

NATIONAL WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS

SUBMISSION TO THE PRODUCTIVITY COMMISSION FROM THE BUSINESS COUNCIL OF AUSTRALIA

SUBMISSION

1 INTRODUCTION

The BCA makes the following submission in respect of national frameworks for workers' compensation and occupational health and safety. This submission is made in response to the issues paper titled "National Workers' Compensation and Occupational Health and Safety Frameworks" ("**Issues Paper**") released by the Productivity Commission ("**Commission**") in April 2003. The submission focuses on options for regulatory reform that would reduce the regulatory burden and compliance costs imposed by existing regulatory schemes on businesses operating across Australia but which would also operate as an effective vehicle for the prevention of work-related injury and for the compensation and rehabilitation of those who incur work-related injury.

The BCA strongly supports the adoption of national legislation regulating occupational health and safety and workers' compensation (with universal application). As an alternative, the BCA supports enactment of uniform legislation in each State and Territory. However, while uniform State and Territory legislation would reduce the regulatory burden and compliance costs for businesses, it would not result in a fully integrated national occupational health and safety and workers' compensation scheme. In any national regulatory scheme or State and Territory schemes there should be a strong emphasis upon establishing and maintaining a positive relationship between prevention of injury and illness, compensation for work-related injury and illness and rehabilitation.

Over the last 20 years there have been a number of attempts to develop and implement national standards on the basis of cooperation between the Commonwealth, States and Territories. None of these have been fully successful. This is itself a compelling reason for the adoption of a national regulatory scheme.

The submission sets out the legal and policy basis for national legislation regulating occupational health and safety and workers' compensation legislation. It also addresses a number of other regulatory options having regard to the business needs of members of the BCA.

2 NATIONAL UNIFORMITY

The Commonwealth and each State and Territory in Australia currently have separate occupational health and safety and workers' compensation regulatory schemes. All of these schemes are based upon the same or similar principles. Each of the workers' compensation schemes provides for payment of compensation to persons who incur

work-related injury, including compensation for lost wages, lump sum compensation for permanent or long-term impairment and reimbursement of medical expenses. All of these schemes operate on a “no-fault” basis, but require a causal connection between work and injury. The various occupational health and safety regulatory schemes can all be seen to conform to the “performance standards” model that was endorsed by the Robens Committee on Health and Safety at Work in the United Kingdom in 1972.

However, there are significant differences between the various jurisdictions in relation to both occupational health and safety and workers’ compensation. These differences impose significant administrative and cost burdens on businesses that operate in more than one jurisdiction. They can also seriously compromise efforts to improve workplace health and safety, to provide for just and equitable compensation for work-related injury, and to ensure the effective rehabilitation of injured workers.

2.1 Impact of Jurisdictional Differences on Companies Operating Nationally

2.1.1 National Regulation

The National Occupational Health and Safety Commission (“**NOHSC**”) was established in 1985 with the objective, among other things, of promoting national uniformity through the adoption of national occupational health and safety standards and codes of practice.

In 1992 NOHSC identified seven national priorities for the development and implementation of standards (manual handling, noise, plant, certification of operators of equipment, major hazard facilities, hazardous substances and storage and handling of dangerous goods). By August 1995, five of the seven priority national standards had been declared by NOHSC, but in all cases significant problems were encountered in relation to implementation of these standards by the States and Territories.

The national standards were intended to operate as model regulations for adoption by State and Territory governments. However, not all jurisdictions have adopted all of the national standards. Those jurisdictions that have adopted them have “tailored” the national standards to meet (perceived) local needs. This has resulted in significant differences in regulatory requirements between the jurisdictions. Few, if any, of these differences can objectively be justified.

The BCA recognises that adoption of elements of national occupational health and safety standards into subordinate legislation and codes of practice in the States and Territories has indeed helped businesses which operate nationwide to implement occupational health and safety management systems on a national basis, and has raised awareness among businesses of critical risks and ways of managing risks. However, the fact remains that the many significant differences in regulation of occupational health and safety significantly compromise the

capacity of national businesses to manage occupational health and safety on a national basis.

There has been no similar attempt to develop and implement national workers' compensation standards or approaches to management of workers' compensation. Consequently, there are major differences between State and Territory workers' compensation schemes. Self-evidently, this seriously compromises the capacity of businesses to manage workers' compensation and rehabilitation on a national basis.

2.1.2 Regulatory Burden and Compliance Costs

There are currently more than 200 occupational health and safety and workers' compensation statutes and regulations in force in Australia. In addition to this substantial body of legislation and regulations there are hundreds of codes of practice, guidance notes, Australian standards and administrative guidelines. Many of these are given (direct or indirect) legal effect by virtue of their being "called up" in regulations.

For businesses operating nationwide the costs of complying with these provisions is high. In 1995, the Industry Commission concluded that resources that should be dedicated to prevention of injuries and illness and improving productivity in workplaces, are instead directed to determining which legislation, regulations and guidance are to be complied with (Industry Commission 1995a: 148-9). The BCA finds no evidence to suggest that this situation has changed significantly over the last eight years.

Most businesses operating nationwide are forced to manage occupational health and safety and workers' compensation on a State by State basis, implementing systems and procedures that are tailored to the particular regulatory and administrative requirements in each jurisdiction. Businesses cannot effectively and efficiently manage occupational health and safety and workers' compensation roles and responsibilities on a national basis, or adopt national approaches to training, as a result of the different regulatory and administrative requirements.

These difficulties impose a substantial administrative burden and high compliance costs on businesses that operate on a national basis. A number of examples are set out below which illustrate the manner in which jurisdictional differences can inhibit national approaches to management of occupational health and safety and workers' compensation. These examples are not exhaustive - rather, they are indicative of just a few of the problems caused by jurisdictional differences.

2.1.3 Examples of Impact of Jurisdictional Differences

Major Hazard Facilities

Regulation of major hazard facilities provides a particularly telling example of how regulatory differences restrict national approaches to management of occupational health and safety.

NOHSC has developed a national standard and code of practice applying to major hazard facilities. However, only Victoria and Western Australia have formally adopted that standard.

The *Occupational Health and Safety (Major Hazard Facilities) Regulations 2000* (Vic) require the operator of a major hazard facility in Victoria to apply for an operator's licence and to prepare a "Safety Case" (which is reviewed and approved by the Victorian WorkCover Authority) to support the licence application. The requirements of the Victorian regulations are largely consistent with the national standard.

The national major hazard facility standard has been formally adopted in Western Australia as an administrative requirement under section 45C of the *Explosives and Dangerous Goods Act 1961*. However, the requirements of the Explosives and Dangerous Goods Act differ significantly from the requirements of the Victorian regulations. Queensland has, on the other hand, developed "Guidelines for Major Hazard Facilities". These guidelines reflect key elements of the national standard but differ significantly from the requirements of the Victorian and Western Australian legislation. The national standard has not been formally adopted in other States and Territories, but is currently being considered for adoption through regulations in some States.

General duties in occupational health and safety legislation in each State and Territory require employers, occupiers of premises and persons who carry on business undertakings to implement systems and procedures to address the classes of risks relevant to each workplace or working environment. However, the lack of national uniformity inhibits businesses from implementing national approaches to the management of major hazard facilities, even though operators of such facilities must address the same general classes of risks in respect of each facility.

For example, a business which operates major hazard facilities in Victoria and other States may be required to implement changes to plant and equipment and/or operating systems and procedures as part of the "Safety Case" process in Victoria, but not required to make similar changes to their facilities in other States. In that situation, the result would be implementation of different systems and procedures in respect of similar facilities in Victoria and other States.

Mines and Mining Activities

A number of States have introduced reforms to occupational health and safety legislation relating to mines and mining activities. These regulatory reforms are not underpinned by any national strategy or consistent approach, and there is currently no national standard relating to regulation of mines or mining activities. Consequently, legislation and regulations in each State and Territory which apply to mines and mining activities use different terminology and definitions, and impose inconsistent requirements, notwithstanding that operators of mines must address many of the same classes of risks (in all jurisdictions).

As a result of these differences it is not practicable for mining businesses operating nationwide to implement a national approach to managing mining operations. A consequence of the lack of national approaches to management of mines and mining activities is that a risk may be identified in one jurisdiction (for example, through the occurrence of a serious incident) and addressed through changes in work methods or procedures in that jurisdiction, but the need for such changes may not be communicated to operators of mines in other States and Territories. Alternatively, critical information about risks and changes to work methods or procedures necessary to address risks may not be communicated by State and Territory regulators to operators until many months (or even years) have passed (allowing the possibility that the risk will result in death or injury in a mine where such changes have not been made).

There is anecdotal evidence of concerns among mining operators in respect of the absence of a national mechanism for the exchange of critical information about mining accidents and incidents, risks in the mining industry and proposals for changes to work methods and procedures.

Interaction between Commonwealth and State/Territory OHS Provisions

A number of large Australian businesses such as Telstra and Australia Post operate subject to both the *Occupational Health and Safety (Commonwealth Employment) Act* (“**OHS (CE) Act**”) and State and Territory occupational health and safety laws. This is because the OHS (CE) Act purports to allow State and Territory occupational health and safety laws to operate in parallel with the Commonwealth provisions to the extent that they are not inconsistent with these provisions (OHS (CE) Act section 4).

The result is that some national businesses may be required to comply with both Commonwealth and State provisions in relation to the same issue. On the other hand, where there is a gap in coverage under the Commonwealth legislation, these businesses must determine (for each jurisdiction) the appropriate standards to which they must adhere. Time and resources are wasted on attempts to resolve issues of jurisdictional boundaries rather than on improving safety.

State and Territory Workers' Compensation Schemes

Inconsistencies between State and Territory workers' compensation schemes also create difficulties for businesses that operate in more than one jurisdiction. Most national businesses find themselves forced to manage workers' compensation and rehabilitation through separate administrative divisions or structures in each jurisdiction. Businesses that maintain workers' compensation insurance are subject to different administrative requirements and auditing regimes in each jurisdiction. There are wide variations in approaches to classifying workplaces and setting workers' compensation premiums between the jurisdictions. Meanwhile, some businesses can self-insure their workers' compensation risks in a number of jurisdictions but not in other jurisdictions due to differences in regulatory and administrative requirements for self-insurance.

National businesses which engage claims management providers to administer workers' compensation claims on a national basis, need to have specific expertise in relation to the specific regulatory and administrative requirements in each jurisdiction. This can lead to wasteful duplication of resources and expertise.

Dispute resolution processes also differ widely between the jurisdictions, making it difficult to adopt a national strategy to management of claims and litigation.

While some businesses can achieve a degree of consistency in their national workers' compensation arrangements with the assistance of their workers' compensation insurers or "claims agents", it is impracticable for most businesses to adopt truly national approaches to management of compensation claims or rehabilitation.

2.2 Case for National Legislation

National legislation regulating occupational health and safety and workers' compensation (with universal application) would help eliminate the regulatory and administrative inconsistencies highlighted in **section 2.1** above. This would substantially reduce the administrative burden and compliance costs for businesses operating nationwide. It would also provide a basis for a more equitable and efficient system for the prevention of work-related injury and for the compensation and rehabilitation of injured workers.

Uniform legislation in each State and Territory would significantly reduce (but not eliminate) regulatory and administrative inconsistencies. It would also assist businesses to implement national approaches to the management of occupational health and safety and workers' compensation, but would not result in a fully integrated national occupational health and safety and workers' compensation scheme (the potential for regulatory and administrative inconsistencies between jurisdictions notwithstanding uniform legislation is discussed further in **sections 2.3 and 3** below). This in turn means that there would not be a basis for the more

equitable and efficient system for the prevention of work injury and for the compensation and rehabilitation of injured workers as would be the case with a national regulatory scheme.

National legislation regulating occupational health and safety and workers' compensation, administered by a single statutory body, would facilitate the provision to employers of critical information about risks and management of risks.

Uniform legislation in each State and Territory underpinned by an agreement between State and Territory regulators in respect of administration and enforcement of legislation may significantly improve the exchange of information between jurisdictions and the provision of relevant information to employers, but the BCA is of the clear view that a fully integrated national scheme would provide the best results in this context.

Other regulatory options (which are noted in **section 3** below) may have some benefits for businesses, but are unlikely to result in the same degree of uniformity in regulation of occupational health and safety and workers' compensation as a national regulatory scheme.

There are no compelling arguments against national uniformity in regulation of occupational health and safety and workers' compensation. There is no cogent evidence that industrial conditions or risks vary so much across Australia that occupational health and safety standards or workers' compensation schemes need to be tailored to suit local conditions. As noted above, the same general classes of risks apply to most workplaces and working environments across Australia.

There is also no compelling reason why workers in different jurisdictions should be subject to different regulatory and administrative requirements for claiming compensation, or different entitlements to compensation for work-related injury or illness. There is no legal or policy basis supporting different regulatory requirements which have the result that a worker in one jurisdiction may be entitled to compensation for an injury while a worker in another jurisdiction is denied compensation for an injury occurring in exactly the same circumstances.

National uniformity would provide significant benefits for businesses which operate in more than one jurisdiction. For example, truly national approaches to managing occupational health and safety and workers' compensation would be much more effective and productive than State-based approaches. Existing resources and expertise could be effectively utilised across all workplaces and business activities in all jurisdictions.

National uniformity would allow businesses in all industries to manage occupational health and safety and workers' compensation on a truly national basis for the first time. It would allow the implementation of consistent systems

for identification, assessment and management of risks, management of compensation claims and rehabilitation, in all workplaces and working environments.

Over time, national uniformity has the potential to facilitate the emergence of stronger “safety cultures” across industries. It would also significantly reduce the costs of training and regulatory compliance for businesses as that operate on a national basis.

Such benefits would be particularly apparent under a national occupational health and safety and workers’ compensation scheme, as there would be no reason or incentive for businesses to adopt State-based approaches to the management of occupational health and safety and workers’ compensation.

Finally, national uniformity would be consistent with other important regulatory developments, particularly uniform regulation of corporations.

2.3 Basis for National Legislation

The Australian Constitution does not grant the Commonwealth a specific and exclusive power to legislate with respect to occupational health and safety or workers’ compensation. However, the Commonwealth could enact national legislation to regulate occupational health and safety and workers’ compensation if the States referred their legislative power to the Commonwealth under section 51(xxxvii) of the Constitution. For this to occur, it would be necessary for all States to reach agreement and promptly enact referral legislation.

The Commonwealth has power under section 122 of the Constitution to legislate with respect to occupational health and safety and workers’ compensation in the Territories. This means that there is no Constitutional impediment to the incorporation of the Territories in any national regulatory scheme.

Partial uniformity could be achieved if some States referred their legislative power to the Commonwealth. Referral by some States may have the effect of encouraging others to follow.

Were the States not inclined to act this way the Commonwealth could enact comprehensive provision relating to prevention, compensation and rehabilitation in reliance upon the “external affairs” power in section 51(xxix) of the Constitution. However this would require ratifying appropriate international conventions addressing occupational health and safety and workers’ compensation, and then legislating in reliance upon section 51(xxix) in order to give effect to the international obligations incurred by ratification. For example, the ILO Occupational Health and Safety Convention 1981 (No. 155) clearly provides a basis for regulation of occupational health and safety on a national

basis based on the recommendations of the Robens Committee. There is also a range of ILO Conventions that deal with specific health and safety issues, or with specific occupational groups. If necessary, ratification of these instruments could be used as the basis for legislative provision applying to those issues or occupational groups.

There is also a number of ILO conventions relating to workers' compensation, including the Workman's Compensation (Accidents) Convention 1925, the Social Security (Minimum Standards) Convention 1952 (Parts VI, XI and XIII), the Employment Injury Benefits Convention 1964, the Workmen's Compensation (Occupational Diseases) Convention (Revised) 1934 and the Sickness Insurance (Industry) Convention 1927. Only the Workmen's Compensation (Occupational Diseases) Convention 1925 has been ratified by Australia. Ratification of the Workman's Compensation (Accidents) Convention 1925, the Social Security (Minimum Standards) Convention 1952 and the Employment Injury Benefits Convention 1964, in particular, would provide a clear basis for enactment of a national workers' compensation scheme with universal application.

As an alternative to, or in addition to, sections 51(xxxvii) and (xxix) the Commonwealth could rely upon a combination of other heads of power to establish national legislation regulating occupational health and safety and workers' compensation. These would include the corporations, taxation, conciliation and arbitration, social security and incidental powers.

It is strongly arguable, for example, that compensation for work-related injury and disease is within the scope of, or reasonably incidental to, the social security power in section 51(xxiiiA) of the Constitution. Amongst other things, this provides for legislation with respect to unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services. Provision for compensation for loss of earnings, impairment and medical expenses incurred as a result of work-related injury or disease could plausibly be said to come within the scope of this power.

Provision for the imposition upon employers of occupational health and safety and workers' compensation levies based upon assessment of the costs of workers' compensation claims and occupational health and safety performance would appear to come within the scope of the taxation power - on essentially the same basis as legislation giving effect to the former Commonwealth training levy and superannuation guarantee levy.

Provision for occupational health and safety obligations and standards applying to employers, contractors and employees would be within the scope of (or reasonably incidental to) the corporations power. There may, however, be some doubt as to whether regulation of the activities of non-corporate employers and other non-incorporated entities would be reasonably incidental to the exercise of the corporations power.

Further, provision for conciliation and arbitration of disputes about occupational health and safety issues (for example, disputes about the powers and functions of health and safety representatives) could plausibly be said to come within the scope of the conciliation and arbitration power.

Referral of legislative power in respect of occupational health and safety and workers' compensation provides the most secure basis upon which a comprehensive national occupational health and safety and workers' compensation scheme could be established. To be fully effective, it would require the cooperation of all States. On the other hand if a number of States, including one or more of the larger States, were to refer their powers in this area, the recalcitrant States could be expected to come under significant political and economic pressure to join in the national scheme.

Reliance upon the external affairs power would not require the agreement of the States (or Territories) but would be politically highly contentious. Nevertheless, section 51(xxix) does appear to provide a constitutionally sound basis for a comprehensive national system, without any of the potentially awkward gaps that would be associated with reliance upon the corporations, taxation, conciliation and arbitration and/or social security powers.

The Commonwealth has in the past sought the agreement of each State and Territory to ratification of the relevant ILO conventions. Further, the Commonwealth has in the past adopted the practice of ratifying international conventions only when satisfied that existing legislation conforms with the conventions. However, the Commonwealth has power to ratify the relevant conventions without seeking or obtaining the agreement of each State and Territory. The Commonwealth also has power to ratify international conventions notwithstanding that existing legislation does not conform with the conventions in all respects.

Issues relevant to the establishment of national legislation regulating occupational health and safety and workers' compensation, and other regulatory reform options, are discussed in **section 3** below.

3 OPTIONS FOR REFORM OF REGULATION OF OCCUPATIONAL HEALTH AND SAFETY AND WORKERS' COMPENSATION

3.1 National legislation for occupational health and safety and workers' compensation

As noted above, various models may be appropriate for national occupational health and safety and workers' compensation legislation.

Firstly, the Commonwealth social security scheme could be amended to provide for workers' compensation entitlements. However, this would clearly have a substantial impact on the operation and costs of the social security scheme. Theoretically, provision could be made for employers to pay contributions to the scheme based upon assessment of workplace risks, the costs of compensation claims and rehabilitation, occupational health and safety performance and other indicators such as remuneration paid to employees. However, this would be inconsistent with the non-contributory nature of the current social security scheme (and therefore difficult to implement). If this option was adopted, occupational health and safety could be dealt with in a separate (Commonwealth) statute.

A further option is the establishment of a single regulatory scheme for occupational health and safety and workers' compensation (separate to the social security scheme). Any national scheme should establish a positive relationship between prevention of work-related injury and the rehabilitation and compensation of injured workers (ie. employers who can demonstrate significant improvements in prevention should benefit from lower workers' compensation levies or premiums and the costs of rehabilitation and compensation should be directed to encouraging effective prevention). Such a scheme could, with appropriate safeguards in relation to the maintenance of standards and the overall integrity of the scheme, include a capacity for employers to self insure.

Further, occupational health and safety and workers' compensation legislation must encourage employers to focus on effective rehabilitation to ensure that injured employees have the best chance of returning to productive employment as early as is consistent with their physical and psychological well-being, and that employers who demonstrate effective rehabilitation systems and procedures benefit from lower workers' compensation costs.

A national occupational health and safety and workers' compensation scheme is undoubtedly the best way to achieve a positive relationship between prevention of work-related injury and illness, compensation and rehabilitation. As noted above, no other approach will achieve a fully integrated national regulatory scheme.

Occupational health and safety provisions in a national scheme should impose general obligations on all persons involved in work activities, persons who carry on business undertakings, persons who occupy workplaces and persons involved in the design, manufacture, supply etc of plant and equipment. A national regulatory scheme should include regulations that apply on a national basis in respect of all key risks and work activities. However, there should be flexibility for industry-specific regulations where conditions in a particular industry give rise to particular risks. Any such industry-specific regulations should apply on a national basis.

A national regulatory scheme should provide for specific, technical guidance embodied in non-binding codes of practice, guidelines and Australian standards.

Codes of practice and other guidance may be industry-specific. National occupational health and safety legislation would ideally be enforced by a Commonwealth body, such as Comcare. If national legislation were enforced by State and Territory agencies, differences in approaches to enforcement would inevitably emerge (even if there was agreement between the State and Territory agencies on common approaches to enforcement).

A national regulatory scheme should provide for payment of standard workers' compensation benefits to employees who suffer work-related injury or illness in all industries across all jurisdictions and should encourage (or require) early assessment and intervention for effective rehabilitation of injured workers.

A national regulatory scheme should provide for employers to pay contributions based upon a fair assessment of workplace risks, claims and rehabilitation costs, occupational health and safety performance (ie. assessment of the effectiveness of occupational health and safety systems and procedures in preventing work-related injury and illness) and remuneration paid to employees.

3.2 Uniform template legislation

As noted above, as an alternative to a national regulatory scheme, uniformity of regulation could be achieved through the enactment of template "national" legislation in one jurisdiction and adoption of the national legislation by reference in each other jurisdiction. Such legislation could be based upon the same principles, and incorporate the same basic elements, as a national regulatory scheme (discussed in **section 3.1** above).

However, uniform State and Territory legislation of this character would not result in a fully integrated national regulatory scheme. There is, for example, a risk that States and Territories would make ad hoc changes to legislation, thereby compromising national uniformity. It is also likely that the States and Territories would adopt different approaches to administration and enforcement of legislation, even if there was general agreement on common approaches. Such differences in approach would compromise the capacity of businesses to manage occupational health and safety and workers' compensation on a truly national basis.

In contrast to a national regulatory scheme, there would be significant difficulties in achieving uniformity in State and Territory workers' compensation arrangements, as each workers' compensation scheme is structured and funded differently. In particular, it may not be practicable for each State and Territory to implement uniform mechanisms for determining employer contributions to the workers' compensation schemes (as the total liabilities for compensation and potential pool of employer contributions would differ under each scheme).

If national uniformity cannot be achieved through agreement between the States and Territories, those jurisdictions that can agree upon a uniform regulatory model should enact uniform template legislation and encourage the other States and Territories to follow suit. This would not establish an integrated national occupational health and safety and workers' compensation scheme, but would at least provide a degree of uniformity between those jurisdictions that adopted the template.

3.3 Other Regulatory Models

The Issues Paper proposes a range of other regulatory models for the establishment of a national framework for occupational health and safety and workers' compensation, including expansion of the Comcare system (to permit employers to self-insure with or pay premiums to Comcare), "mutual recognition" between the States and Territories of the occupational health and safety and workers' compensation schemes in each jurisdiction, establishment of a national body to develop and implement national standards relating to workers' compensation, and extension of Commonwealth legislation (particularly the Insurance Act and the Corporations Act) to all workers' compensation insurers.

The BCA is of the view that none of these regulatory models or options would achieve a fully integrated national occupational health and safety and workers' compensation scheme, or a significant degree of uniformity in regulation of occupational health and safety or workers' compensation. Consequently, these regulatory models and options are not addressed in detail in this submission.

As emphasized in this submission, there are no compelling arguments against national uniformity in regulation of occupational health and safety and workers' compensation, and the BCA is strongly of the view that a national regulatory scheme is the best way of achieving national uniformity.