SUBMISSION ON BEHALF OF THE AUSTRALIAN FEDERATION OF EMPLOYERS AND INDUSTRIES (AFEI)

RESPONSE TO PRODUCTIVITY COMMISSION REPORT BENCHMARKING THE COSTS OF OHS LEGISLATION

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Response to Productivity Commission Report Benchmarking the costs of OHS legislation

In this submission we address four features of the report:

- The "on paper" comparison of OHS regulation
- The suggested ameliorating effect of the proposed model OHS legislation on OHS regulation
- The reported "trivial" costs of OHS regulation for SMEs
- The recommendation that there be greater regulation of psychosocial hazards

The comparison of legislation

The benchmarking exercise is undertaken by way of comparative legislative provisions applying in each jurisdiction. The impact of actual implementation of current OHS laws within a jurisdiction and the practical effect for business have not been adequately considered, other than in the description of the unacceptable regulatory burden placed on businesses operating in multiple jurisdictions. The effectiveness of regulation from the ease of compliance perspective has not been considered; reporting the features of the jurisdictions regulatory schemes does not provide insight into the outcomes of that regulation.

A comparison of legislative provisions does not capture the quality of a regulator's approaches or, importantly, judicial interpretation. For example, the case law emanating from the Industrial Relations Commission of NSW demonstrates a different interpretation of "reasonably practical" to that provided in the report.[1]

[1] Report Page 17

The report poses the question in relation to the qualification of the duty of care

> *Despite the differences in the qualifications used, like the duties imposed on designers, it is unclear whether these constitute real differences in terms of compliance burdens. For example, it would be expected that the interpretation of reasonably practicable would address the issue of control.* [2]

Even a cursory examination of prosecution outcomes in NSW demonstrate that there are differences and that they are significant.

Similarly, comparison tables such as those provided at Tables 2.2 and 2.3 and the surrounding discussion in the report do not provide a complete understanding as to the depth and extent of duty holders' obligations. The absolute and all encompassing duties of employers, persons in control of workplaces, plant and substances and other duty holders (apart from the general duty of care owed by employees) in NSW ensures that any failure is readily established as a breach. This terminology is deliberately exhaustive. [3]

The simple "tick box" approach of a regulatory comparison misses important elements of the actual impact of regulation and does not involve consideration of what is required for business to actually comply.

For example, while not appearing in Table 2.2, a risk management approach is an objective of the Occupational Health and Safety Act 2000 (NSW) (the NSW OHS Act) [s3e] and Chapter 2 of the Occupational Health

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[2] Report Page 183

[3] "There would appear to be no reason to make any implication that the words "to ensure" are to be construed in any way other than their ordinary meaning of guaranteeing, securing or making certain."

"The duties imposed by the Act are not merely duties to act as a reasonable or prudent person would in the same circumstances … under section 15(1) [now section 8(1)] the obligation of the employer is to "ensure" the health, safety and welfare of the employees at work. There is no warrant for limiting the detriments to safety contemplated to those which are reasonably foreseeable … the terms of section"

Drake Personnel Ltd v WorkCover Authority of NSW (Inspector Ch'ng) (1999) 90 IR 432.

and Safety Regulation 2001 (NSW) requires employers to undertake risk management assessments; it is encapsulated in the primary duty of care.

There is no need for the general duty under the NSW OHS Act to specify information, instruction and training for managers and supervisors; these are ensconced in the general duty to provide such information, instruction, training and supervision as needed to ensure safety. The general duties are underpinned by further legislative provision and regulations. The Occupational Health and Safety Regulation 2001 (NSW) stipulates employer obligations in relation to undertaking risk assessment, consultation, facilities and accommodation, PPE, medical and first aid and record keeping. Similarly, while the table identifies one jurisdiction as requiring the employment of a suitably qualified person to provide OHS advice, in NSW the OHS Regulation requires an employer to obtain such information as is necessary from an authoritative source to enable them to fulfil their responsibilities in the risk management process. [4]

There is a mismatch between the report's "on paper" accounts of regulatory requirements and regulator activity and what is happening "on the ground". For example, after two decades of a heavily prosecutorial approach WorkCover NSW has recently attempted to promote an assistance and education role, particularly for small business. This possible change of direction or emphasis is reflected in the "snapshot" comparison of regulator data presented for 2008-09 in Chapters 2, 5 and 6 of the report with a much lower rate of prosecution, interventions and fines than previously and a higher proportion of funds spent on education reported for NSW. [5]

Because of our long-term experience in dealing with employers who come into contact with WorkCover NSW, their inspectors and OHS legislation, we can say with confidence that for over two decades the vast majority of

[4] Occupational Health and Safety Regulation 2001 (NSW) clause 16. We note that this obligation is further discussed at 7.4 of the Report

[5] This downward trend in penalties and prosecutions is also noted in the Comparative Performance Monitoring Report December 2009 (CPM11) page 19.

employers did not, and do not yet, see WorkCover NSW as primarily a source of assistance and information. [6]

In terms of actual application of the so called compliance pyramid there is no transparent basis on which employers can determine whether or not what they have done is an adequate response to the requirements of the legislation and whether, in the event of an accident, they will or will not be prosecuted. There remains a widespread view that WorkCover is not accountable to any need to provide reasonable, balanced and practical regulation, or to actually provide technical assistance and advice to employers.

This imposes difficult to measure, but none the less, real costs on how employers run their businesses and the actual cost of regulation which is not reflected in the report. The statement that "*the NSW core OHS regulator spent the smallest percentage of total expenditure on enforcement compared to other regulators*" [7] may be statistically accurate based on the information provided by the jurisdictions but provides no insight into the actual operation of the NSW regulatory system. The point in time comparison raises questions about expenditure over a longer period of time, and how a figure for expenditure is decided. For example, are amounts received for fines imposed by the Industrial Court and WorkCover deducted from enforcement expenditure? There may also be a point at which expenditure reaches maximal utility so that it is no longer useful to consider proportionate expenditure on enforcement.

The description of the NSW regulator's "relatively rare" use of prosecution belies the actual impact of the punitive and unbalanced approach the regulator has adopted. It has not engendered a culture of compliance, nor improved safety outcomes in NSW compared with other jurisdictions. Over the past two decades WorkCover NSW has prosecuted at a much

[6] For example, see attached AFEI 2007 member survey of employer views of WorkCover NSW

[7] Report page 122

higher rate than other jurisdictions and at multiples of prosecution rates in other countries.

These are important features in assessing the quality of regulation and are not apparent in a benchmarking approach which focuses on differences and similarities in statutory requirements. Further, the account of various forms of assistance and services offered by regulators provides no insight into their effectiveness or coverage.[8] Mechanisms may be in place and reported as such but this gives no indication as to how they are actually utilised, how the regulator in fact responds and if there is any improvement in the quality of regulation as a result. Moreover they tell us nothing about the experience of employers who have sought WorkCover NSW assistance on a particular on site safety issue only to receive a subsequent visit by another WorkCover inspector who issues a penalty notice for a different safety issue, no doubt noted and reported by the first inspector.

The suggested ameliorating effect of the proposed model OHS legislation

The benchmarking exercise focuses on current regulation but is cognisant of the forthcoming model OHS legislation. Reference is made to some regulatory issues "being taken care of" by the OHS review panel and the proposed legislation is seen as overcoming a number of regulatory harmonisation issues.[9]

Certain issues which have been problematic and expensive for employers, notably those relating to overlapping inter jurisdictional compliance requirements; the qualification of the absolute duties and the reversal of the onus of proof in NSW, are noted as being within the purview of the OHS model legislation review.

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[8] Report Pages 130-137

[9] Report Chapter 2

However, the model legislation whilst addressing some aspects of harmonisation will not necessarily reduce or improve the overall regulatory burden for employers.

Significantly, the model Act is not federal legislation capable of replacing state legislation — it is a 'model' and each state and territory will need to enact its own laws to follow the model OHS Act and regulations.

However, the proposed model Act is replete with jurisdictional notes that enable each state to have provisions it prefers, for example, on aspects of:

- union right of entry
- additional functions for the regulator
- the relationship between the model Act and other Acts
- the description of penalties.

Most significantly for NSW employers, the model Act allows each state to decide who is the regulator and specify the relevant court or tribunal for its jurisdiction.

As a consequence, WorkCover NSW and the NSW Industrial Relations Commission (NSW IRC) will retain their respective positions as regulator and tribunal. This being the case, it is reasonable to expect that actual improvement for employers in the NSW system could be significantly constrained, subject to the impact of the recent High Court decision.[10]

For NSW employers the model Act has the apparent advantages of the removal of the reverse onus of proof and the replacement of the absolute duty of care 'to ensure' with the common law 'reasonably practical' derivative. However given the virtual impossibility defendants have faced in running the current reasonably practical defence it is debatable whether this new formulation of the duty of care will make a significant difference to the unreasonable exposure of employers in NSW. Based on past

[10] Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs) [2010] HCA 1 (3 February 2010)

experience and even with reverse onus removed, the prosecution is unlikely to be overly taxed in proving that reasonably practical measures could have been taken. Where there has been an accident or incident, the standard legal advice in NSW is to plead guilty early and take remedial action, despite the fact that such measures are frequently used by the prosecutor to show that there were steps that could have been taken.

The model Act has adopted significant features of the current NSW system including the expansion of duty holders which have the potential to make OHS regulation even more onerous:

- A major change is to move the focus of the law away from work and the workplace, with the express intention of 'untying the link to employment'. The range of duty holders and their obligations has been expanded to cast the duty holder net as far as possible. As is currently the situation in NSW, duties are concurrent and overlapping.

- The primary duty holder is to be the 'person conducting a business or undertaking'. More than one person can be a person conducting a business or undertaking at any given workplace.

- There are duties of persons related to specific activities including management or control of a workplace, designers, manufacturers, importers, suppliers, installers and constructers. There are specific and separate duties based on the activity (design, manufacture etc). This is an expansion of duties both upstream and downstream and over the life cycle of the plant, substance and structure.

- Officers have specific duties imposed on them that are qualified by 'due diligence'. Officers will be liable if they fail to exercise due diligence. The duty has been changed to a positive obligation on officers to proactively ensure compliance rather than an attributed liability in the event of a breach by the company.

- Penalties and categories of breaches have been increased.

- There are to be extensive and detailed provisions for worker consultation and OHS representation. The role and powers of Health and Safety Representatives (HSRs) are extensive, including the power to stop work and to issue improvement notices. There are also provisions for HSRs to have intrusive access to the organisation's information and records and request the assistance 'of any person' who is also to have access to the workplace. Powers such as these in the hands of militant representatives have repeatedly been shown to have significant destructive consequences.

- The expanded union rights of entry are likely to be contentious. Employers in the industrial "firing line" are not comforted by the assertion that better safety outcomes are "associated" with a union presence at the workplace.[11] There is ample evidence of the misuse of such powers.

The reported "trivial" costs of OHS regulation for SMEs

The primary measure used by the Productivity Commission to assess the cost of regulation is the Sensis survey of SMEs who are asked to assess the cost of safety measures they have taken in the previous twelve months. With the exception of reference to the difficulties of measuring compliance costs and an industry group survey, no other measurement of compliance costs is provided. Reference is also made to the limitation in considering the impact of costs on business alone and that any regulatory cost imposts are borne by the wider community.

Subsequently the benefits of regulation are professed to outweigh any costs, particularly in the areas of consultation, training, presence of HSRs, union involvement and organisational interventions for psychological injury. This contention is made with reference to various studies which

[11] Report Page 243

infer such outcomes but do not demonstrate that this outcome is both universal and certain.

The cost of OHS compliance for business should not be dismissed as being outweighed by the professed benefits of regulation, or cancelled out by a conceptual approach that the costs are transitory and carried by the wider community. This is an area which warrants closer attention if safety outcomes are actually to be improved.

The report observes that:

> *If businesses are unaware of their OHS requirements, OHS regulation is unlikely to create any additional compliance costs because what businesses are doing is unaffected by OHS regulation and thus compliance costs will be minimal.*[12]

The Sensis survey reports a high level of awareness of regulatory requirements with 89 per cent of respondents reporting they are very, or somewhat aware. However, how this translates into actual compliance is difficult to assess, as only 61 per cent undertook hazard identification and risk control, and just over half kept records, provided protective clothing, tasked staff to implement OHS (25 per cent engaged an external consultant) or trained staff, all key compliance elements.[13] 60 per cent of respondents said that no individual OHS elements concerned them, or that they did not know. [14]

While not reported in aggregate, the cost associated with each of these measures was reported as "trivial" by around three quarters of respondents, with the exception of staffing for OHS and plant modification /replacement which were described as "moderate" by around one third.[15]

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[12] Report Page 159

[13] Report Table 4.2 Page 89

[14] Report Page 79

[15] Report Table 4.2 Page 89

The Atax[16] study concluded that compliance with occupational health and safety legislation was generally not regarded as a concern by the businesses it surveyed, largely because few ensured that they were fully compliant. Atax commented that those who were more aware of the OH&S requirements reported that 'many of the rules were ridiculous, inflexible and unmanageable for small business'. Atax concluded that 'small businesses would generally be in breach of OH&S regulations'.

We also have observed a significant difference in responses reported by employers and businesses who:

- are aware of regulatory requirements and are attempting to comply
- those who are aware and have decided that compliance is not possible as the cost involved would be fatal for the business
- those who are unaware of OHS obligations

In our experience, businesses join organizations such as ours because they need help with regulatory compliance i.e. they have a heightened awareness of their obligations.

In February 2010 we surveyed 400 of our SME members to assess their level of awareness of the OHS requirements for their business and the cost impact of OHS compliance actions. 65 per cent described themselves as "very aware" and 35 per cent as "somewhat aware". In contrast to the Sensis survey, 82 per cent had undertaken hazard identification and risk control, 86 per cent kept records, 61 per cent provided protective clothing, 88 per cent tasked staff to monitor and implement OHS (36 per cent engaged external consultants).[17]

[16] http://www.taxboard.gov.au/content/downloads/Atax%20%20BOTSBCC%20%20Final%20Report%2031082006.pdf

[17] See attached Table 1

The apparently higher degree of attempted compliance is reflected in higher compliance costs. In contrast to the Sensis report:

- 28 per cent reported these costs to be substantial
- 46 per cent reported these as moderate
- 27 per cent reported as trivial.

Both outcomes demonstrate that actual OHS compliance is a significant obstacle for business when cognizant of the extent of their legal obligations. This is also reflected in the higher compliance costs in higher risk industries. The answer lies in assessing how and why business reacts to compliance requirements and in having regulation which is demonstrably workable, practical and capable of compliance.

The "trivial" cost of safety reported in the Sensis survey does not accord with the numerous industry surveys which identify OHS and workers compensation as major regulatory burdens.

We agree that size matters, although in which direction is by no means certain, again highlighting the difficulties in measuring the actual cost of OHS to business. [18]

The regulation of psychosocial hazards

Stress, harassment and bullying are identified as areas where greater regulatory involvement is seen as a positive measure to reduce the number of claims and where the cost of interventions are said to be outweighed by the benefits of reduced claims incidence.

This is a vexed and complex area of regulation for employers, with a high level of risk. The draft report's observation that inspectors find these

[18] The Sensis survey reported higher average costs for medium sized businesses (Report page 172). CPA Australia found in its 2003 survey of small businesses that the larger the business the more difficulties it had complying with OH&S requirements. In the UK Lancaster et al, 2003 found smaller businesses incur higher costs per employee for OHS compliance than larger ones.

claims difficult to deal with is the only indication that this is a contentious area.

The draft report does not consider what the legislative interventions actually involve for business. The proposition that stress claims have been reduced in Queensland, Western Australia and South Australia as a consequence of greater regulation, and hence pressure on business to manage stress claims, is highly questionable.

The extent and cost of psychosocial hazard claims has more to do with how these claims are regarded by the regulator, and the extent to which any rigour and even handedness is present in the claims acceptance and investigation process.

Further, there was no examination of the detailed and complex requirements in setting up and managing psychosocial risk intervention programs. Whilst these vary in the demands placed on employers [19] even a so called simple or minimalist approach is resources intensive and beyond the capacity of most employers.

The report identifies stress as occurring when work demands and pressures that are not matched to their knowledge and abilities and which challenge their ability to cope. [20]

The knowledge, abilities and ability to cope of a worker are a matter of individual assessment and perception. To ensure health an employer must guarantee that the worker will not experience, at the minimum:

- insecure employment and any element of job uncertainty in their workplace
- hours which are unsuited to their needs
- work demands which they consider excessive
- any perceived lack of clarity in their work role and organization

[19] For example, see the HSE Stress Standards
[20] Report page 279

- uncertainty in organizational strategies and objectives poor relationships at work.

Whilst reference is made to the positive benefits of the myriad of organizational interventions a key question is whether a direct link can be shown between these management and organizational remedies and individual health and job quality outcomes. A major proponent of regulatory organizational interventions is itself uncertain:

> *"While the analysis in the review of existing literature identifies some persuasive associations, causation remains unproven."* [21]

The push for greater regulatory intervention to reduce stress claims is driven by proponents of the ideological view that workers must have control over their job (ie how and when it is done) and they must have secure, non precarious jobs. Proponents allege a decline in the quality of working life, an increased work intensification and the reduction in autonomy and control and assert these as issues must be regulated if workers are to be healthier in the future. They argue that regulators must intervene in management's human resources policies and practices to ensure that workers must have their desired level of control over how and when they do their jobs. Moreover they say that if the employee considers their job is too hard/unpleasant/demanding/boring/out of their control/unpredictable/etc, this perception will lead to from work/ presenteeim/stress claim/disability.

In our experience the overwhelming majority of workers compensation "stress" claims are employee performance related (ie where the employer has initiated a performance review/disciplinary action/counselling procedure/change in work arrangements). Whilst workers compensation legislation ostensibly precludes claims in such circumstances, there is almost universal acceptance of these claims in NSW with the insurers' investigator inevitably identifying some contributing factor in the workplace. Invariably this factor is a matter of dispute, with the insurer

[21] The Work Foundation Good Jobs p12 See also Briner

electing to accept the employee's interpretation of events. Additionally, typically there is no attempt on the part of the treating doctor or psychologist to ascertain the facts of the matter at the workplace before diagnosing the employee with anxiety or similar disorder allegedly caused by work. By way of example, employees who do not like the idea of change in their work arrangements are diagnosed with "adjustment disorder", an ostensibly medical but specious translation of "they don't like it" designed to provide access to compensation without scientific or medical rigour.

There will be no abatement in stress claims until some reform is made in the regulators' approach (and directives to claims agents) to ensure a more rigorous and even handed investigation of stress claims. Irrespective of the actual nature of their work environment, it remains open to employees to see work as the cause of their unhappiness /dissatisfaction/ill health with a compensatory outcome.

Bullying

We question the conflation of stress with bullying manifest as physical assault, as in the Coleman case. There is a clear distinction between such acts - to wrap an employee with plastic, shoot with a stud gun, etc - these are criminal matters requiring the involvement of police. This is recognised in the Western Australian Code:

> *Physical assault or the threat of physical harm of any form is a criminal act. If a criminal act has been committed, the appropriate response is a direct complaint to the police.*[22]

Employers can face legal action for workplace bullying under a wide range of laws - criminal, OH&S, anti-discrimination and workers compensation - as well as personal injury liability and breach of contract. It is already an area of extensive regulation, not just in those jurisdictions with codes or legislative provisions specifically addressing this issue. Again, employers

[22] Report Page 13

are confronted with the potential for such claims when setting work goals or deadlines, carrying out reasonable supervisory practices or setting achievable performance goals or disciplinary action.

The distinction should be made between good management style versus bullying. Bullying should not be about setting work goals or deadlines, carrying out reasonable supervisory practices or setting achievable performance goals or disciplinary action.

TABLE 1: ACTION TAKEN BY SMEs TO COMPLY WITH OHS LAWS AND REGULATIONS

Action	**Sensis SMEs**	***AFEI SMEs***
	%	**%**
Employed an additional employee with specific skills	10	11
Engaged an external consultant	25	36
Tasked existing staff to implement OHS	56	88
Developed an health and safety committee and/or appointed an health and safety representative	30	72
Conducted hazard identification and risk control	61	82
Provided protective clothing	53	61
Kept records	58	86
Purchased information from external sources	33	48
Purchased staff training externally	35	68
Undertook staff training internally	53	60
Modified existing plant and equipment	34	48
Replaced plant and equipment earlier than otherwise	19	30
Changed what is produced	3	1
Changed production processes	12	8
Changed inputs or materials	7	7
Other	1	-
None of these	16	0