SUBMISSION BY THE

Housing Industry Association

to the

Department of Education, Employment and Workpalce Relations

on the

Review of self-insurance arrangements under the Comcare scheme

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SUMMARY

HIA's submission is directed solely at the following Terms of Reference relating to "access to the Comcare scheme":

Item j: Why do private companies seek self insurance with Comcare? Are there alternatives available to address the costs and red tape for employers with operations address jurisdictions having to deal with multiple occupational health and safety and workers compensation systems?

Item k: If self insurance under the Comcare scheme remains open to eligible corporations, should there be changes to the eligibility rules for obtaining a licence to self-insure under Comcare?

HIA has developed a model for the federal Government to achieve national harmonisation of private worker's compensation insurance without the federal government being involved in establishing its own scheme.

The High Court has confirmed the Government's ability to regulate rights and liabilities of corporations and their employees, including the ability to override state-based worker's compensation schemes.

It would be a missed opportunity if the Government only duplicated the State regimes on a national basis. Instead, HIA proposes not a federal insurance scheme, but a federal framework that would permit Insurers – including existing state schemes - to register a policy that provided a package of workplace injury cover "no less generous" than a prescribed national "benefits benchmark".

The "benefits benchmark" would be the level of benefit provided by Comcare or some other politically acceptable benchmark.

Whatever the benchmark, the crucial aspects are that Registered Policies may deviate from it provided as a whole the package of benefits is "no less generous" than the benchmark and that a "no fault" policy based on traditional notions of sickness and accident insurance is specifically recognised as capable of being more generous than a fault-based scheme.

An employer covered by an approved policy would be exempt from State-based worker's compensation laws and liability for common law negligence. An employer without an approved policy would remain bound by the relevant State scheme.

The employer would pay income and medical expenses up to the agreed excess period or amount.

Such a model would allow for innovative design of insurance products, including 24/7 cover for employees.

Benefits of HIA's Proposal

Such a scheme would allow all private enterprises to have access to a flexible, nationally consistent worker's compensation regime without the federal government being involved in setting up its own scheme.

It would achieve national uniformity in a way that provided insurers and employers with the flexibility to develop policies that suit their workplace, including 24/7 cover and other add-ons to attract staff. It would convert worker's compensation from an imposed cost to a weapon in the war for talent.

This flexibility would have flow on benefits including:

1. Lower premiums: longer excess periods and amounts (voluntarily assumed) would significantly reduce insurance cost and give employers flexibility to accept more risk through longer excess periods.

2. Better Rehabilitation and responsibility: employer achieves obvious benefit for rehabilitating employee while employee shares cost of injury and cost of malingering.

3. Less injuries: employers have clear incentive (through less payouts and lower premiums) to adopt best practice in preventing workplace injuries.

4. Faster compensation: lawyers become peripheral as key disputes are medical rather than legal.

SECTION 1: POWER TO REGULATE WORKER'S COMPENSATION

The Commonwealth's power to regulate worker's compensation has been confirmed by the high Court's decision in *Attorney-General (Vic) v Andrews* [2007] HCA 9 (21 March 2007).

In that decision a 5-2 majority of the Court determined that the Commonwealth may use the corporations power to adjust or determine the liability of corporations for injuries to people who do work for corporations, including removing or adjusting common law liability for workplace injuries and liabilities under state-based worker's compensation schemes; and

The Commonwealth may use the corporation's power to regulate the terms on which corporations can insure the liabilities so imposed on corporations.

The Government therefore has scope to think more broadly about the way in which worker's compensation laws could be harmonized nationally.

It would be a missed opportunity if the Government used its broad powers only to duplicate, with all their inherent flaws, the State regimes on a national basis.

SECTION 2: PROBLEMS WITH EXISTING SYSTEM

The three over-arching goals of worker's compensation are to avoid injury where possible, to properly cover those workers who are injured, and to do so in a way that encourages swift and complete rehabilitation.

Goals undermined

Unfortunately, existing worker's compensation schemes suffer from inherent flaws that undermine rather than promote these goals.

1. No excess: To avoid moral hazard most insurance policies contain a form of excess. In contrast, worker's compensation involves no excess and even the smallest claim is covered for the employee. This drives up costs. It also encourages fraud because an employee who is injured outside of work has a huge incentive to portray that injury as work related.

2. No responsibility: Related to the problem of no excess is the fact that, other than injury, employees generally suffer no consequences for negligence. This means the employee is not an equally willing party in the co-operative processes necessary for good work practices that avoid claims. Nor is the employee encouraged to rehabilitate. Rather, existing systems tend to encourage malingering and exaggeration of illnesses; at least until court cases are settled.

3. No reward: The industry-wide nature of workers' compensation schemes offer employers little or no reduction in premium for a good claims history while substantially penalizing employer's for a poor claims history. This results in an opaque premium setting mechanism. It increases employer frustration with the scheme and further clouds (or wholly severs) the link between investment in injury reduction initiatives and reduced premium costs.

4. No efficiency: The worker's compensation schemes are overly legalistic with long delays to settlement. This increases frustration for employees who suffer delayed benefits and an uncertain future at precisely the time in their life when they most need money and certainty. Further, medical practitioners routinely add surcharges to medical expenses related to worker's compensation because of the delay in being paid.

5. No flexibility: The schemes are a one-size fits all approach. There is no opportunity for the parties to design schemes better suited to their needs or to agree on different ways to share the risks of injury in return for greater salary or benefits.

Sub-Optimal Outcomes

Currently there is insufficient encouragement to reduce injuries because employers receive no clear price signal and no demonstrable benefit from investing in injury prevention measures while employees can benefit by making fraudulent claims and suffer no penalty for their own negligence.

Worker's are not properly covered because the cost of the schemes mean benefits are being whittled away and deserving cases are forced to wait often years for court claims to be settled.

Rehabilitation is not encouraged because employees suffer no penalty for an injury and are rewarded by larger payouts for malingering.

SECTION 3: PROPOSED FRAMEWORK

The solution to these problems is to redesign of the concept of worker's compensation.

What is proposed is harmonisation achieved, not a federal insurance scheme, but a federal framework for a new type of insurance – Workplace Health and Income Protection.

This framework would have the following attributes.

Registration of Policies

An underwriter would be entitled to develop and lodge for registration with the relevant Commonwealth agency a Worker's Health and Income Protection policy.

Any person covered by a registered policy would be wholly outside the application of state worker's compensation laws and common law liability.

A person without a policy would remain covered by the relevant state scheme(s).

Tests for Registration

To be registered the policy would have to meet the following tests:

1. No disadvantage: it must provide a package of benefits that, considered as a whole, make the insured parties no worse of than the Benefits Benchmark;

2. Premium based on business risk: it must guarantee that the premium calculation will be based on the insured's specific business activities and claims history;

3. Reward for good practice: it must provide for lower premiums in return for implementing measures designed to reduce the likelihood of injuries or increase the success of rehabilitation; and

4. Excludes trainee wages: it must specify that payments to trainees/apprentices are excluded from the calculation of premium.

Benefits Benchmark

The Benefits Benchmark against which the policy would be measured would be the benefits provided by Comcare or some other appropriate benchmark of benefits.

Whatever the benchmark, the crucial aspects are that Registered Policies may deviate from it provided as a whole the package of benefits is "no less generous" than the benchmark and that a "no fault" policy based on traditional notions of sickness and accident insurance is specifically recognised as capable of being more generous than a fault-based scheme.

Nominal Insurer Arrangements

The concept of a nominal insurer doesn't fit with the scheme as proposed because it is an "opt in" scheme. The nominal insurer would be the relevant state's nominal insurer because people who haven't opted into the federal system will remain covered by a state regime.

However, some form of federal nominal insurance arrangement would need to be worked out with the States, even if it only involves federal financial assistance to the state-based nominal insurance arrangements. Potentially, this could be in the form of a levy on each registered policy remitted to the states.

That same levy would fund a federal nominal insurer if the Government ever moved to make a Registered Policy compulsory nationally.

Other General Machinery Provisions

The framework would include a range of related machinery rights and obligations including:

1. Subrogation and Offset: The insurer would be entitled, by right of subrogation, to sue on behalf of an injured employee to recover other amounts payable to the employee paid from any third party (i.e. not the employer), such as from a negligence under public liability or motor vehicle claims and off set these amounts against payments made to the injured employee.

2. Eliminate Common Law Negligence: Common law of negligence (as between the employer and employee) would be wholly replaced for work related injuries in favour of the benefits under the policy.

3. Dispute Resolution: A speedy expert-based administrative dispute resolution process to resolve extent of incapacity and whether an accident was work related.

4. Payout of Tailing Claims: Ability for insurer to make a lump sum payment to payout trailing claims for income protection and medical expenses cover.

5. Non-Portability: The benefits would not be portable between employers (although existing benefits would continue if an employee changed employers).

SECTION 4: BENEFICIAL OUTCOMES

The principal benefit of the proposed framework is that it would achieve national uniformity but with significant flexibility.

The Benefits Benchmark would act as a national minimum standard from which insurers and employers could develop policies that suit their workplace. This might include such things as, 24/7 cover, higher employer-funded excess periods or amounts, and other add-ons to attract better staff. Workers' compensation would then move from a state-imposed bugbear to a weapon of competitive advantage in the fight to attract the best and brightest employees.

The flexibility of the scheme would allow for policies to be better structured to achieve the three over arching goals of worker's compensation. These flow-on benefits include:

1. Lower premiums: Flexible policies would be cheaper than the existing worker's compensation because employers can make informed decisions about the excess periods and amounts to remove small claims from the system, vastly improving the administrative costs and claims history. This would increase incentives for both employers and employees to take reasonable measures to avoid injuries.

2. Shared responsibility for injuries and rehabilitation: Rehabilitation would be improved because longer excess periods (voluntarily

assumed by the employer) excess maintain the relationship between employer and employee and help ensure the success of rehabilitation opportunities. Further, no fault benefits paid as part of a sickness and accident style of policy mean there is reduced incentive to malinger since compensation would not depend on adversarial court processes.

3. Less injuries: Injuries would be reduced because the scheme would send a clear price signal to employers, in the form of lower or higher premiums, regarding the costs and benefits of taking reasonable measures to prevent injuries.

4. Less delay: Lengthy and costly adversarial disputes would be replaced by simple administrative processes designed to determine the degree of incapacity and nature of the injury. Lawyers would become peripheral as key disputes would be medical rather than legal. Benefits would be received immediately as a consequence of injury, not as a consequence of a lengthy court case establishing liability.

SECTION 5: INTERACTION WITH STATE LAWS

Such a new scheme would inevitably need to interact appropriately with State worker's compensation schemes, and State OH&S schemes.

State Worker's Compensation Schemes

The existing state schemes rely on a viable premium pool. If companies – particularly large companies – "opt out" of the state system it will progressively become more expensive for those that remain until it becomes unviable.

The answer to this opposition is twofold. First, the proposed scheme doesn't necessarily destroy the State schemes – it merely competes with them. The States, like other insurers, become just one of the providers of worker's compensation insurance products and in the spirit of competition can amend their own schemes to compete for employers.

Secondly, a levy could be imposed on each registered policy. A portion of that levy could be remitted to the states to fund their nominal insurer and OH&S regimes. That same levy would prove the scheme is self sustaining and would fund a Commonwealth nominal insurer and OH&S

arrangements if the Government decided to override the states with this scheme.

The problem for insurers under State schemes will be the claims tail. Worker's compensation has been an unprofitable line of insurance for many years. Insurers are relying on future premiums to cover the existing claims tail. Notwithstanding the unfunded claims, the more professional and solvent insurers will see the proposed scheme as an opportunity to provide a more tailored and profitable product and as a means of mitigating risk.

The proposed framework significantly reduces the structural role for lawyers in workplace injuries. This should be seen as a positive. First, whatever the Benefits Benchmark it should largely accord with amounts employees might have received in common law damages but without the pain and delay of a court hearing. Secondly, that the goal is not compensation but rehabilitation with appropriate income and financial support during the rehabilitation process. Finally, it is only fair that a workplace injury rehabilitation and compensation scheme be structured, as far as possible, in a way that minimises the need for expert legal representation.

Interaction with State OH&S Laws

Any worker's compensation scheme has to work hand-in-glove with occupational health and safety for two reasons.

First, the states and territories fund OH&S out of worker's compensation premiums. They maintain that it is unfair for them to bear the cost burden of OH&S regimes for companies that have opted out of the state's worker's compensation system. For example, in response to the threat of large companies deserting to the *Comcare* scheme, NSW has introduced a levy designed to force these companies to contribute to OH&S infrastructure.

Second, while worker's compensation is about supporting injured workers during rehabilitation and sending price signals to employers about the benefits of injury prevention, OH&S is the enforcement and regulatory arm that prosecutes for failures to take reasonable steps to avoid accidents and injury. The better the two regimes work together, carrot and stick, the more likely it is that injuries will be avoided.

HIA's model does not necessarily require the federal government to establish a national OH&S scheme. It is quite capable of working along side different OH&S regimes in different states.

What HIA's model achieves is a way for all private enterprises to have access to a flexible, nationally consistent worker's compensation regime without the federal government being involved in setting up its own scheme.