



H. R. Nicholls Society

ABN: 64 209 829 624

PRESIDENT: N R Evans
SECRETARY: R J Day

The H.R.Nicholls Society Inc. PO
Box 424 Collins Street West
MELBOURNE VIC 8007
www.hmicholls.com.au Tel 1800
630 572 Reg No A0010920T

23 July, 2003

Submission to Productivity Commission inquiry into national workers compensation and safety frameworks Preliminary Comment

1. A primary objective of the HR Nicholls Society is to enable working people to be free to organise their working lives in their own interests as they see them. The Society, established in 1986, has campaigned strenuously for deregulation of the labour market, and for employer and employee to be free to determine the terms of their contract, subject only to the constraints of unconscionability. The Society's objectives are set out in the appendix.
2. The terms of the contract of employment embrace insurance and worker safety. The Society welcomes inquiry into the matters of workers compensation and worker safety (in which we include occupational health) with the purpose of allowing, subject to necessary safeguards, employer and employee to decide these matters as they see fit in their own interests. Regulation is necessary because information asymmetries can provide scope for opportunistic behaviour by either party to the employment contract. Regulation is also desirable because the limits of employer liability are in disarray under the general law.
3. The Society has thus examined with interest the terms of reference for the Productivity Commission's present inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks and the issues paper for the inquiry.

A Summary

4. The Society submits:
 - (a) the Commission needs to present facts which support the argument that there is a case for regulating the States in the way the States themselves regulate workers compensation and worker safety. It needs to explain why the 1994

and 1995 inquiries led nowhere and now need (in effect) to be reopened and how the 'frameworks' approach assists uniformity or otherwise benefits the workplace.

- (b) The issues paper, contrary to its "aims to help you prepare a submission to the Commission's inquiry", strays outside the terms of reference for the inquiry and is misleading.

It is regrettable that the public, in particular the workplace, as well as trade unions and bodies like this Society, have been put to the trouble of making submissions without the above proper preparations by the Commission. The Society requests that the proposed interim report of the Commission later this year present all the necessary facts and rectify the deficiencies of the issues paper. Interested parties will then be better able to make informed and appropriate submissions.

B Where are the facts?

- 5. The terms of reference for the present inquiry are largely for an inquiry into the problems of States regulating workers compensation and worker safety. Eg the inquiry is to report on a 'consistent definition of employer, employee" etc across all the Australian schemes for workers compensation and worker injury. It may be that employee or employer suffer loss, expense or inconvenience because States regulate workers compensation and worker safety in different ways and because the States employ different definitions of employee and employer etc. However is this variety and differentiation a cause of loss, expense or inconvenience to employee or employer? Does this variety have (or the potential to have) competitive benefits? These questions have to be answered with facts which demonstrate problems or consequences arising from the States each separately regulating workers compensation and worker safety. It is only then that the terms of reference can be acted on. It is a great disservice and imposition on the workplace, and its insurers, for the Commission to embark on an enquiry without fundamental facts of this kind being gathered and reported.
- 6. The need for the facts to be gathered and reported is confirmed by the submission of the Australian Industry Group to the present inquiry. The AIG is one of the best resourced employer representative organisations in the country. Yet in its submission it listed 10 'criteria' to be met, that is 10 sets of factual circumstances to be investigated, before it could support either a new national scheme for workers compensation and OHS or a State based where there was genuine competition between the States. AIG's recommendation R13 was that "Research be commissioned into the interface between worker compensation, the social security system including Medicare and other forms of insurance". These factual circumstances and the research between workers compensation and social security etc are at the heart of the

present inquiry. Had they been available a much more focussed submission could have been made by this employers group. The research recommended by AIG confirms the need for an interim report as we recommend at paragraph 12.

C Past inquiries unexplained

7. The terms of reference say that the Productivity Commission should draw on recommendations of two Industry Commission reports. One of these, Workers Compensation in Australia, 1994, recommended uniform state based workers compensation cover, an alternative national workers compensation scheme and a better relationship with Medicare and superannuation. Now, nine years later, the issues paper for the inquiry confirms that generally the recommendations were not carried out. It would have been helpful for the issues paper to have explained this result before putting the workplace and its insurers to the trouble of reopening many topics investigated in the 1994 report.
8. The other report, Work, Health and Safety, 1995, recommended greater consistency between States **in OHS regulation**. This topic also falls within the present terms of reference. What is the reason for reopening a matter investigated thoroughly and then seemingly forgotten for many years? Again the workplace is entitled to be told.

D Frameworks approach needs to be justified

9. The specific task of the inquiry is to assess "models for ... national frameworks for workers' compensation and OHS arrangements".

Where regulation of the terms of workers compensation or worker safety is necessary workers and employers will be vitally interested in the regulations themselves. They and their insurers are well equipped to understand the actual regulations. As they can understand the regulations it is not apparent why the inquiry must beat about the bush with models for arrangements for frameworks for regulations. But if frameworks have benefits they should be described and justified. There may be benefits to State and Federal government officials and parliaments in having models, arrangements and frameworks which they can interpret, adapt and pick and choose from in making actual regulations for compensation and safety. But those models, arrangements and arrangements offer no obvious benefits to the worker and the employer. Nor is it apparent that if uniformity is desirable (which we vigorously question - see para 10) a system which allows departures at one or more of three levels would be likely to achieve uniformity.

E. Issues paper raises issues outside the terms of reference

10. The inquiry is also required to assess the extent to which worker injury should be compensated by public funds, including from Medicare. Term of reference (j) seeks the boundaries between employee, employer and 'community' responsibility for worker injury. The inquiry is thus required to establish factors and reasons for drawing those boundaries, a major exercise. This is not the same as establishing whether there have been changes to the boundaries or reasons for changes, matters which do not fall within the terms of reference. However the issues paper under the heading Cost Sharing and Cost Shifting seeks public comment on "[w]hat consequences has the changing nature of the workforce" had on who, as between employee, his or her family, employer and government bears the costs of worker injury. This has two problems. (i) Say an employer reduces its employed workforce in favour of outsourcing and as a result reduces its workers compensation premiums. This still says nothing about the different sources of compensation for its employed or outsourced work force. There would be few members of the public who would have this information. (ii) The issues paper is inviting comment on a matter which is outside the terms of reference.
11. One factor which should bear upon the drawing of boundaries for different types of responsibility for worker injury is the factor of employment growth or diminution. It seems to the Society that the facts as to the likelihood of there being more jobs or fewer jobs under different regimes of workers compensation (largely freely negotiated/ compulsory/ self insurance/ government compensation scheme/ other) need to be established. Other factors on which the boundaries may be drawn include cost to state or federal governments, deterrence and the injury rate and, of course, the cost of premiums. The Society recommends that the Commission gathers information and report on all the factors.

F Issues paper is misleading

12. The issues paper says that the terms of reference envisage a cooperative approach between Commonwealth and States on workers compensation and worker insurance and worker safety.

This is plainly wrong and misleading. No particular Commonwealth -State role is envisaged in the terms of reference. It may be that a particular relationship between governments provides the best workers compensation and worker safety. However a particular relationship can only be advocated as a solution to problems facing employees and employers. The relationship cannot be advocated unless the problems are expounded and this has not yet

been done.

13. The issues paper says that the Commonwealth could establish a national workers compensation and OHS scheme "via the exercise of its existing constitutional powers (eg corporations power and referred power from the States)". The paper does not mention the Commonwealth's power with respect to "Insurance, other than State insurance; also state insurance extending beyond the limits of the State concerned" (s 51(xiv) of the Constitution). The insurance power is ample; the corporations power is limited. Powers referred by the States are so infrequent that they do not warrant mention, certainly not as an "existing constitutional power". For the lay readers of the issues paper, the paper should have provided a more balanced picture of Commonwealth power.
14. The Society supports freedom of choice, including choice as to workers compensation insurance. The benefits of such choice have recently been reported in the case of workers compensation insurance in the United States'. Each of the fifty American states has a workers compensation system. Among the systems there is a variety of state and private systems, and provision for self insurance, none of which is the subject of federal requirements'. The workers compensation insurance market is said to be less regulated than in 1990³ There is competition and experimentation in workers compensation insurance and it has been found that the rate at which workers are injured has been falling steadily in the last decade and that the cost of the insurance has declined in that time ⁴.
15. The issues paper asks:

Can the perceived problems arising from the current multiplicity of arrangements [for workers compensation and OHS] be adequately addressed by alternative measures? (p 7)

How might greater uniformity in self-insurance arrangements be best achieved between jurisdictions? (p 9)

What are the areas in OHS regulation and implementation where differences between the jurisdictions impose the most cost? (p 10)

There is an assumption that diversity in workers compensation insurance and OHS and in self-insurance is fraught with problems and expense. However the terms of reference do not make the assumption and the above US experience suggests that the assumption should not be made and is likely to be quite wrong.

¹ B Conerly, "Allowing the States to Innovate", *Regulation*, Spring 2003, p46. ²

Conerly at p 47.

³ Conerly, p48

⁴ Conerly, pp48-49.

In the Society's view the above questions in the issue paper raise false issues.

G What the interim report should address

The Society recommends that in its interim report the Commission address the foregoing deficiencies, and in particular:

The benefits of diversity of workers compensation and worker safety schemes, with some consideration of the US experience.

The benefits of deregulation of workers compensation and worker safety schemes.

Publish case studies of 'regulatory burden and compliance costs' arising from different workers compensation and OHS schemes (see term of reference (i)). Once actual experiences of such costs are aired (and for balance experience of any cost savings arising from diversity should also be sought) the public will be better able to comment to the commission on matters such as whether those experiences match their own.

Without such an interim report the facts as to "models for ... national frameworks for workers' compensation and OHS arrangements" will not be gathered and reported to the public and the stage would be set for a flawed report which could cost workers and employers and the nation generally in matters of workers compensation and worker safety.