

# ESTABLISHMENT OF NATIONAL OHS AND WORKERS' COMPENSATION SYSTEMS.

Attached is information regarding the push for National regulation. Section 1 refers to NSW IR Minister John Della Bosca's view on the subject. Section 2 is ACCI's Blueprint for reform solutions for OHS regulation. Section 3-Government rejects PC's key recommendations.

## Section 1-NSW to lead push for national workplace safety regulation

**Monday 12th September 2005 1:02 pm EST**

NSW IR Minister John Della Bosca has indicated he will support the establishment of national OHS and workers' compensation systems if they incorporate the best elements of each jurisdiction's current schemes.

The prospect of national regulation will be a major topic at *The Safety Conference*, which will be held in Sydney next month.

Della Bosca says he would consider giving up state jurisdiction over both OHS and workers' compensation.

"We would happily look at a single regime so long as it was not based on the lowest common denominator and that the best of each state's system was preserved," his spokesperson said.

The change also has support from employer groups, safety professionals, lawyers and unions.

Prominent OHS lawyer Michael Tooma says he will argue strongly for reform in his address to the conference. He says the federal government should use its external affairs power to enact uniform laws.

Tooma says every wave of state reform subtly widens the difference between each jurisdiction's employer OHS obligations, adding to confusion and the already substantial costs of compliance across states.

"This may be great for lawyers but makes no commercial or economic sense," he said.

ACCI has long supported the establishment of consistent laws to ease the compliance burdens on its members - most recently in its [Blueprint](#) for improving OHS over the next 10 years (see related articles).

The push also has support from the Safety Institute of Australia's (SIA) NSW division, which is running the conference.

Any support is conditional on the best practice and highest standards applying in each jurisdiction being incorporated into any national Act.

"Further, the defining of best practice or highest standards would be developed by the unions to avoid watering down. This would not limit the introduction of legislation over and above what currently exists where it would be beneficial to workers."

[The Safety Conference](#) will run from Wednesday 26 October to Friday 28 October at the Sydney Showground, as part of [The Safety Show](#).

## Section 2-ACCI offers detailed reform solutions for OHS regulation

Thursday 28th April 2005 3:57 pm EST

ACCI's Blueprint for improving workplace safety outlines detailed solutions for reforming Australia's OHS regulation.

ACCI released its blueprint, *Modern Workplace: Safer Workplace* this morning, saying Australia's OHS system is in dire need of reform (see [related article 1](#)).

### Reforming OHS regulation

Part 3 of ACCI's Blueprint sets out regulatory reforms, which it says if implemented would increase awareness, communication and co-operation on OHS; and reasonable, balanced and practical OHS regulation that contributes to Australia having world-class OHS systems and performance.

The Blueprint says the emphasis of regulatory frameworks must be on encouraging the development of a culture of mutual responsibility in the workplace and open and active communication.

It says the concepts of "reasonably practicable", "foreseeable" and "control" have been significantly distorted in several Australian jurisdictions, "to the point where they no longer reflect what is reasonable, practical or achievable".

The Blueprint says there are significant problems with regulatory design and administration of OHS in Australia, as identified by employers:

- **the quantity of regulation** - multiple sources of regulation on the same topics, including in each jurisdiction;
- **the quality of regulation** - the duty of care interpreted to impose "extreme, absolute and in some cases, literally impossible duties" on employers and designers in meeting performance-based obligations; inadequate defences where conduct has been reasonable; and not accompanied by effective communication to industry;
- **the frequency of change** - once introduced, regulation isn't properly reviewed. As well, employers have difficulty keeping up with the volume of new regulation;
- **the compliance and red tape burden of regulation** - especially for smaller businesses;
- **the lack of national consistency** - regulation, even on common, basic issues, differs between jurisdictions, and even standards developed on a national basis aren't implemented consistently;
- **the inconsistent interpretation of regulation** - in particular, the employer duty of care has been progressively distorted through interpretation and re-interpretation;
- **the selective and unbalanced enforcement of regulation** - balance and judgement in prosecutorial discretion among regulators has been inconsistent, and independence of decision makers on enforcement is open to compromise by governments, unions or interest groups; and
- **the undermining of objectives in OHS regulation by non-OHS laws** - employment law, discrimination law and privacy law is increasingly encroaching upon and denying employers the right of control over the conduct of all staff, contractors and third parties within their businesses.

## Compliance

The Blueprint says that most offences under OHS law should be civil and not criminal, and tried before a court. There should be no absolute or strict liabilities, and penalties should be monetary, judicially determined and based on the seriousness of offences and the circumstances of breach.

"Enforcement requires a mix between education and persuasion on the one hand, and in serious or repeated cases, prosecution and penalties on the other."

It says that while prosecution and heavy penalties may be appropriate for the worst offenders who manifestly fail in their duties, the deterrent effect of prosecutions or extreme, new law-making focussed on punishment (such as the ACT's industrial manslaughter offence), "are marginal and symbolic at best and virtually non-existent as deterrents for the great majority of employers...".

The Blueprint says a system of enforceable undertakings should be an alternative approach to compliance, provided that such undertakings are developed in consultation with business and don't confer inappropriate directions on regulators.

It says the advantages of enforceable undertakings are that, unlike prosecutions, they can produce better results in terms of lasting compliance with the law and do so across a wider range of workplaces. "Whilst the system would not replace prosecutions, they would be a superior alternative in most cases given the time consuming and resource intensive nature of prosecutions... The rationale is to have inspectorates stop thinking about what courts can do after a breach, but rather what needs to be done to improve OHS in the workplace."

## Industry solutions for OHS regulators

The Blueprint says Australian OHS law and practice should reflect reasonableness, practicality, balance, mutuality, independence and consistent national principles.

## Reasonableness

The Blueprint calls for OHS legislation based on a general duty limited by what is reasonable, foreseeable, controllable and realistic.

It says the legal framework should provide for a general duty in which **employers, employees and all persons in the supply chain are to take reasonable steps** within their actual influence or control to prevent workplace injuries or health risks.

Neither parliaments nor courts should impose extreme, absolute or impossible duties.

Each party holds **separate and independent duties of care** - for example, it is not reasonable for a user of manufactured goods to be liable for safety risks arising from deficiencies in the manufacture of those goods.

The Blueprint calls for clear legislative **guidance in what is meant by "reasonable, practicable and foreseeable"** and capable of being achieved, economically and practically. As well, new statements on the standard of the duty of care are required in those jurisdictions where the concepts of reasonably practicable, foreseeable and control have been significantly distorted.

Where an employee is terminated because of failure to work consistently in a way that gives effect to the employee's duty of care then termination should not be regarded as an unfair dismissal (or give rise to an "unfair contract" action) under federal or state workplace relations laws. "The basic principle should be that an employer taking action to meet their obligations under health and safety laws, including terminating or otherwise **disciplining an employee due to that employee's breach of safety laws, should not face liability under other industrial laws** for having done what safety law would require."

The Blueprint says the fact of a **workplace injury or illness should not in and of itself constitute a breach of the legal duty** - a key element of the duty (and the establishment of a breach) should be that a person did not act reasonably in all of the circumstances.

As well, **adherence to regulations or codes in the workplace should constitute compliance** and prima facie meeting of the duty of care.

## Practicality

The Blueprint says the over-riding focus of a workable OHS system at the national, jurisdictional and workplace level must be the prevention of injuries and the management of foreseeable risk which is **practical and achievable**.

It says prevention-based **OHS materials should be developed by governments in close and genuine consultation and agreement** with employers, with adequate time and resources to undertake the process and review the outcomes.

An employer's workplace health and safety **liability should be limited to those factors over which the employer has direct and actual influence** or control and which are truly OHS in character.

The Blueprint says **incentive-based and reducing workers' compensation premiums** should be pursued.

As well, regulators - before regulation is made - need to be **in touch with the realities of business operations** and the views of employers and employees on prevention and regulatory compliance.

## Balance

The Blueprint says OHS regulation must be balanced. This should be reflected in the mutuality of duties owed by all parties, and in the fairness of enforcement and prevention strategies.

It says new laws and regulatory and judicial decision making should be **based on reason, hard evidence, data, practical design principles and rationality**, not emotion, ideology, unsubstantiated opinion or assertion, or inappropriate collective generalisation.

Regulatory bodies should have a **dual role as both information providers and enforcers**, but it must be clear that compliance with the regulator's advice and guidance material may legitimately be used as a defence when something goes wrong.

The Blueprint says that where a breach is alleged, the **prosecution should have to prove that a person did not act reasonably** in all of the circumstances - this should not be a legal burden borne by the accused.

Penalties imposed by the courts should reflect the circumstances of the commission of offences and the status of the business, and there should be **consistency in approach**, so that employers managing similar risks in similar circumstances are not exposed to different enforcement measures.

ACCI says **prosecution should be used as a last resort**, and should be initiated only by an impartial and independent authority.

## Mutuality

The Blueprint says OHS regulation must, at all levels, encourage a culture of mutual responsibility.

It says **jurisdictions should work together with workplace parties** to achieve a better understanding of what is reasonably achievable in the workplace to improve workplace prevention strategies and practice.

Employers and employees should work together to achieve not only compliance with OHS regulations but the **genuine prevention of injury and work-related illness**.

ACCI says industry should establish **co-operative mechanisms in the workplace** through policies and work procedures, workplace agreements and management initiatives, including:

- education and induction of employees to raise awareness of their role, contribution to OHS and duties in the workplace;
- consultation and participation in workplace changes that may impact on health and safety;
- co-operation, open and active communication;
- high quality workplace relations - characterised by mutual respect for employer and employee interests; and
- mechanisms to deal with injuries, issues arising out of risk assessments and OHS breaches by employers, employees or other parties in the work environment.

## **Independence**

The Blueprint says legislative frameworks should not encourage the use of OHS for political or industrial relations agendas.

It says all stakeholders should realise that **exploitation of health and safety issues for non-OHS purposes damages genuine commitment** to improving safety and health.

All persons entering a workplace for the purpose of OHS inspections or dealing with OHS complaints should be appropriately authorised, with current entry permits issued under the relevant legal framework.

**Inspectorates should operate independently of industrial or political interference**, and officers should be appropriately qualified and experienced.

The Blueprint says governments and policy makers should resist calls for trade union officials, or other parties with industrial agendas, having an inspectorate, quasi inspectorate or prosecutorial role over OHS issues or workplace investigation and inspection.

## **Consistent national principles**

ACCI says **OHS regulation should be nationally consistent**.

It says nationally consistent packages of standards, codes of practice, guidance materials and regulations should be developed against the following principles:

- scientific evidence, including appropriate, sound, measured statistical data;
- an industry impact assessment;
- reasonable and practical standards designed to deal with hazards;
- standards developed by a tri-partite body;
- core national standards and codes adopted and implemented consistently and uniformly in all jurisdictions; and
- objectively-based and focussed on OHS outcomes devoid of subsidiary industrial or political agendas.

It says new standards should not be adopted without a regulatory impact statement.

[Modern Workplace: Safer Workplace - An Australian Industry Blueprint for Improving Occupational Health and Safety 2005-2015](#)

[Speech by ACCI chief executive Peter Hendy](#) - 28 April 2004

### 3-Government rejects PC's key recommendations

Friday 25th June 2004 12:00 am EST

The Government's response to the Productivity Commission's final report indicates the inquiry was a waste of time, money and paper. It has rejected the Commission's key recommendations for a national workers' compensation scheme and OHS laws, but provides in-principle support to recommendations on a number of soft issues.

The Government tabled the Productivity Commission's final report on National Workers' Compensation and OHS Frameworks in Parliament yesterday.

In its response to the report, the Government says that while supporting a number of the Commission's recommendations, it does not support the key elements of its proposed national framework model. These include:

- replacing NOHSC with a smaller body appointed on basis of skills and expertise;
- requiring all jurisdictions to adopt uniform OHS regulations;
- sharing funding of NOHSC between the Government and the States;
- developing an alternative workers' compensation scheme to operate in parallel with existing State schemes (as proposed under steps 2 and 3 of the Commission's model); and
- establishing, by legislation, a workers' compensation body to develop nationally consistent scheme elements.

The Government says its role is to facilitate the development of a nationally consistent framework for OHS and workers' compensation rather than to develop national template OHS safety standards or be in the business of providing national workers' compensation.

The Government says it aims to develop a number of alternative strategies that build on cooperation with the States and key industry players, through its proposed Australian Safety and Compensation Council.

Its response contained the first information the Government has provided about the ASCC's structure and function. (*OHS Alert* will provide details in a separate article today.)

The Commission's 14 recommendations and the Government's responses are outlined below.

**Note:** On all of the recommendations for which the Government provides in-principle support, it recommends that the proposed ASCC provide further advice.

#### **Self insurance, alternative schemes**

As previously reported, the Commission recommends three steps to developing a national workers' compensation scheme to operate in parallel to existing schemes.

The Government supports step 1 (encouraging employers that meet the current competition test to self-insure under Comcare), if the WR Minister had legislative responsibility for considering applications.

The Government does not, however, support steps 2 or 3 of the recommendation (development of a national self-insurance scheme, and in the longer term, an alternative, national premium-paying scheme).

It says this proposal would result in a substantial shift to the Government of responsibility for an area that is traditionally, and should remain, a State matter.

As well, the States would be unlikely to support such a scheme, it says.

## **No support for cooperative OHS framework**

The Commission recommends a cooperative national OHS framework model that would involve a smaller NOHSC and adoption by all jurisdictions of uniform OHS legislation.

The Government does not support this recommendation, saying a smaller NOHSC board with no obligatory requirement to include industry representatives isn't a viable option.

As well, it says that it is unlikely the States would agree to the model.

The Government says the Commission's findings demonstrate that current national consultative arrangements aren't working, and it was for this reason that it decided to establish the ASCC - a non-legislative OHS and workers' compensation advisory council.

## **Eligible employers to be covered by Commonwealth OHS Act**

The Commission recommends that the Government amend the *Occupational Health and Safety (Commonwealth Employment) Act 1991* to enable employers that self-insure under Comcare to elect to be covered by the Commonwealth OHS legislation.

There is merit in this idea, the Government says, but eligible firms should not have the choice, rather, it will move to amend the Act to *require* coverage of non-Commonwealth employers who self insure under the scheme.

## **SRC Commission a stand-alone regulator?**

The Commission recommends progressively developing the Safety, Rehabilitation and Compensation Commission (SRCC) to strengthen regulation of the Australian Government's workers' compensation schemes and OHS regimes.

This recommendation was made in light of the proposal to develop alternative workers' compensation schemes (which the Government doesn't support), but the Government says nonetheless there is merit in examining the recommendation in more detail.

## **No support for new national workers' comp body**

The Government does not support the Commission's recommendation that the States, Territories and Australian Government establish a new national body to develop nationally consistent scheme elements for workers' compensation.

It says the body would be duplicative and not build on the synergies between OHS and workers' compensation systems, and that the proposed ASCC would be better placed to coordinate policy development and strategic directions for both workers' compensation and OHS.

## **Definition of employee**

The Government gives in-principle support to the Commission's recommendation for using the following principles in defining an employee for workers' compensation purposes:

- employer control - recognising that the common law "contract of service" provides a solid basis for defining an employee in most situations;
- certainty and clarity for workers and employers;
- administrative simplicity - to reduce the costs of administration and enforcement;
- consistency with other legislation; and
- durability and flexibility - to deal with a wide variety of working arrangements.

## **Definition of work related fatality, injury and illness**

The Government also gives in-principle support for the Commission's recommendation that consistent criteria be used when defining a work-related fatality, injury and illness under workers' compensation schemes.

The Commission recommends the definition of work-relatedness be in terms of "arising out of or in the course of employment", as used by most jurisdictions. The definition of attribution - "a significant contributing factor" - should be a minimum benchmark, while "major contributing factor" would add clarity, it says.

The Commission recommends that coverage for journeys to and from work *not* be provided, on the basis of a lack of employer control, availability of CTP cover and in most instances the ability to be dealt with under enterprise bargaining.

It also recommends that coverage for recess breaks and work-related events be restricted, on the basis of lack of employer control, to those at workplaces and at employer sanctioned events.

## **Principles to facilitate durable return to work**

The Government gives in-principle support to the Commission's recommendation that the following principles be used to facilitate durable return to work:

- early intervention - including the early notification of claims and the provisional assignment of liability;
- workplace-based rehabilitation where possible, at the pre-injury workplace; and
- return to work programs developed and implemented by a committed partnership of the employer, employee and treating doctor, drawing on the services of a rehabilitation coordinator and allied health professionals as required.

## **No common law access**

The Government gives in-principle support to the Commission's recommendation that common law should not be included in a national framework for workers' compensation on the grounds that it:

- doesn't offer stronger incentives for accident reduction than a statutory, no-fault scheme;
- can provide lump sum compensation that may prove to be inadequate to the longer term needs of seriously injured workers;
- may over-compensate less seriously injured workers who could be expected to rehabilitate and return to work;
- delays rehabilitation and return to work (if there are psychological benefits to be derived from receiving a lump sum, these could be obtained through statutory benefits; and
- is a more expensive compensation mechanism than statutory workers' compensation.

The Commission recommends that if common law is to be included in a national framework, it should be restricted to the most seriously injured workers and be for non-economic loss only.

It also recommends imposing restrictions on plaintiff legal fees (including incentives for early settlement); mandatory settlement conferences (including an exchange of offers); and legislative provision to encourage early rehabilitation by plaintiffs.

## **Government supports nationally consistent benefits**

The Government supports in-principle the Commission's recommendation that the following principles be used in the development of a nationally consistent benefit structures:

- sufficient incentives should be provided for injured or ill employees to participate in rehabilitation. Benefit step-downs and caps are generally the most appropriate mechanisms for providing these incentives;
- benefits should not be so low as to result in workers bearing an unacceptably high burden of workplace injury or illness. Income replacement should be related to pre-injury average weekly earnings, including any regularly received overtime;
- all reasonable medical and rehabilitation expenses should be reimbursed;
- access to lump sum payments should be based on meeting minimum impairment thresholds, while minimising the extent to which the availability of such payment delays rehabilitation and return to work; and
- such structures, and health and income support schemes, should minimise the extent of any cost-shifting.

## **Principles to ensure full funding, improved OHS and RTW, administrative simplicity**

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

- there should be no cross-subsidisation between employers through premiums as it distorts pricing signals. Any cross-subsidisation should be minimal and transparent;
- premiums should be set efficiently. In essence, large employers' premiums should be based on their experience rating. Small and medium employers' premiums should be based on industry class rating (where the classes reflect common risk profiles) accompanied by experience rating to the degree appropriate, and by explicit, cost-effective financial incentives for preventing workplace incidents and for promoting rehabilitation and return to work;
- private insurers should comply with relevant requirements under the *Insurance Act 1973* (particularly the prudential standard governing liability valuation for general insurers) to ensure full funding of the schemes. There should be separate but light-handed regulatory monitoring of the premiums set by private insurers; and
- premiums should be set by public insurers so as to achieve full funding, with independent monitoring by a separate body to ensure transparency of any differences between appropriate and actual premiums.

## **Licensed insurers to provide coverage under all schemes**

The Government gives in-principle support to the Commission's recommendation for the following regulatory framework, which would allow licensed insurers to provide coverage under all schemes:

- in privately underwritten schemes, it should be sufficient for insurer licensing requirements to rely on APRA authorisation under the *Insurance Act 1973* as evidence that prudential concerns are satisfied;
- in publicly underwritten schemes, competitive outsourcing to appropriately skilled and resourced service providers should be supported by carefully designed and monitored contracts; and

- were the Australian Government to implement a national insurance scheme as an alternative to existing schemes, it should be privately underwritten by insurers authorised by APRA under the *Insurance Act*.

### **Assessing self-insurance applications**

In its report, the Commission recommends the following principles be used for assessing self-insurance applications under the national self-insurance scheme:

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

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

The Government supports the recommendation in-principle, noting that it was made primarily to support the recommendation for an alternative national scheme, which the Government doesn't support.

### **Dispute resolution**

The Government provides in-principle support to the Commission's recommendation that mechanisms to manage and resolve disputes about claims equitably and effectively have the following features:

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