private sector insurers having responsibility for setting premiums, managing and settling claims. The scheme is fully funded from the premiums set and collected by the approved insurers.

Insurers are required, as part of their approval to operate within the scheme, to charge sufficient premium to cover the full costs of the scheme including the management of injuries and the administration of the scheme. There is no subsidisation of workers' compensation premiums from public monies, meaning that the actual costs of accepted claims for compensation are met by the Territory's employers.

11. In addition to the coverage provided by approved insurers, the Workers Compensation Act also allows employers who meet criteria set out in the Regulations to self-insure. Currently there are nine, predominantly national, employers in the financial, education and industrial sectors of the workforce approved to self-insurer. This represents less than five percent of the total scheme.

12. Workers who are injured in the course of their employment are entitled to compensation from their employer. The employer is indemnified by their insurer for any losses experienced by the employer in the payment of an entitlement to an injured worker. An injured worker's entitlement to claim against their employer fall into the following categories: weekly benefits, medical expenses, permanent impairment, and under certain circumstances, common law negligence. Apart from a claim for common law negligence, the scheme does not require the injured worker to establish fault on the part of the employer, nor does fault on the part of the injured worker deprive the worker of benefits under the scheme unless the fault is reckless or criminal.

B. RESPONSE TO INTERIM RECOMMENDATIONS

Occupational health and safety

13. It is unclear how the Commission's recommendation that all jurisdictions adopt uniform acts, regulations and codes without variation could be achieved. As with all Australian Governments, in the ACT the passage of legislation is a function of the legislature, rather than the executive. While the Government is committed to achieving greater consistency in occupational health and safety legislation, it is

not possible for the Government to give a commitment that legislation will be adopted in the ACT without variation.

14. The ACT submits that there would be greater take-up within the jurisdictions of existing national standards developed through the National Occupational Health and Safety Commission (NOHSC) if the standards were reviewed more frequently and kept up-to-date. Many of the existing standards are simply not suitable bases for modern legislation, and do not provide a template for legislation that can be adopted with minimal modification.

15. To ensure that national standards remain suitable and relevant, and can promote consistency in national OHS regulation, the federal Government must support the NOHSC office with sufficient resources. The NOHSC Office is currently underfunded and cannot complete essential projects such as reviewing, updating and developing national standards in a timely way.

16. It is unclear how the proposed removal of employee and employer representatives from the NOHSC would assist in overcoming these fundamental problems. The ACT supports the maintenance of effective national tripartite consultative arrangements to promote best practice and national consistency in occupational health and safety.

17. The Commission appears to be recommending that the Workplace Relations Ministers' Council (WRMC) approve template Acts, regulations and codes for implementation in all jurisdictions. The WRMC Standing Orders clearly state that the Council is a consultative forum, rather than a voting forum. The consultative nature of the WRMC is partly a reflection of the politically contentious nature of workplace relations issues. Decisions are only made with the full support of all WRMC members.

18. WRMC does not make decisions on more contentious areas of wages policy, legislation, conditions of employment or industrial disputes as these are the responsibility of the jurisdictions. It is submitted that the Commission should reconsider its recommendation having regard to the WRMC Standing Orders,

which would seem to preclude WRMC from approving national template legislation if just one jurisdiction did not support a particular part of proposed template legislation.

Workers' compensation

19. The ACT does not support the Commission's interim recommendation 2, to develop a national workers' compensation scheme to operate in conjunction with existing State and Territory schemes.

20. Businesses that are classified as 'small' and 'micro' in size predominate within the ACT. There are 20,000 small businesses (accounting for 53 percent of total private sector employment) compared to 700 large businesses (accounting for 47 percent of total private sector employment). For the majority of ACT businesses that only operate in this jurisdiction, differences in scheme design and operation are not a concern.

21. They have no requirement for coverage or policies in multiple jurisdictions. It is for the most part the smaller number of large national employers who experience some level of administrative complexity in dealing with multiple workers compensation schemes. However, it should be noted that in many cases, it is the insurers that manage this complexity on behalf of the national businesses.

22. It is worth noting that a similar level of administrative complexity also exists between the various State-based industrial relations jurisdictions. Similarly, large employers who operate under the *Workplace Relations Act 1996* (Cth) may have a multitude of workplace certified agreements, creating a similar level of administrative complexity for those businesses. It is suggested that many larger employers enter into a number of workplace certified agreements of their own accord, citing improvements in productivity that can be derived from being able to respond to local circumstances and issues.

23. While it is recognised that the purpose and intent surrounding the introduction of enterprise-based bargaining was unrelated to workers compensation, a side effect

of the prevalence of workplace-level bargaining is the creation of significant human resources capacity within large companies. Transactions for these businesses associated with workers compensation are no more complex than for other human resources issues, and should be well within the capability of an effective human resources area.

24. The proposed 'stage one' of interim recommendation 2 would have a particular impact on the ACT and other jurisdictions with small workers' compensation pools. The potential withdrawal of a number of the Territory's larger businesses could have a significant impact on the ACT scheme.

25. In the ACT, businesses with a payroll in excess of $1,250,000 per annum must register and pay payroll tax. Whilst it is not possible to determine the precise number of employees for each of these businesses, it is estimated that all registered businesses would each employ in excess of 20 persons (based on an annual salary of $40,000). According to ACT payroll tax data for the 2002-03 financial year, 1791 business entities were registered to pay the tax during that period. It is estimated that approximately 157 of those registered entities are based only in the ACT, the remaining business entities employ in both the ACT and one or more other jurisdictions. The top 40 registered businesses each pay over $10,000,000 in ACT wages, making a combined total of $1,143,732,117.

26. The departure of just those businesses from the ACT workers compensation scheme would have a significant impact upon the present wages pool. This is illustrated in Table 1, which shows a comparison between the total amount of declared wages for payroll tax purposes and the total amount of wages declared for the workers compensation premium pool for the financial year 2001-02 and the potential remaining wages pool without the contribution of large businesses.

Table 1

Total declared ACT wages under payroll tax (2001-02)	$2,848,461,092
Total ACT wages pool for workers' compensation premiums 2001-02	$3,501,456,699
Potential wages pool without contribution of registered entities (using 2001-02 figures)	$652,995,607

27. The ACT workers compensation regulations require that insurers minimise, as far as possible, the extent of cross subsidisation both across and within industries. However, the relatively small size of many industries in the ACT means that it is not possible to eliminate cross subsidisation (this is discussed further below at paragraph 31). The withdrawal of large employers would have an impact on the size of the premium pool within industries and potentially across industries, depending on an individual insurer's employer/risk profile.

28. Of the Territory's eight approved insurers, four account for around 75% of the market while the remaining four share about 20% of the market, with self-insured employers representing some 5% of the market. Of the four smaller insurers, many came to and remain in the ACT because of their national clients, that is, they sell their business on the basis that they can offer coverage in all jurisdictions. If large national employers are permitted to leave the ACT scheme at will, the incentive for these insurers to remain in the ACT scheme will diminish. The lessening of competition in the market will place an upward pressure on prices, with a negative impact on those smaller businesses who are unable to self-insure under the proposed Commonwealth scheme.

29. Self-insurance within the ACT workers compensation scheme is assessed on a case-by-case basis with each employer having to satisfy a set of prudential and financial requirements set out in the legislation. The particular circumstances in

which employers are able to self-insure are the result of a careful analysis of the specific local conditions that apply in the ACT to the business seeking the self-insurance.

30. The ACT is surrounded by New South Wales (NSW), with its large centrally-funded scheme. As it is a very small jurisdiction, the ACT could not withstand the costs associated with operating a scheme of this type. The ACT scheme has evolved in response to the demands of the bulk of small and medium businesses that operate almost exclusively within the borders of the ACT.

31. The ACT scheme relies upon the contributions that large interstate and national firms make to industry-based premium pools. The ACT premium pool is divided by the seventeen ANZSIC codes, with each approved insurer required to minimise as far as possible any cross subsidisation between industries. However, within the ACT there is the further complication that five of the seventeen industries employ less than one percent of the total ACT workforce, with ten of the seventeen industries employing less than five percent of the total ACT workforce. The result is that, because the number of employers and employees is so low in so many industries, cross subsidisation across industries is inevitable.

32. Work undertaken by Trowbridge Consulting Actuaries for the Insurance Council of Australia on the ACT Workers Compensation ANZSIC Relativities in June 2000 stated that:

    In the ACT around 60% of all 4-digit ANZSIC codes experienced 10 claims or less over the five-year period. In total some 86% of the codes have experience of no more than 10 claims a year, on average.

33. The impact of low claim numbers in industry classification minimises the capacity of the scheme to operate on an idealised model without cross subsidisation. The removal of large employers has the potential to exacerbate an already difficult situation for scheme participants.

34. The premium collected in the ACT also pays for the administrative overheads associated with the operation of an insurer's business within the jurisdiction. The removal of large national players has potentially two negative effects on the ACT workers compensation scheme. First, the removal of funds that support the operation of the scheme. Second, the incentive for many of the smaller national insurers to remain within the ACT would be significantly diminished.

35. Many of the ACT's smaller approved insurers operate within the ACT to service national clients. If these national businesses no longer require workers compensation insurance within the ACT scheme, this would remove a major incentive for those insurers to operate within the ACT market. The ACT has a privately underwritten scheme, with competition between insurers regulating prices. The withdrawal from the market by these small players would reduce competitive pressure in the ACT workers compensation market, leading to increased costs for ACT businesses.

36. While the ACT Government is supportive of agreed national principles for a self-insurance framework, it does not support the concept of self-insurers moving under the Comcare licensing scheme, nor the notion of self-insurers being licensed for all jurisdictions through using the address of their head office for licensing purposes.

37. Stage two of the recommendation would allow further large to medium enterprises to leave the ACT scheme in favour of a new, as yet undefined, Commonwealth scheme. This would presumably be targeted at large and medium businesses that remained in the ACT scheme, as it is likely that only these businesses would have the capacity to meet the prudential and other unspecified occupational health and safety performance requirements to be proposed in the model. The majority of ACT businesses are small and micro-businesses.

38. In addition to leading to higher premiums for employers remaining within the ACT scheme, the withdrawal of the larger employers to the proposed national scheme also has the potential to impact upon return to work outcomes for the injured workers of small businesses.

39. Due to the nature and size of their business, small businesses often do not have the capacity to accommodate return to work arrangements for their injured workers. Insurers in the ACT scheme are currently able to arrange return to work placements (if practicable and appropriate) for the injured workers of their small business clients with their large business clients. The capacity for insurers to engage large and small employers in this manner would cease if large employers transferred to the proposed national scheme.

40. The primary driver of the Commission's recommendations would seem to be promoting the interests of large multi-jurisdiction employers. The ACT submits that the interests of other businesses, particularly small businesses, need to be properly considered in the Commission's final report.

41. Also, equity for employees should be considered. The interim recommendations would lead to the creation of a two-tiered system, with employees of large and national employers enjoying a well funded, full benefits scheme that has been designed for federal public servants, with the remaining smaller businesses left in State and Territory schemes with reduced economy of scale and consistent pressure to reduce access, entitlements and benefits in an effort to control costs.

42. The Commission's interim report also recommends that the WRMC report and make recommendations on the future of workers compensation in Australia. The WRMC would be responsible for determining priority areas for reform of workers compensation and oversight the performance of the national body. Comments are made above at paragraphs 17 to 18 regarding the suitability of the WRMC to perform this type of function.

43. The recommendation includes the formation of a new national body to develop standards for consideration by the WRMC, collect data and then either perform or coordinate a systematic analysis of the data to enable monitoring and reporting on the performance of the workers compensation schemes. This work is already being undertaken each year at the direction of the WRMC by the WRMC Working Party that prepares the Comparative Performance Monitoring Report.

44. The ACT does not support the establishment of a new national body that would require additional funding to be provided by the States and Territories. These functions are already being performed by the Heads of Workers' Compensation Authorities (HWCA), and no duplication or additional bureaucracy is necessary or desirable.

45. It is also unclear that the body proposed by the Commission would include any representation from the ACT, or whether there would be any mechanisms to ensure that the views of ACT employees, businesses and the community would be adequately represented.

46. The Commission appears to place little faith in the ability of the HWCA to resolve issues of national significance. This does not take into account the recent agreement to resolve long-standing cross-border workers compensation issues, and the amount of work that has already been done to improve consistency between jurisdictions. This is particularly evident in jurisdictions that share borders, such as the ACT and NSW, where significant elements of injury management processes are identical.

47. The HWCA is already well progressed in identifying and prioritising key outstanding issues in national uniformity for workers compensation. It is submitted that formalising the role of the HWCA, and requiring this body to report to the WRMC would be preferable to establishing an additional body that will duplicate most of the HWCA's work. The HWCA should be asked to progress priority national policy issues, including significant areas not fully dealt with by the Commission's inquiry, such as cost-shifting associated with the loss of superannuation and retirement savings associated with work-related injuries.