

# **Business SA Submission**

**PRODUCTIVITY COUNCIL INQUIRY INTO WORKERS  
COMPENSATION AND OCCUPATIONAL HEALTH AND  
SAFETY FRAMEWORKS**

**June 2003**

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# Introduction

## Business SA

The South Australian Employers' Chamber of Commerce and Industry, trading as Business SA, is the State's leading business organisation and represents more than 7,000 businesses through direct membership and affiliated industry and association groups.

It delivers a wide range of integrated services to business including:

- lobbying and representation across all levels of industry activity
- employee relations advice, advocacy and consulting services
- occupational health and safety training and consultancy services
- HR training programs and consultancy services
- reference publications and handbooks
- international trade and business development services
- management of apprenticeships and traineeships
- administrative support services for industry and trade associations and
- networking opportunities.

Business SA is a registered association of employers under the State's Industrial and Employee Relations Act 1994 and recognised under that and other legislation as the State's peak business and employer group.

Business SA has long recognised that it is essential that all organisations effectively manage occupational health and safety. Business SA believes that

- it makes good economic sense to effectively manage occupational health and safety;
- occupational health and safety systems must be an integral part of the management systems and as such it cannot be seen to be 'tacked on' to the organisation's systems or individuals' responsibilities;
- the only way of efficiently achieving high standards of occupational health and safety is through effective consultative mechanisms and processes involving all employees at the workplace.

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## Business SA Submission

The Business SA submission reflects the basic thrust and core principles of:

- Business SA Policies on Workers' Compensation and Occupational Health & Safety
- Input from Business SA members reflecting current and emerging concerns.

### Outline

The Business SA submission addresses a number of core principles but not necessarily addressing each of the individual terms of reference.

In brief Business SA advocates and supports the following core principles:

- Nationally consistent workers' compensation schemes including premium setting, benefits structures and insurance regulations.
- Nationally consistent OHS& W regulatory framework underpinned by practical guidance materials.
- Regulatory frameworks and systems to also be nationally consistently administered and interpreted.
- A regulatory approach which seeks to raise awareness, to inform and to educate with compliance and enforcement as a last resort.
- A culture of working together with mutual responsibilities

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# Economic background

## The Context: Globalisation, Microeconomic Reform, OHS&W and Workers'

### Compensation

Globalisation, is a largely irresistible force. What it amounts to is the rapid *integration of economies* worldwide, through trade, financial flows, technology spillover's, transnational networks and cross-cultural currents.

Globalisation, in the sense of "integration of economies", isn't new: it has been happening since trade between differently located people began. What makes the present surge in the scope and scale of globalisation unprecedented is that rapid advances in technology, especially information and communications technologies, and significant reductions in the real cost of transport, have extended the reach of businesses to a fully global scale. Recent examples include the relocation of call-centres with global reach to India, and of data processing to China. In both cases, labour costs are low but education and training levels sufficiently high to underpin a cost-driven, large-scale relocation. Meanwhile, businesses that have made these location decisions for back-office functions are selling their shop-front services in global markets against domestically located competitors with higher underlying cost structures.

Nations and organisations may attempt to resist the impacts of globalisation - but the long-term costs of doing so are substantial. These organisations in attempting to 'turn back the clock' can render themselves irrelevant in a modern context and can in their endeavours hold back the critical development of regional economies (such as in South Australia).

Faced with the pressures of globalisation and the need to be export-oriented and/or to meet intensified import competition, businesses have had to become more innovative in what they do and how they do it. Some innovation is focussed on improving process technologies, some on the nature and quality of products and some (perhaps the bulk) on finding better ways of doing things within the production process (eg, Just-in-time systems for parts and accessories).

The bottom-line is that adaptability, flexibility and inventiveness are the keys to being innovative and hence to being competitive in a challenging and uncertain environment, and they require the capacity for businesses to substantially change traditional patterns of production and work, skill uses, and

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organisational systems - in fact, most facets of the workplace. The need for restructuring of work processes will be continually changing - and different in different firms even in the same industry.

Numerous studies of innovative firms/enterprises have stressed the importance of trust and shared-objectives within the enterprise in supporting innovations in products and processes. Uncertainty is a key feature of an environment of innovation - some innovations - whether in products or processes - work and some don't. The entire organisation has to be prepared to experiment and redesign products and processes in response to lessons learned. Only in organisations where there's mutual trust between owners, management and workers and a shared understanding of, and interest in, the firm's objectives and directions will there be the capacity for on-going redesign of production and other processes.

This is where OHS&W and Workers' Compensation legislation is essential. This is an especially sensitive but, nonetheless, very significant component of Australia's microeconomic capacity to respond to the pressures of globalisation.

- It is *sensitive* because the OHS&W and Workers' Compensation legislative framework must be such that it can provide a framework that will enable workplaces, to develop new and creative ways of undertaking activities. It must not be so inflexible that it prevents change. Some organisations would use the OHS&W legislation to actively inhibit change at the workplace.
- It is *important* because it contributes to other microeconomic reforms: it directly bears on productivity and innovation which are the key elements in successfully meeting the pressures of globalisation and hence sustaining economic growth and job creation.

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# Occupational Health & Safety framework

## Historical context

Historically, Australia's approach to the issue of occupational health, safety and welfare (OHS&W) has been modelled on British experiences. Early attempts to control and minimise risks and hazards within the workplace closely followed 19th century British legislation. However, this approach was far from desirable, with a multitude of ad hoc industry-specific Acts forming the basis for OHS&W regulation in the UK.

## Regulatory development

Early OHS&W laws provided only very general obligations and it was left to the process of regulatory development to enhance the effectiveness of these statutes. Specific requirements and obligations were developed over time and these were added to the various regulations accompanying each particular Act. The role of inspectors, empowered by the statutes and governed by their regulations, was also crucial to the development of early OHS&W laws.

As the law developed over time it became narrow in application, specific in nature and frequently difficult to enforce. Employers became disenchanted with OHS&W laws, and due to the extreme complexity of these laws, were often ignorant of their obligations. The law relating to safety at the workplace had become detrimental to the enhancement of good OHS&W practice, and had little actual influence on the formation and development of employer standards on OHS&W matters. A change was necessary and that change occurred in the form of general duties legislation. Common law and workers' compensation law had considerable impact on the development of new standards, particularly in Australia, where compensation systems have for years been quite different (and considerably more institutionalised) than those found in Britain.

## The Robens Report

The establishment of a Committee of Inquiry by the English Government in 1970, under the chair of Lord Robens to review existing OHS&W provisions and make suitable recommendations to reform their application soon became the impetus for a substantive change in the approach to OHS&W regulation.

Robens clearly favoured the introduction of a self-regulating system with respect to OHS&W, and this forms the thrust of all his recommendations.

### **The Ham Report**

A similar legislative review initiative was instigated in Canada in 1975 when a Royal Commission was established, chaired by James Ham. The resultant Ham Report as it has become known made an important distinction between the causes of industrial accidents and industrial disease. It was found that 'relatively few accidents were the result of technical or physical defects that were independent of the personal act of work. The great majority of accidents arise out of the act of work itself' (Ham, 1974). It was concluded that few accidents occur because of inherent defects in plant or machinery but most in fact arise from 'human error'. These comments do not infer blame on the injured party but rather indicate that the system and arrangement of work could be improved. However, industrial diseases were found by Ham to occur, not because of the personal act of work but as a result of the environment of the workplace over which the individual employee has little control.

Ham recognised that there were causal distinctions between occupational diseases and injury. He therefore proposed that there should be separate strategies for preventing diseases to those, which prevent injuries.

The philosophy that underpinned Ham's strategies was that of a joint approach to OSH at the workplace: "...the worker, the shift boss and management must work together to restore a sense of *mutual responsibility* for working conditions" (Emphasis added).

The distinction between the nature of the causes of industrial accidents and diseases and the strategies used to contain them is often lost sight of by policy makers and legislators. To use the one strategy to approach prevention of industrial accidents and disease is limiting.

### **The role of Government**

The role of government in both Britain and Canada was altered in response to the reform agenda proposed by Robens and Ham from that of inspector/enforcer to that of auditor/resource. The role became more of a monitoring one with governments abandoning previously favoured approaches of intervention and interference for a new approach in which the promotion of self-regulation and



voluntary compliance became paramount. Education became necessary to enable self-compliance with OSH regulation, and this also became a focal point of government.

### **Self-regulation**

The concept of self-regulation that became the central tenet of OHS&W reform in both the UK and Canada (where it is called 'internal responsibility') effectively altered the fundamental emphasis of occupational safety and health. The systems were designed specifically to encourage and support industry in addressing its own OHS&W issues. It was believed that this approach would help reduce the effects of apathy that drew considerable attention from Robens; avoid conflict and disputation; and limit the need for criminal sanctions. The reinforcement of the idea of a mutual moral responsibility between employers and employees was emphasised. The concept provided the ability for greater change, adaptability and a degree of simplification that could never be provided by regulation.

The methods by which self-regulation and moral responsibility were encouraged differ to some degree between the systems, but in essence a number of common elements can be identified:

- Promotion of consultation and co-operation between the parties at the workplace level.
- Promotion of education and communication as to the nature of hazards and the methods by which they could be overcome, with information being made available to all parties.
- The establishment of bipartisan safety committees and the empowerment of safety representatives to oversee and facilitate the adoption of safer work practices.
- A greater reliance on general duties and less on specific regulation.
- The potential for greater adaptability at individual workplaces.

### **The Australian experience**

The first inquiry held along similar lines to those of the UK and Canada occurred in 1979-80. The findings of the inquiry, which was chaired by NSW Industrial Magistrate TG Williams reflect the suppositions and conclusions drawn from the Robens and Ham inquiries that preceded it (Williams, 1981).

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Williams expressed a similar view to Robens on the concept of self-regulation although he qualified this by also expressing reservations as to the extent to which industrial co-operation could be engendered in this country. However, the Industrial Relations environment has changed radically since the beginning of the previous decade and Williams' concerns as to the ability of Australian employers and employees to co-operate and consult with each other are not as relevant today.

Williams also provided explicit views on the role of legislation and external regulation within a self-regulating system.

Legislation should provide a framework for self-regulation of the workplace by a partnership of employees and employers working together. Not a one-sided employer self-regulation but a co-operative effort working for the common good. There is a need for governmental involvement in the areas of promotion and guidance.

However, the application of such a philosophy has often been confused and clouded with political and emotive rhetoric. This confusion has allowed the issue of safety and health at work, which is of equal concern to all parties to at times become an industrial relations issue. The concept of self-regulation has been limited due to a fundamental misunderstanding as to the nature of interaction between the parties.

As stated in the Ham report, "if the direct responsibility system [self-regulation] is to be effective, the prerogative of managerial responsibility must be recognised by employees and their representatives... *However, management must recognise that its prerogative in this area carries with it the requirement to consult in a meaningful way*" (Ham, 1974). In Australia, an attitude prevails whereby OSH&W is seen as a managerial responsibility, but not a managerial prerogative.

The ultimate responsibility for work and the manner in which it is carried out rests with the employer. The function of safety committees and safety representatives are to assist and contribute to the decision-making process. In other words, the concept of consultation that is so central to the idea of self-regulation, should enable greater and more effective input by employees. It is not an avenue by which employees make the decisions themselves for if this were the case, employees must be held accountable for the results and effects of their decisions - a situation which does not currently exist.

The national agenda for conformity is resulting in increased regulation that only externalises accountability. Robens saw the need to internalise responsibility and accountability and this can only

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occur with greater employee involvement. However, employees must become more responsible for their actions and accountable for outcomes resulting from their input at the workplace.

Governmental regulatory policies have attempted to turn in the direction of self-regulation by placing an emphasis on decision-making in consultation with the worker. The flexibility inherent in self-regulation thus becomes blunted by the practice of placing absolute obligations on employers to recognise and provide resources to ensure thorough consultation at the workplace.

Safety representatives are an extremely useful conduit by which employees can make a positive impact on the decision-making process. In practice, though, conflicting goals and expectations and misplaced idealism have repeatedly detracted from the potential for positive change to occur.

This situation is not unique to Australia, however, and the following statement, resulting from a Canadian inquiry into safety in the Ontario mining industry, reflects on the problems associated with the consultative mechanisms promoted by Acts such as Ontario's Occupational Health and Welfare Act, 1978 (Ham, 1974):

*the absence of a common understanding with respect to the meaning and application of direct responsibility and contributive responsibility has resulted in role confusion, misplaced expectations and, inevitably, to an unhealthy level of frustration within the system. Perhaps the structure of the Occupational Health and Welfare Act 1978 which deals with consultative mechanisms before specifying the duties and responsibilities of the direct participants has contributed to the misunderstanding.*

Such a situation is incongruous with the aims of any OSH&W system - to improve safety and health at the workplace. Legislative change should therefore, first and foremost, address any deficiencies in understanding of the roles of the various parties, and the ways in which those roles interact.

### **The barriers to change**

It has been commonly recognised that there are two equally important barriers to change. One is physical the other psychological. No party will change unless they perceive a need for the change, they are in a position to augment the change and the changes can be achieved in a quick, efficient and beneficial way.

The National Occupational Health and Safety Commission (NOHSC) and the WorkCover Corporation in South Australia have expended considerable resources in identifying particular hazards and

developing standards and other resource material which provides information on the identification, assessment and control of hazards. However, the equally important issue of acceptance and initiation of commitment to the processes by parties at the workplace has only received limited attention.

Physical and cultural barriers to change are real although the research into the acceptance of standards is limited. The Commission partially recognised the problem in 1991 and commissioned research into the effectiveness of publications as the first of several research projects aimed at increasing awareness and acceptance of OHS&W standards. The study conducted by Cross draws attention to the need for assessment of the target audience (Cross, Johnstone, Gibbs & Darby, 1993).

Cross and others suggests that information including the target audience's existing attitudes and values, the strength of their motivation to act, the opportunities to implement or practice the recommended behaviours and their reading and comprehension levels can be and should be gathered prior to development of the instruments.

#### *Workplace focus*

The major trend in contemporary labour relations in Australia is a shift in focus from decision-making at institutional levels to the workplace level. Occupational safety and health should be treated no differently. This objective in particular requires the commitment of all persons at and associated with the workplace. A safe workplace can never depend entirely on employer action. Employees must take some responsibility for their own actions and behaviour.

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## The National OHS framework

Business SA has been an active member of the tri-partite National Occupational Health and Safety Commission (NOHSC) since its inception in 1985.

The development by Business SA of the National OHS&W Framework followed closely by the development and endorsement of the National OHS&W Strategy has strengthened the working partnership of the Business SA stakeholders.

Business SA is now recognised by the stakeholders as having a central role to play in the implementation of a national consistent OHS&W framework through the development of a package of national standards and codes of practice underpinned by guidance materials endorsed by the Workplace Relations Minister's Council. (WRMC)

Endorsement of National standards packages at WRMC is now supported by a requirement for an annual report on the implementation, monitoring and reporting process on the status of adoption by the jurisdictions.

Whilst this reporting on the adoption of national standards is step forward towards national consistency there are still issues of inconsistent adoption and a mechanism to hold the jurisdiction to account is required. The commitment to the National OHS&W Strategy is seen as a catalyst for such a mechanism.

Business SA now has the opportunity to use the WRMC endorsed National OHS&W Strategy to provide greater national leadership and coordination of national OHS&W resources through the jurisdictions, leading to improved national consistency and improved national OHS&W performance.

One suggestion is that instead of national standards that NOHSC develop a national package for each standard which would include:

- A Model Regulation
- Code of Practice
- A Suite of industry sector risk/hazard guidance materials

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## **Reduce OHS&W incidence of injuries and fatalities**

The National OHS&W Strategy has set a number of action priorities and targets including accident reduction targets of - Injuries 40% reduction

Fatalities 20 % reduction

The national strategy has the commitment of all parties and it is anticipated that all the parties working together will meet these targets.

### **1. Nationally consistent regulatory framework**

Employers submit that the development of a nationally consistent regulatory framework which is adopted consistently by the nine (9) jurisdictions through nationally adopted standards supported by national codes of practice and underpinned by guidance materials will lead to improved OHS&W performance coupled with reduced costs of compliance and enforcement.

The framework would be further improved where the jurisdictions regulate through only one recognised agency in each States/Territories.

The nationally consistent regulatory framework would also include international strategies and programs designed to move towards Global Harmonisation where global developments are in the best interests of Australian Employers for example in such areas as Chemicals.

Any additional individual subjects would be assessed against these criteria for applicability.

### **2. Nationally consistent application in the workplace**

National Consistency through national adoption of standards, regulation, guidelines and compliance strategies leading to a level playing field for industry in all states/territories across Australia will result in a range of benefits to industry including:

- Improved understanding leading to improved compliance
- Reduced complexity
- Reduced compliance costs. .

The adoption of effective evaluation of the practical effect of the national instruments in the workplace would be key to the implementation of such a strategy.

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### 3. Focus on prevention

Industry is seeking a change of focus and direction by the jurisdictions to a clearly defined and demonstrated focus on prevention

Industry recognises the need for regulations and the responsibility of jurisdictions to ensure compliance with the regulations but in pursuing the aims and objectives and particularly the targets of the National OHS&W Strategy jurisdictions' should develop a more balanced approach to education and compliance.

A review of the compliance and enforcement data reveals that there has been an increase in the issue of improvement and prohibition notices with a resultant increase in prosecutions, convictions and fines awarded by the courts. This trend over the past four years has not been matched by a similar improvement in OHS&W performance.

Current strategies clearly demonstrate that the jurisdictional focus is on regulation, compliance and enforcement. This strategy has not been effective and is not supported by hard evidence.

### 4. Fair and reasonable / affordable and practicable

One of the basic principles of OHS&W at the workplace is a culture of working together based on the core issues of what is fair and reasonable and at the same time is affordable and practicable. This workplace understanding and culture is not reflected in the application of the legalisation.

Changes to the interpretation and application of the legislation by the jurisdictions would assist in developing this culture. National uniformity in legislation that priorities working together would assist a current imbalance.

Application of the OHS&W 'duty of care' in a balanced and equitable manner recognising that employers cannot predict or control every activity or event in the workplace would assist in redressing the current imbalance.

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## **5. A culture of mutual responsibility - working together at the workplace and with Governments**

In the workplace employees and employers working co-operatively together in an environment of shared responsibility to ensure a safe and healthy workplace is a shared expectation of both employers and employees.

The shared responsibility should also be reflected in the courts by the implementation of the philosophy of ‘contributory negligence’ in the settlement of Workers Compensation cases and in prosecutions. .

At government level, a culture, which recognises compliance as a key role but which, encourages consultation rather than confrontation should be inbuilt as encouraged by the National OHS&W Strategy.

The encouragement of a workplace culture of working together and of mutual responsibility is seen by industry as one of the core principles in achieving successful outcomes in OHS&W.

The use of OHS as an industrial bargaining tool or as a lever to achieve industrial aims is the antithesis to a culture of working together to achieve improved OHS&W performance.

## **6. OHS&W materials to be less complex - easy to understand**

Industry supports the development of packages of nationally consistent Standards, Codes of Practice and guidelines, which are developed in, close consultation with industry, are written in plain English and have a focus on ‘what to do’ and ‘how to’ at the workplace level.

Information to be easy to understand, presented in brief segments, industry and workplace focussed and be readily accessible and available.

The current process whereby NOHSC develops National Standards, which are then endorsed by WRMC, does not include a commitment to nationally consistent guidance materials, which are the key to educating employers and employees

Current guidance materials prepared by jurisdictions are often generic rather than industry specific are written in a bureaucratic legalistic style rather in plain English and as a result are not as effective as they could be.



Industry seeks the development of nationally consistent guidance materials, which meets employer needs.

## **7. Culture of education, training and assistance – not punishment**

The jurisdictions to develop a prime focus on prevention and on assisting employers to improve OHS&W performance through education, training and assistance rather than the current focus on compliance and enforcement.

A more personal non-threatening approach to small business is required to bring about improved OHS&W performance

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# Workers' Compensation framework

## Overview

### Fundamental principles and objectives

A Nationally Consistent Workers Compensation system incorporating a range of key fundamental principles, which are implemented and applied consistently in all jurisdictions is the core of the ACCI Workers' Compensation Policy.

#### 1. National consistency

ACCI is committed to the achievement of nationally consistent workers' compensation schemes. In order to ensure equity and fairness, it is important that all workers' compensation schemes are consistent in their approach. There should be co-operation between jurisdictions in order to identify those elements that should as far as possible be consistent across all schemes.

However the pursuit of consistency should not be at the expense of achieving a proper balance between the conflicting pressures in the current systems.

In order to achieve the best outcomes it is suggested that there be wide consultation with all relevant parties.

The list below is taken direct from the ACCI Workers Compensation Policy and represents the current ACCI policy approach. The policy platform forms the basis of the ACCI submission plus other key areas of concern.

1. Access and entitlement - **the definition of key terms such as "injury", "worker" and "independent contractor". These must be clear and take into account changes in the labour market, especially the increased contracting out of services.**

2. Premiums - formulae for the calculation of premiums, especially integration of matters such as the definition of remuneration and experience rating. The double payment of premium by employers who operate in more than one state/territory must be avoided.
3. Benefits - definitions and classification of the various levels and periods of incapacity, the calculation of weekly payments, access to common law and lump sum payments.
4. Insurance Regulation - the licensing, monitoring and auditing of insurers, self insurers, and other providers, self insurance arrangements or requirements and workers' compensation reporting and statistics requirements.
5. Rehabilitation - employers' and employees' obligations on rehabilitation and return to work and accreditation and monitoring of occupational rehabilitation providers.
6. **Dispute Resolution** - the use of cost-effective alternative dispute resolution mechanisms is critical to the maintenance of an affordable workers' compensation system; legal costs should be kept to a minimum.

## 2. Nationally consistent definitions

Jurisdictions have developed definitions within their own frameworks, which differ and lead to inconsistent application.

There is a need to develop and agree a process to develop nationally consistent definitions for a range of terms used including:

Injury

Worker

Workplace

Contactor

Independent Contactor

An example of the definition for which we would seek to achieve national consistency is:

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### **‘In the course of employment’**

For the “no fault” principle to work effectively however, it must be shown that the injury or illness truly arose **out of or in the course of employment**, or that employment played a major or significant part in the development of the injury or disease.

Injuries sustained by workers while travelling to and from work should not be included in any workers’ compensation scheme. Such injuries or illnesses cannot properly be said to have a direct causal connection with work to qualify them as work related injuries.

There is inconsistency the definition of a ‘workplace injury ‘ in such basic issues as journey accidents where some jurisdictions exclude such incidences and other include them.

### **3. Premiums setting**

Employer Workers Compensation premiums should be based on claims experience so as to provide an incentive to employers to prevent workplace injuries. In addition, this will reduce cross-subsidisation and provide a framework within which all employers pay their true-risk premium.

Claims costs relating to a particular claim must only be included in an employer’s premium calculations for a defined period of time as premiums may be significantly affected by one incident and to maintain the effects of that incident in the form of increased premiums over a number of years only serves as a disincentive to improve performance. Containment of premiums at an affordable and stable level is vital to the continuing viability of business generally. Incentives that encourage rehabilitation assist in these aims.

Given the difficulties associated with applying a fully experience rated premium systems to small businesses, it is important that all workers’ compensation schemes contain additional incentives, which will encourage accident prevention in small businesses. These incentives need not be included in the premium system. Given that the majority of Australian businesses are small to medium-sized businesses, all workers’ compensation schemes need to address the special needs of small businesses as a priority.

Workers’ compensation scheme must be fully self-funding with experience rated premiums and incentives to prevent injuries and rehabilitate injured workers.

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In some states industrial awards Workers' Compensation payments are supplemented by 'make-up pay' arrangements to full salary where by the employee is paid the same salary whilst absent on Workers' Compensation as if on normal duty.

The 'make-up pay' arrangements are a deterrent to the application of one of the core principles of the Total Injury Management program, which has a focus on rehabilitation and return to work.

Such payment removes any incentive to return to work until the 'make-up pay' arrangement is exhausted.

#### **4. Benefits structure**

Workers' compensation systems should have a benefits structure that provides adequate compensation for injured workers but which at the same time encourages them to remain at or return to work.

Weekly benefits to injured workers should be based on the worker's pre-injury ordinary time earnings, excluding over-time. At all stages, a worker's entitlements to weekly benefits must be determined by having regard to the worker's level of incapacity. Weekly benefits should be capped at a level, which is affordable, by the scheme.

Only workers who have a permanent total or partial impairment or loss of use of any part of the body should be entitled to a lump sum payment.

#### **5. Insurance regulation**

Private insurers should have the right to participate in every workers' compensation scheme irrespective of whether it is a fully privatised scheme or a government monopoly.

The requirements governing the operation of private insurers should be consistent across all states. Competition amongst insurers should be encouraged as this will result in improvements in the quality of service being provided and ultimately result in lower workers' compensation premiums.

All workers' compensation schemes should provide for self-insurance of suitably credentialed employers.

Mechanisms should be developed to allow nationally consistent self-insurance licences and or national insurance coverage for national employers with operations in more than one jurisdiction.

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## 6. Rehabilitation and return to work

One of the key objectives of any workers' compensation system must be to create an incentive for injured employees to return to work, with adequate compensation while undergoing rehabilitation.

Rehabilitation and return to work should be the cornerstone of all workers' compensation systems.

All workers' compensation schemes should incorporate a Total Injury Management System and seek to achieve a return to work culture by encouraging both employers and employees to actively participate in rehabilitation programs for their workplaces.

This can be achieved through:

- early intervention by the employer following an injury to ensure effective medical treatment leading to an early return to work by the employee.
- encouraging employers to provide, as far as practicable, suitable duties for an injured worker for an appropriate period of time, but at the same time recognising the difficulties faced by small and medium sized businesses in meeting this objective;
- encouraging employers to establish rehabilitation programs for their workplaces and implement return to work plans for injured workers;
- encouraging workplace-based rehabilitation and early referral;
- linking an injured worker's entitlement to ongoing weekly benefits to their participation in rehabilitation, including return to work;
- encouraging the re-training of injured workers to enable them to return to their pre injury employment or other employment
- emphasising the benefits of early return to work and resultant lower premiums.

## 7. Dispute resolution

Dispute resolution mechanisms should be nationally consistent, affordable and cost effective with a minimum of legal intervention and resultant cost.

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## 8. Access to common law – lump sums

Workers' compensation schemes operate on a "no-fault" basis.

Common law, which is based on the allocation of fault or proof of negligence, is at odds with the principle of a "no-fault" workers' compensation system.

Common law is based on an adversarial system, which inhibits the rehabilitation process and the normal expectation of a return to work by encouraging both parties to become entrenched in their adversarial roles in order to achieve maximum gain.

Common law is a feature of some Workers' Compensation Systems and if it is to be retained it must be restricted to those seriously injured, leading to severe disability or death and balanced against the total benefits provided to injured workers under the scheme.

The awarding of lump sum payments has taxation benefits for the claimant over regular weekly payments or annuities. 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.

## 9. Duty of care

The 'Duty of care' principle is designed to apply to both employer and employee though the emphasis by the jurisdictions is a focus on employers where an **absolute** 'duty of care' is administered.

This one sided and targeted approach does not meet the principles of 'no fault' or 'reasonably practicable' which are both key elements of both Workers' Compensation and Occupational Health & Safety legislation and ACCI policy approaches.

The application of an absolute duty of care is reflected in the jurisdictions and the courts approach in both Workers' Compensation and Occupational Health & Safety.

Employers are required to predict safety problems even though compliance with standards/code of practice have been achieved

Even where an employer has complied with the regulations but has not predicted an event resulting in an injury the employer has been prosecuted for not meeting 'duty of care' obligations.

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In the cases of psychosocial issues including stress, bullying and fatigue where employers have no knowledge of the employee's personal life style or circumstances or activities which may have given rise to such claims the employer is deemed to have breached 'duty of care' requirements as the employer had not foreseen the effect on the employee.

In addition to a change in the regulatory approach taken by jurisdictions there is a need for a legal framework, which will recognize and enforce 'contributory negligence' in workers compensation cases before the courts or the tribunals based on the concept of 'mutual responsibility'.

## **10. Licensing arrangements for national companies**

The current individual jurisdictional arrangements are complex.

These arrangements are even more complex and challenging where employers operate nationally or even across just one state border.

To address this issue we suggest that jurisdictions should enter into an agreement to develop a process and mechanism, which will allow national employers or employer operating across state borders to be licensed for Workers Compensation purposes to enter into insurance or self-insurance arrangements which are nationally consistent in application and interpretation.

Many large national companies are eligible for self-insurance licenses but the arrangements and the criteria differ in each jurisdiction leading to complex individual arrangements in each jurisdiction and increased compliance costs.

The complexities of cross border issues have been addressed in arrangements between NSW and Victoria and these arrangements may be of assistance in developing a model for a national approach.

Such mechanisms, to gain the support of the jurisdictions, must be designed to achieve national consistency without financial disadvantage to any jurisdiction.

## **11. Total injury management**

In order to achieve an affordable, efficient, workers' compensation system which is not subject to abuse the system should incorporate the features of a Total Injury Management approach including:



- injury prevention, with a view to minimising work related injuries;
- rehabilitation, with a view to ensuring early return to work by injured or ill workers;
- employee responsibility to co-operate with their employers in injury prevention and return to work;  
and
- the identification and recognition of costs which should properly be borne by the general community rather than only employers.

## **11. Funding arrangements**

Workers' compensation scheme should incorporate as a fundamental principle and objective a commitment to be fully self-funded and effectively managed to provide stable long-term premium arrangements, which are predictable by employers and governments.

Stable predictable funding arrangements are an essential element of business planning.

Employers in the ACCI 2001 pre-election survey list the cost of Workers' Compensation premiums in the top 10 of their concerns. (See attached survey)