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25 August 2003

Mike Woods
Commissioner
National Workers' Compensation and
Occupational Health and Safety Frameworks Inquiry
Productivity Commission
PO Box 80,
Belconnen, ACT 2616

Dear Commissioner

ICA Supplementary Submission to National Workers' Compensation and Occupational Health and Safety Frameworks Inquiry

ICA, on behalf of its members, encloses this submission for the Commission's consideration.

In principle, ICA remains committed to the long term aim of a nationally regulated and consistent workers compensation framework. In pursuing this, ICA does not believe that greater consistency between the state/territory jurisdictions and the implementation of a national scheme for self insureds are either inconsistent or mutually exclusive.

ICA has provided additional information on the matters of:

- dispute resolution procedures, and
a national scheme for self insureds.

ICA makes a number of submissions, including that:

- dispute resolution processes should be structured, with emphasis placed upon informal and alternative forms of dispute resolution, and
self insureds should be subject to appropriate prudential and financial standards to ensure that workers entitlements are protected.

Should you require any further information, please do not hesitate to contact either myself on 9253 5120 or Jane Nelson on 9253 5121.

Yours sincerely,

Dallas Booth
Deputy Chief Executive

**INSURANCE
COUNCIL OF
AUSTRALIA**

**Supplementary Submission to the
Productivity Commission Inquiry into National
Workers Compensation and Occupational
Health & Safety Frameworks**

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1 Executive Summary

At its Public Hearing in Sydney on Wednesday 25 June 2003, the Productivity Commission sought further clarification in respect of certain aspects of the Insurance Council of Australia's (ICA) initial submission to this Inquiry. Specifically, the Commission sought clarification on ICA's position on:

- dispute resolution regimes and
- a national scheme for self-insureds.

More recently, staff enquired as to ICA's position on self insured, both in regards to prudential standards and how they might interact with any Policyholder Protection Scheme (PPS).

ICA remains committed to the long term aim of a nationally regulated and consistent workers compensation framework however such an outcome is predicated on a number of reforms to be progressively implemented.

2 Dispute Resolution'

ICA has previously submitted that standard dispute resolution procedures should be introduced into the State and Territory schemes, with consideration given to:

a rule based and codified system that is built upon 'no fault' principles

- a clear set of rules for resolving disputes, with an emphasis on alternative forms of dispute resolution
- the use of independent medical experts to provide a binding determination with respect to physical/mental injuries in the event of any dispute and

avoiding unnecessary litigation.²

Specifically, the Commission sought ICA's views on "models of state practice [of dispute resolution] that draw accolade or commend themselves".³

To varying degrees each jurisdiction embraces some of the elements proposed by ICA as representing an appropriate dispute resolution process. Direct comparisons in respect of dispute resolution mechanisms between the jurisdictions are problematic as each system has been designed for a specific jurisdictional arrangement.

However, the better dispute resolution regimes focus on resolving disputes through informal (workplace) based approaches and collaborative forums such as mediation and conciliation. By utilising these techniques in the formative stages of any dispute the focus is placed on identifying the issues and working together to find common ground. Adversarial forms of

¹ Please refer to section 6.7 and Appendix 2 of our earlier submission.

² ICA Submission to the Productivity Commission Inquiry into National Workers Compensation and Occupational Health & Safety Frameworks, June 2003, pp. 29-30.

³ Mr Michael Woods, Presiding Commissioner, Transcript of Proceedings, Productivity Commission Inquiry into National Workers Compensation and Occupational Health and Safety Frameworks, p. 664.

dispute resolution such as arbitration and litigation do not engender the same cooperative approach between participants.

Some general observations of dispute schemes on a jurisdictional basis are made in the table below.

Jurisdiction	Advantages	Disadvantages
Victoria	The use of medical panels Limiting common law appeals to matters of law Channelling of disputes into 'medical' and 'liability' issues	
New South Wales	Use of the Workers' Compensation Commission Channelling of disputes into 'medical' and 'liability' issues	The Conciliator and the Arbitrator are the same person.
Queensland	The use of early (informal and formal) review stages Medical assessment	Unlimited access to common law The use of common law for the determination of damages
South Australia	Structured process of dispute resolution	No use of medical expert panels None of the earlier stages are binding
Western Australia	Structured process incorporating medical assessment and conciliation	
Tasmania	Opportunity for informal (internal) dispute resolution Use of the Workers' Rehabilitation and Compensation Tribunal Provision for the establishment of a medical panel (but have yet to do so)	
Australian Capital Territory	Uses internal resolution	Unlimited access to common law
Northern Territory	Uses mediation Common law access for matters of law only	

The West Australian scheme could be considered a desirable model to follow in the development of a national approach to dispute resolution. The WA model is consistent with the dispute resolution mechanism employed by Insurance Enquiries and Complaints Ltd (IEC)⁴, which in turn is aligned with ICA's own Code of Practice.⁵

⁴ <http://www.iecltd.com.au>, accessed 22 August 2003.

⁵ <http://www.ica.com.au/codepractice/dispute.asp>, accessed 22 August 2003.

3 An alternative national scheme for self insureds⁶

ICA supports both the establishment of a national scheme for self insureds and increased consistency and predictability within and between the State and Territory jurisdictions⁷

The implementation of these two initiatives need not be on a "one or the other" basis. Ideally, the two options could progress in parallel, as depicted in Appendix 1.

3.1 The interaction between a self insureds approach and jurisdictional based consistency

The establishment of a national self insureds scheme would provide a real alternative to the existing State and Territory regimes and provide further impetus for jurisdictional based reform. The scheme would not supplant the State and Territory schemes but it would provide an option to eligible employers either marginalised by existing the State/Territory schemes or seeking the administrative simplicity associated with a nationally recognised solution.

A national scheme for self-insureds would be redundant if the State and Territory regimes embraced consistency across several key elements of workers compensation. However, until such time as this occurs, it may be necessary to drive consistency through a national approach, such as that proposed for self insureds.

3.2 Prudential requirements for self insurers⁸

In all Australian jurisdictions, there exists a facility whereby employers can be approved as self-insurers subject to certain criteria specific to each state/territory.

The most basic criteria for approval as a self insurer may include: a minimum number of workers in the jurisdiction, a minimum amount of net tangible assets, a satisfactory record in workplace safety and appropriate reinsurance arrangements⁹. On top of these, there is typically a requirement for some form of financial guarantee or security, for example:

- In NSW, WorkCover holds money deposited by a self-insurer as security on trust for the payment and satisfaction of all claims, judgments or awards against the selfinsurer not otherwise paid or satisfied. Alternatively, a bank guarantee may be provided as an alternative to a security deposit¹⁰, and
- In Queensland, WorkCover requires either an unconditional bank guarantee or cash deposit".

ICA considers that the most effective method for ensuring that a self-insurer is financially sound to absorb risk is through the application of appropriate APRA standards and monitoring. This would include:

- estimating claims liabilities

⁶Please refer to section 6.8 of our earlier submission.

⁷Sections 6.1-6.7 of our earlier submission.

⁸ICA refers to its earlier submission (section 6.8.3) but adds the following. ⁹

See sections 101-102, *WorkCover Queensland Act 1996* (Old) See sections

¹⁰ 213-216, *Workers Compensation Act 1967* (NSW). " See section 113, *WorkCover Queensland Act 1996* (Old)

- capital adequacy requirements (probably with a bank guarantee or similar security for the risk retained by the self insurer), and
- reinsurance requirements (whereby reinsurance could only be sought with an APRA regulated insurer).

In situations where a self insurer chooses not to retain any liabilities (ie. places reinsurance from the first dollar) their only requirements would be that they take out sufficient cover with an APRA regulated insurer¹². The insurer would already be compliant with the APRA capital adequacy or liability valuation requirements.

In Tasmania the examples of Pasmenco and Blue Ribbon show that a bank guarantee, on its own, may not be sufficient to protect workers' compensation entitlements. The Board of WorkCover Tasmania recently conducted a review of the requirements to have a bank guarantee and found that:

approximately half of all guarantees were below \$200,000

- guarantees were only reviewed once a year. So while a particular amount of guarantee may have been appropriate at the start of the year, it may not remain so during the course of the year and
- a large claim may occur for which the guarantee at the beginning of the year is totally inadequate¹³.

Following this, new prudential requirements were introduced that strengthened the financial protection of workers compensation entitlements¹⁴. The new requirements include the calculation of a notional premium (for new self insurers) or central estimate (for existing self insurers) and additionally a considerable risk margin (>_ 30%) for all self insurers¹⁵.

3.3 Terrorism Cover and the *Terrorism Insurance Act 2003 (Cth)*

Following the terrorism attacks of 11 September 2001 in the United States, there was a gradual withdrawal of terrorism insurance cover. This has led to legislative responses at the State/Territory and Commonwealth Government level in an effort to address this market failure.

Indeed, many Australian jurisdictions were quick to introduce indemnities for workers compensation insurance pending any Commonwealth response.

With the recent passage of the *Terrorism Insurance Act 2003 (Cth)* (the TIA), the Commonwealth Government's terrorism insurance policy has taken effect¹⁶ including the establishment of the Australian Reinsurance Pool Corporation (ARPC)¹⁷. As the Act currently stands, it excludes workers' compensation claims from coverage under the pool of funds managed by the ARPC.

¹² "Sufficient cover" is a concept which has been considered with each of the jurisdictions and would need to be considered in the context of a national scheme were one to be established.

¹¹ Attachment to a letter from the Tasmanian Department of Infrastructure, Energy and Resources to Mr Brian Aherne (ICA consultant) dated 20 May 2002.

¹⁴ WorkCover Board of Tasmania, Annual Report 2001-02, p. 23

¹⁵ Attachment to a letter from the Tasmanian Department of Infrastructure, Energy and Resources to Mr Brian Aherne (ICA consultant) dated 20 May 2002.

¹⁶ Please refer to: <http://www.treasurer.gov.au/tsr/content/pressreleases/2002/064.asp>

¹⁷ <http://www.arpc.treasurv.aov.au/content/Default.asp>, accessed 15 August 2003.

This being the case, any self insured operating in any national scheme would nominally be responsible for its own terrorism risk coverage unless it could reinsure its risk elsewhere.

However, it is possible that this situation may change in the future, pending an agreement between the States, Territories and the Commonwealth to extend the TIA. Were this to occur (and depending on the mechanism) it could have an effect on the potential liabilities of self-insureds operating in any national context.

Appendix 1. Moving towards consistency in Workers Compensation.

