



Australian Chamber of Commerce and Industry

Productivity Commission Inquiry into Workers' Compensation and Occupational Health & Safety – 2003

ACCI Interim Response to Interim Recommendations

Introduction

Occupational Health & Safety and Workers Compensation are key elements of workplace legislation; they do not operate in a coordinated or cohesive manner and with other government regulations, which have the potential to conflict with each other to affect the employer employee relationships and other benefits and entitlements.

Legislative requirements for employers, which have an impact on each other, include:

- Workplace Relations - Unfair dismissal/Work & Family
- Equal Opportunity in Employment
- Drug and Alcohol Testing
- Sexual Harassment
- Privacy
- Disability
- Discrimination
- Genetic Testing

The whole of government legislative framework and policy development mechanism does not provide a process to allow for an evaluation of the impact of policy development and implementation of these workplace issues on each other or to allow the tools used in one process to be used to resolve an issue in other area.

For example:

An employer dismissed an employee for a clear case of sexual harassment (agreed by the Sexual Discrimination Commissioner) however the Industrial Relations Commission forced the employer to re-instate the employee. The effect on the employer and on the staff members was to say the least negative.

The core issues for industry in the review of frameworks for Occupational Health & Safety and Workers Compensation are articulated against a background of workplace issues including;

- The very nature of OHS and its reliance on a cooperative framework and culture in the workplace is not supported by the current regulatory framework. OHS is overregulated and these regulations are interpreted by the authorities and the courts applying a zero tolerance or absolute duty of care approach.



Industry focus is instead on prevention based on workplace practicability and reasonable foreseeability.

- The volume and complexity of OHS regulations make it particularly difficult for small business to comply.
- The interpretation of the Duty of Care for employers and employees – in OHS and Workers Compensation tribunals and courts including contributory negligence. This subject has not been addressed in the Interim Report and ACCI suggests that it be addressed in the final report. ACCI believes that for the OHS framework to work effectively the duty of care should be revised so that the interpretation is both a shared duty and is ‘reasonably practicable and reasonably foreseeable’.
- The access to national licensing arrangements for self-insurers
- National Consistency for Occupational Health & Safety and Workers’ Compensation
- A more effective regulatory framework including a packaged approach to Standards, Codes and Guidance materials.

Note:

ACCI has responded to each of the interim recommendations set out in the Interim Report of the inquiry.

In the response ACCI has segregated the paper into the two sections:

- National Frameworks for Occupational Health & Safety
- National Frameworks for Workers Compensation

For ease of reference in our discussions and in development of the industry response you will note that each recommendation has been numbered.



National frameworks for occupational health and safety

Overview

The ACCI policy position stated in its original submission to the Commission is to achieve a nationally consistent Occupational Health & Safety system. This position is reinforced in ACCI policy statements and in ongoing work by ACCI in a wide range of National Occupational Health & Safety Commission (NOHSC) committees.

ACCI is working to achieve these goals within the current OHS regulatory framework.

ACCI tabled a discussion paper on the subject at the NOHSC Commission on 15 October 2003, which was the catalyst to establish a high level NOHSC commissioners committee to review the current national standards development and implementation process. The review will include consideration of the ACCI discussion paper, which outlines a national standards package as a structured approach to achieving national consistency.

PC Recommendation No. 1

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

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

ACCI RESPONSE DISAGREE

The suggested smaller, more skills oriented board leaves open a number of unanswered questions including:

- The structure and membership of such a board and how members are to be appointed
- The structure is not tri-partite so that industry representation does not appear to be guaranteed
- If there is no industry representation or none, which is, tied to a peak industry organisation, how is it planned to establish a two-way conduit to industry, to provide input and to disseminate information.
- Will the new board structure have an effect on industry representation on the wide range of other NOHSC tri-partite committees?
- How would the board work and/or interact with WRMC and the NOHSC secretariat?



Occupational Health & Safety is a workplace issue in which employers and employees work closely together to achieve a safe and healthy workplace. Much of the regulatory framework and guidance materials to assist the parties is derived from national standards developed in close consultation with industry representatives in the NOHSC tri-partite forum.

The suggested move away from a tri-partite Commission to a small 'expert' board would downgrade and in practice disenfranchise industry, which plays a very active and constructive role in developing national policy, national standards and the national strategic direction of Occupational Health & Safety in Australia through NOHSC and importantly to distribute OHS information to the employer network.

In fact, the only stakeholder to be well advanced in implementing the National OHS Strategy is industry, through its representation on NOHSC.

The current tripartite process whilst sometimes criticised as slow and time consuming provides an effective mechanism for a wide and genuine consultation and a 'reality check' on bureaucratic decision makers and for a 'buy in' of all the parties who have an interest in and responsibility to implement national policies and strategies.

The criticisms of the current tri-partite mechanisms and NOHSC relate in the main to the lack of delivery of the agreed outcome of national consistency. This is not so much a fault of the process but a lack of commitment, in the main, by the bureaucracy in the jurisdictions to implement policies and standards which they have assisted in developing and which have been endorsed by their own ministers at WRMC.

The removal of the NOHSC tri-partite board structure would leave a major gap in the consultation arrangements, which currently involve all the OHS stakeholders.

The NOHSC Commission is currently reviewing the unsuccessful delivery of national consistency in standards and related materials and the role of NOHSC in facilitating their development and implementation. As a part of this review the Commission will consider a proposal to develop model template regulations for all current and future national standards and the implementation of some of the recommendations in this report will also lead to an improved process to gain commitment to and to achieve implementation of national consistency.



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

**ACCI RESPONSE
AGREE IN PART**

The National OHS Framework had as one of its key objectives a commitment to develop a process to implement a nationally consistent approach to OHS regulations.

This objective is now reflected in the National OHS Strategy and the ongoing work being undertaken within NOHSC.

The objective and commitment to achieving national consistency could be included in each national standard as part of the model template regulations and in the guidelines for their development currently being developed by NOHSC.

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

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

It is perhaps value to set out some of the core principles which industry advocates in the development of national standards and materials.

Whilst the PC recommendations refer to nationally uniformity the ACCI response use the term national consistency and there is a significant difference in the interpretation of these terms.

National uniformity means in, our view, a national OHS act supported by national materials, which automatically become the regulation/law in every jurisdiction.

National consistency on the other hand envisages a national package of materials, as set out in the industry response to 1.3, which is agreed, adopted and then administered by each jurisdiction. This can be achieved through the current NOHSC structure and process and within the broad requirements of the individual OHS Acts.

In pursuing national consistency industry is seeking not only a level playing field so that OHS regulations and their interpretations are nationally consistent but also the quality and applicability of the content.

The content is vital - it is important to industry that national standards are adopted within the packaged structure as set out in the response to 1.3.

Materials need to be easy to read and understood at the workplace, to be practicable and achievable at all level including for SMEs.



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

ACCI RESPONSE AGREE IN PART

WRMC has endorsed a nationally consistent approach to the development and implementation of national standards and has recently re stated its commitment to national consistency.

NOHSC is developing a revised strategy to improve its processes and products to achieve national consistency, the strategy to be endorsed by WRMC, is expected to include model template regulations.

The industry proposal, which is the catalyst for the NOHSC review includes a package structure as outlined below with a focus on the following key elements:

- National Consistency
- Practicability
- Small Business

ACCI - Proposed National Standards Package structure

National Standards to be developed through the NOHSC tri-partite processes as a standard national package of materials to be adopted nationally, which would include:

- A National Standard - Written as a Model Regulation
 - Performance Based framework
 - Designed to be adopted as regulations by the jurisdictions
 - Written and presented in an agreed template model regulation format
 - Content to be focussed on practicability
- Code of Practice
 - Generic
 - Written to clarify and explain the regulations in simple easy to read plain English language.
- A Suite of guidance materials
 - Workplace focussed
 - Industry/hazard/risk specific
 - Focussed on what to do and how to do it
 - Brief, simple easy to read and understand
 - Easily accessible either in hard copy or electronically
 - Meet the needs of small business

An alternative to consider may be to include the national standard as a broad statement in addition to a national model regulation.



The package would include an implementation strategy to achieve national consistency within an agreed short timeframe. This would enable NOHSC and the jurisdictions to review and revise all elements of the standards package approach and to retire current materials whilst maintaining an adequate legislative framework in place.

The one key issue not addressed in the NOHSC review or in the ACCI proposed packaged approach is the subject of the individual jurisdictional OHS Acts. The OHS Acts are different in each jurisdiction and ACCI would prefer to see consistency in this area also but recognises that there are political and states rights issues and difficulties.

Whilst their considerations are real-politic, it is important to recognise that the concept of 'competitive federalism' has very little, if any, role to play in competitive OHS systems between jurisdictions.

ACCI is therefore taking a step-by-step approach to achieving national consistency by focusing on the national standards and related materials and tools to bring about a nationally consistent policy approach to be applied in the workplace.

- 1.4 three committees to assist the WRMC:**
- **a standing policy committee comprising the heads of State, Territory and Commonwealth departments responsible for OHS;**
 - **a technical committee of experts; and**
 - **an OHS advisory committee comprising representatives of employers and unions;**

ACCI RESPONSE DISAGREE

The recommendation to introduce three committees to provide assistance to WRMC would appear to remove the authority of NOHSC in providing advice to WRMC on OHS and related issues.

ACCI has concerns that these three committees, which it is proposed, will provide assistance to WRMC, not to NOHSC will increase the advice channels for WRMC from one, NOHSC, to four. The committee structures will also downgrade and in practice disenfranchise industry and reduce the role of industry to one of advice rather than direct input to policy direction, as is the current situation.

Industry has played a significant role and been a major contributor and effective driver in the development of the original National OHS framework and now the National OHS Strategy and in developing and gaining industry sign off on national standards and the strategic direction of OHS in Australia through NOHSC.



WRMC meets only twice per year; its agenda is predetermined as are largely its outcomes. It is hardly the most effective illustration of an objectively structured debating or decision-making forum based on independent or open-minded judgment.

The role of ACCI has been to represent industry on the Commission and related committees, which has the effect of gaining industry sign off, and commitment to decisions of the Commission.

The first two committees suggested will only serve to replicate some of the current mechanisms such as the Heads of Workers Compensation and Safety Authorities. This body, for example, operates as an independent expert group to develop policies, operating strategies, and to share information between the WorkCover Authorities and aside from their independence and lack of reporting requirements or accountability they carry out much of the same work as envisaged by the first two committees proposed in the interim report.

OHS technical issues are effectively managed in the NOHSC current system through a range of industry and risk/hazard committees/working parties eg Chemical Standards Sub-Committee.

The proposed industry advisory committee reduces the industry input and influence in improving OHS performance at the workplace through input to the development of national standards, codes of practice and guidance materials, which should be the focus of the OHS system to assist employers to both comply but more importantly to improve prevention strategies and improvement in OHS performance.

The proposal that these committees will provide advice direct to WRMC when the individual WRMC members already have a plethora of government bodies, staff committees and advisors at both federal state/territory levels appears to duplicate current resources without any perceived benefits to WRMC, NOHSC or the OHS systems.

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

**ACCI RESPONSE
AGREE IN PART**

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

There is no evidence to suggest that WRMC has been tardy in dealing with OHS issues, in fact the trend has been that an increasing number of OHS issues are being tabled and dealt with by WRMC. However whilst WRMC operates on the



current basis it is hard to see how this recommendation could be effectively implemented.

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

**ACCI RESPONSE
AGREE IN PART**

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

Industry believes that it is important that the federal government demonstrates its commitment to OHS at the national level by allocating federal funding in this way.

- A level of independence from the jurisdictions
- Isolation from the possible vagaries of political change and possible conflict on the levels of funding and payment arrangements of shared funding arrangements.
- Equality of representation by the members, which is not affected or perceived to be affected by different levels of financial funding arrangements between the jurisdictions.
- A level of certainty over funding arrangements from one source, the Commonwealth.

There are however some NOHSC initiated projects and/or programs, which cannot be funded within the NOHSC budget and are consequently not included in the annual business plan. Under these circumstances special shared funding arrangements, may be a necessary and effective way of developing a particular product or program.

A recent example of shared funding in kind, is the development of a 'tilt-up construction code' by the WA WorkCover Authority which it has been agreed will form the basis of the development of the national code.

In such cases individual jurisdictions should be asked or may volunteer to take the lead in the development, for example, of a Code of Practice, which will then be used by NOHSC as the draft for the development of a national code.

This is a very cost and resource effective process which would also speed up the development of a suit or package of materials at the national level.

ACCI would encourage the more wide spread use of this process of shared development as the National Standards are revised and developed into national packages including National Standards (Model Regulations) Codes and industry/hazard/risk specific guidance materials.



Notwithstanding this approach to share the workload, resources and the costs to achieve improved outputs on specific projects/programs, the primary funding for NOHSC should remain with the commonwealth for the reasons outlined above.

PC Recommendation No. 2

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

ACCI RESPONSE AGREE IN PRINCIPLE

In Australia we currently have two levels of OHS regulations, namely the Occupational Health and Safety (Commonwealth Employment) Act 1991 for Commonwealth agencies and a small number of approved enterprises and the eight separate jurisdictions acts covering state/territory government activities and the private sector.

The suggestion to allow self-insurers under the Commonwealth workers compensation laws to elect to be covered by the extending the Occupational Health & Safety (Commonwealth Employment) Act is, in principle, a sensible one, which will help to achieve national consistency at least amongst some self-insurers with consequent cost and efficiency benefits.

The recommendations need further explanation and expansion to address a number of issues including:

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

However the other option, which needs to be addressed, is whether the objective would be met by achieving national consistency which would avoid creating the potential anomalies outlined above.

Whilst this would increase the number of workplaces covered by Commonwealth OHS regulations vs state/territory based regulations in any one jurisdiction, the number would actually be quite small as we are talking of a relatively small number of major corporations spread across Australia.



National frameworks for workers' compensation

Overview

ACCI supports in principle the Commission's recommendations in steps 1 and with some conditions and reservations step 2 to achieve national consistency in Workers Compensation arrangements including mechanisms for national self-insurance arrangements.

ACCI however does not support the proposal to develop a national workers compensation scheme as set out in Step 3.

PC Recommendation No. 3

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

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

ACCI RESPONSE AGREE

The recommendation for eligible enterprises to elect to apply for national self-insurance licenses through Comcare is supported by ACCI. This recommendation seeks to encourage eligible national corporations to apply for a national self-insurance license within the current provisions of the Comcare Act.

ACCI would expect that national companies, with operations in a number of jurisdictions and in competition with Commonwealth entities, particularly those currently holding individual state/territory self insurance licenses, would carefully examine this option in the light of their own circumstances, licensing fees, the licensing conditions, and the application of the Commonwealth OHS Regime.

There has been some public comment on the potential financial impact on the State/Territories WorkCover Authorities and consequent increases in premiums for those enterprises, which are not eligible to apply for self-insurance licenses – in the main SMEs.

The authorities claims that major corporations who elect to apply for self-insurance licenses under Comcare this will reduce the premium income pool, reduce cross subsidies and as a consequence increase premiums for SMEs.



ACCI is of the view that as many major corporations are already self-insured and pay only a licensing fee, rather than paying premiums to the WorkCover Authorities that the impact on jurisdictions financial viability and consequently premium rates would be minimal. The smaller jurisdictions already have a premium income based on SMEs and manage their business around their constituency. It could be argued that this is a management and efficiency issue rather than an issue of income stream.

The comment by the Commission in the Interim Report, drawn from the submission by the Institute of Actuaries submission, consultations indicates that there is no significant financial impact on the WorkCover Authorities.

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

**ACCI RESPONSE
AGREE IN PART**

ACCI agrees in part but has reservations and seeks additional information on this recommendation.

The proposal has the advantage of flexibility in that employers who are already self insurers and have either elected to apply for and gain a Comcare license or have elected to stay with their jurisdiction license will now have a choice to move to a truly national scheme which is not tied to a commonwealth government employment culture.

ACCI seeks further detail in the Productivity Commission's final report on the implications of financial and other aspects of this proposal on state workers compensation schemes.

Some of the matters on which industry would seek further information include:

- It is not clear whether this recommendation applies to
 - National companies only or
 - Includes major companies who operate in only one state.
 - Groups of Companies
- The treatment of exit fees
- Security and terrorism coverage
- Retrospectivity for the long tail including liability for IBNRs.

Whilst it is just likely that these impacts would not be great, there would be impacts. It is important that such impacts do not disadvantage the position of remaining employers in the premium pool.

ACCI believes that this is only one way to achieve this objective, the other is to achieve national consistency



This step is a further move towards a more nationally consistent but not necessarily a national Workers Compensation System.

However the implementation of steps 1 and 2 will create a set of coverage options for self-insurers on top of the current jurisdictional and Comcare arrangements, which will need to be, clearly defined to avoid confusion and even disputes on coverage issues.

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

**ACCI RESPONSE
DISAGREE**

ACCI support for nationally consistent arrangements does not extend to support for a national insurance scheme.

On balance industry does not support the recommendations as many employers have concerns over the proposal and would oppose a move to a national workers compensation scheme. Whilst the proposal would ensure national consistency and a level playing field for all employers in terms of premium setting and conditions it does create its own problems and issue for employers and jurisdictions alike.

The strategies recommended and set out in Steps 1 and 2 provide a range of opportunities for sound, well-managed enterprises with good OHS performance to apply for self-insurance licenses and thus develop their own claims and injury management and prevention strategies for their own workplace provided that the issues raised earlier in this paper are addressed..

The access to a national self-insurance license is valuable and cost effective option for major corporations, especially those operating across state/territory borders.

However a national insurance scheme would have little appeal to small to medium employers who do not meet the self-insurance criteria.

ACCI has identified a number of issues and problems emanating from the Step 3 recommendation, which it will speak to at the public hearing. These include:

- Tendency to increase cross subsidies to the disadvantage of SMEs.
- Difficult to gain political agreement on a range of issues including recommendations to:
 - Reduce Premiums
 - Close benefits loopholes
- Potential growth in compensation mentality created (eg Growth of number of disabled pension)

NOTE:

Whilst ACCI does not support the introduction of a national Workers Compensation Scheme as recommended in step 3 we have taken the opportunity to comment on the following recommendations as they might apply in a nationally consistent scheme

PC Recommendation No. 4

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

- 4.1 the body would be established by Commonwealth legislation and would have a board of five to nine members with relevant skills and expertise in workers' compensation matters;*
- 4.2 the body would be directly accountable to the Workplace Relations Ministers' Council which would determine the priority areas requiring attention by the national body, make decisions on recommendations made to it, appoint members to the national body and oversight its performance;*
- 4.3 the body's main functions would be to develop standards for consideration by the ministerial council, collect data and undertake/coordinate analysis and research, and monitor and report on the performance of workers' compensation arrangements;*
- 4.4 the Commonwealth, States and Territories would retain responsibility for implementation, with a view to improving the performance of their respective schemes and, over time, achieving greater national consistency; and*
- 4.5 funding of the body would be shared by the jurisdictions.*

**ACCI RESPONSE
DISAGREE**

This recommendation is based on the premise that step 3 will be implemented. Step three is a step, which can only be achieved with federal government intervention at the political level.

ACCI has major concerns over the proposed interim board during the proposed development of a national scheme and the role and structure of the body. The appointment of such a board will lock in an expectation, even perhaps a pre-determined certainty, that a national scheme will be introduced some time in the future.

The proposed interim arrangements overseen by a small expert board whose functions are broadly set out in 4.1, 4.2 and 4.3 will be an ineffective and



cumbersome process, which would not operate any more effectively than the current processes under the more consultative jurisdictional processes of HOWSCA.

The proposal for an interim board is we believe an unworkable proposal and ACCI would not support the proposal for the following reasons:

- There appears to be no effective role for industry as there is no designated industry representative.
- Board members are subject to political appointment
- The function set out in 4.3 would in effect create a new commonwealth bureaucracy
- There are no cost or operational benefits articulated in the proposal.

ACCI agrees in principle with the recommendations in 4.4 and 4.5.

Defining access and coverage

Overview

The definition of access and coverage is a core issue in the move towards national consistency. ACCI comments and response relate to the concept of achieving national consistency.

If we can agree these core issues and the jurisdictions both accept and implement these recommended changes, with some reservations as noted below that would constitute major progress.

The next step would be to influence the courts to take a consistent approach in handing down judgments.

PC Recommendation No. 5

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

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

ACCI RESPONSE AGREE IN PART

ACCI supports in general terms these principles. However we do not support the use of these principles to extend any definitions beyond the common law 'contract of service.'

Principles 5.1, 5.2, and 5.3 can all exist within the framework of that common law definition

Principles 5.4 and 5.5 should be confined to that definition.

PC Recommendation No. 6

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

- 6.1 *definition of illness and injury should provide comprehensive coverage of recognised medical injuries and illnesses and include aggravation, acceleration, deterioration, exacerbation or recurrence of a medical condition;***

ACCI RESPONSE DISAGREE

The definitions used in most jurisdictions are comprehensive in their coverage but do not attempt to detail 'recognised medical injuries and illnesses'. Attempts to define and detail these matters would lead to much dispute and would in the final analysis not achieve the objective.

One of the major challenges for every workers compensation system is the lack of control and consequent 'blow out' of medical expenses. A recommendation, which advocates 'comprehensive coverage', has the potential to be used, or misused, to exacerbate that problem.

- 6.2 *definition of work-relatedness should be in terms of 'arising out of or in the course of employment', as used by nearly all jurisdictions;***

ACCI RESPONSE AGREE

- 6.3 *definition of attribution, 'a significant contributing factor', which is used in a number of jurisdictions, should be a minimum benchmark, while 'the major contributing factor' would add greater clarity;***

ACCI RESPONSE AGREE

ACCI agrees that the definition of attribution as 'the major contributing factor' would remove much of the confusion and lack of consistency in interpretation by WorkCover authorities and the courts in workers compensation cases.

- 6.4 *coverage for journeys to and from work should not be provided, on the basis of lack of employer control, availability of alternative cover and the ability to be dealt with by enterprise bargaining; and***



ACCI RESPONSE AGREE

The jurisdictions currently have differing approaches to 'journey accidents' Industry is concerned that there are widely differing interpretations of what constitutes the journey between home and the workplace the mode of transport, personal business activities and other personal activities of the employee during the journey. (e.g. a visit to a hotel on the way home from work)

The lack of 'employer control' element of the circumstances of the incident and subsequent claim is the key objection to the current regulations.

ACCI strongly supports the removal of the coverage.

Employees are able to claim for compensation, for an injury under these circumstances, through a range of other avenues depending on the mode of transport and other factors e.g. Motor vehicle Third Party insurance.

6.5 *coverage for recess breaks and work-related events should be restricted, on the basis of lack of employer control, to those at workplaces and at employer sanctioned events.*

ACCI RESPONSE AGREE

The lack of 'employer control' element of the circumstances of the incident and subsequent claim is the key objection to the current regulations.

ACCI strongly supports the restrictions recommended.

Injury management

PC Recommendation No. 7

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

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

ACCI RESPONSE AGREE

The injury management proposals are broadly compatible with the ACCI policy, which states:

‘to achieve nationally consistent workers’ compensation schemes with an emphasis on an effective Injury Management approach’.

The ACCI information paper states:

“Early intervention or early action by the employer in managing the claim and the return to work program as soon as practicable after the accident is the key to effective Injury Management.

The involvement by the employer in the early stages of the medical treatment of the employee, the claims management by the insurer and the return to work plan is essential to achieve the most cost effective outcomes for the employer and the injured worker.

The process of Injury Management should commence immediately following the reporting of the work related injury or illness.”

The employee also has a responsibility to report the accident to the employer and to participate in the early intervention actions

The fact that early intervention takes place does not necessarily always mean ‘an assignment of responsibility’.

Whilst the recommendation does not address, and should, is the importance of the employer involvement in the decision about rehabilitation and return to work. It should be a principle of workers compensation systems that direct employer engagement in rehabilitation and return to work is necessary and desirable.



Recommendation 7.1 re early intervention needs some further explanation:

ACCI supports in principle the 'provisional assignment of responsibility' to enable rehabilitation and return to work actions to be undertaken but needs to set some conditions and limitations as follows:

- Employer agreement to accept provisional responsibility without exposure to penalty.
- Where employee fraud is proven that the employer has the right of full recovery.



Common law access

PC Recommendation No. 8

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

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

PC Recommendation No. 9

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

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

ACCI RESPONSE AGREE

The removal of access to common law and thus lump sum payments is supported by ACCI.

The awarding of lump sum payments has taxation benefits for the claimant over regular weekly payments or annuities and as a result is attractive to claimants but also provides an incentive to undertake legal action.

It also has the potential to encourage double dipping and cost transfers between State and Commonwealth when the lump sum is eroded and the claimant seeks to gain cover under the social services system.

Statutory benefit structures

PC Recommendation No. 10

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

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

PC Recommendation No. 11

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

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

ACCI RESPONSE AGREE IN PART

The recommendations do not propose major changes to the broad thrust of current jurisdictions models except in the area of lump sum payments.

Access to common law lump sum payment should not be included in the benefits schedule except where required as specified in the section of access to common law.

It is vital that any restructuring of benefits is designed to bring about earlier return to work rates, and to minimise the potential for a welfare compensation based culture.

Premium setting

PC Recommendation No. 12

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

- 12.1 there should be no cross-subsidisation between employers through premiums as it distorts pricing signals. If cross-subsidisation is to exist, it should be minimal and transparent;***
- 12.2 premiums for large employers should be based on experience rating. Premiums for small to medium-sized employers should be based on industry class rating (where the classes reflect common risk profiles) accompanied by explicit, cost-effective financial incentives for preventing workplace fatality, injury and illness, and promoting rehabilitation and return to work;***
- 12.3 compliance by private insurers with relevant requirements under the Insurance Act 1973 (particularly the prudential standard governing liability valuation for general insurers) should ensure full funding of schemes. There should be separate but light-handed regulatory monitoring of the premiums set by private insurers; and***
- 12.4 premiums should be set by public insurers so as to achieve full funding, with independent monitoring by a separate body to ensure transparency of any differences between appropriate and actual premiums.***

ACCI RESPONSE AGREE

These recommendations accord with the ACCI submission on the subject. The criticisms of the effect of removing the major companies from the premium pool and the effect of cross subsidies on SMEs by some jurisdictions appears unwarranted and the authorities would be better employed by directing their attention to the efficiency of the system.

Efficient management is a key factor in balancing the conflicting demands of risk and capacity to pay. The jurisdictions attention should be focussed on how to improve efficiency in a number of areas including:

- Fraud minimisation
- Improved claims management
- Cost effective and efficient dispute resolution systems
- Reliable and easily accessible data.
- Reductions of Legal and Medical costs.

The role of private insurers

PC Recommendation No. 13

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

- 13.1** *in privately underwritten schemes, it should be sufficient for insurer licensing requirements to rely on APRA authorisation under the Insurance Act 1973 as evidence that prudential concerns are satisfied;*
- 13.2** *in publicly underwritten schemes, competitive outsourcing to appropriately skilled and resourced service providers should be supported by carefully designed and monitored contracts;*
- 13.3** *a national policyholders' support scheme to deal with insurer insolvency as proposed by the HIH Royal Commission should be established; and*
- 13.4** *were the Commonwealth to establish a national insurance scheme as an alternative to existing schemes, it should be privately underwritten by insurers authorised by APRA under the Insurance Act 1973.*

ACCI RESPONSE

AGREE

ACCI strongly supports the opening up of the scheme to private insurers, which brings with it the economic and systemic benefit of competition.

However experience has shown that the selection and use of private insurers should be based on their prior performance and expertise as appointment of private insurers does not in itself always guarantee the implementation of effective claims management process and/or outcomes.

The only issue of concern is the national policyholders support scheme – this was supported by the ICA to address the unique circumstances of the HIH insolvency. It does however introduce an extra levy on employers over and above any premiums payable and over and above any financial arrangements for self-insurers this is potential cash flow issue for employers.



Self-insurance

PC Recommendation No. 14

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

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

PC Recommendation No. 15

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

ACCI RESPONSE AGREE IN PART

The recommended principles for assessing self-insurance licence applications are substantially in line with current conditions applying across most jurisdictions with some amalgamation and refining to achieve national consistency.

However some of the principles do not reflect those in the Comcare prudential and other requirements. In the event that steps 1 and 2 are agreed and implemented (with ACCI reservation) and step 3 is either not approved or its implementation delayed, employers in the private sector may find the Comcare financial capacity and other prudential requirements more demanding than the jurisdictions requirements and as a result either delay their applications or seek a revision of the Comcare requirements.

Clearly the risk profile and organisational culture of the private sector applicants will differ quite widely from the public sector clients and Comcare may need to adjust its current conditions and requirements to accommodate these differences.

The suggested additional risk management strategy of applying a post event levy with the downside of cash flow demands may deter some organisations from applying for self-insurance licenses. The post event levy is currently only applied in Tasmania driven by the collapse of one self-insurer, which also evoked a



strengthening of bank guarantees and the auditing of internal reserves set aside to cover claims.

The subject of reinsurance is discussed in the body of the report and rejected for a number of reasons, one of those being availability and cost of reinsurance policies but is still include as risk management strategy in the recommendations. In the event that the reinsurance requirements and the associated cost involved were removed from the prudential requirements then the post event levy may well be worth reviewing to provide an increased level of policyholder protection.

The ACCI response to the reference to OHS in 14.4 above is that OHS is not the primary principle or driver for employers to apply for self insurance licenses, employers seek improved control of claims management and the successful outcomes of the process often drives OHS prevention programs to improve OHS performance rather than compliance.

Dispute resolution in workers' compensation

PC Recommendation No. 16

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

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

**ACCI RESPONSE
AGREE**



The aim of well-managed injury management and claims management together with effective early intervention strategies is to avoid disputes.

These processes involve settling issues through more informal internal dispute resolutions processes outside of the more formal legalistic frameworks.

ACCI would want to avoid mechanisms, which lead to costly legal disputes, which can result in added costs for all the parties and an offsetting reduction in the benefit paid to the claimant (worker)

Legal costs, together with medical costs, are already a significant cost to the Workers' Compensation System and processes and mechanisms, which avoid the need to access the legal processes, in the main, provide a speedier and less costly dispute resolution outcome.