

**ACTU SUBMISSION  
TO  
PRODUCTIVITY COMMISSION  
INQUIRY**

**NATIONAL WORKERS'  
COMPENSATION AND  
OCCUPATIONAL HEALTH AND  
SAFETY FRAMEWORKS**

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## PRODUCTIVITY COMMISSION INQUIRY

### NATIONAL WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS

#### ACTU SUBMISSION – OCCUPATIONAL HEALTH AND SAFETY

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#### A. Work-Related Death, Injury and Disease

1. Australia must urgently implement occupational health and safety actions which attack the full extent of work-related death, injury and disease.
2. The estimated number of deaths that occurred from occupational exposure to hazardous substances in Australia each year from 1989 to 1992 was just under 2,300. (Charles Kerr et al, *Best Estimate of the Magnitude of Health Effects of Occupational Exposure to Hazardous Substances*, Worksafe Australia Report, April 1996, p.viii)
3. The most recent report on traumatic work-related deaths, based on coroners' reports for the period 1989 to 1992, shows that:
  - there were an average of 597 deaths each year, of which 305 persons per year were killed in a workplace, 135 were 'work-road deaths', and 157 were 'commuting' deaths;
  - in addition, 75 workplace bystanders were killed each year (almost half of whom were children under 15 years); and
  - there were also 119 deaths per year of road bystanders.(*Work-related traumatic fatalities in Australia, 1989 to 1992*, National Occupational Health and Safety Commission (NOHSC), December 1998, pp.xvi-xvii)
4. In addition, work is a significant cause of suicides. Coronial findings from 1989 to 2000 reported that work factors contributed to suicide in over 109 cases in Victoria. (John Bottomley et al, *Work Factors in Suicide*, Urban Ministry network, September 2002, p.iii)
5. 477,800 persons experienced a work-related injury or illness in the twelve months to September 2000, of whom 189,400 received workers' compensation. (*Work-Related Injuries, September 2000, Australia*,

Australian Bureau of Statistics, October 2001, p.12)

6. Australians have approximately 2.8 million long-term work-related conditions. (*National Health Survey, 2001*, Australian Bureau of Statistics, October 2002, "Summary of Results", p.39))
7. 3.9 million work-related problems and 1.1 million new work-related problems are estimated to be handled each year by general practitioners. (*Work-related aspects of patient presentations to general practitioners in Australia: Analysis of the first two years of BEACH data*, NOHSC, December 2001, p.21)
8. Mr Jerry Ellis, Chair of NOHSC, indicated on 28 April 2003 that: "Australia has a long way to go to match world's best practice. For example, according to the ILO, the best performing country, Norway, has a record of work-related fatalities more than twice as good as Australia." Mr Ellis also pointed out that more people die in Australia from work-related causes than in road accidents. ("World Day for Safety and Health at Work", NOHSC media release, 28 April 2003)
9. The road toll in Australia in the year to May 2003 was 1,693 deaths. (*Road Fatalities Australia – Monthly Bulletin*, Australian Transport Safety Bureau, May 2003, p.2)
10. Excluding NSW (for which data is not available), there were 13,621 road accidents involving casualties in Australia in 2000. (*Year Book Australia 2003*, Australian Bureau of Statistics, "Transport, Road Traffic Accidents", Table 28.25)

## **B. National OHS Strategy 2002-2012**

1. The Federal Government has asked the Productivity Commission to "assess possible models for establishing national frameworks for workers' compensation and OHS arrangements". (Ian Campbell, Parliamentary Secretary to the Treasurer, "National Workers' Compensation and Occupational Health and Safety Frameworks, Terms of Reference", 13 March 2003)
2. In 1999, the Federal Minister for Employment, Workplace Relations and Small Business, together with other ministers responsible for OHS, welcomed the *National Occupational Health and Safety Improvement Framework* as a valuable step in guiding governments, employers and unions to improve Australia's OHS performance. (*National Occupational Health and Safety Improvement Framework*, NOHSC, December 1999, p.iii)
3. The federal, state and territory governments, as well as the Australian Council of Trade Unions (ACTU) and the Australian Chamber of Commerce and Industry (ACCI) have moved, however, beyond a national framework for OHS to a national strategy.

4. On 24 May 2002, the Workplace Relations Ministers Council (WRMC) endorsed the *National OHS Strategy 2002-2012*. The Ministers indicated that: "The OHS Strategy is significant in that, for the first time, Australia will have all jurisdictions, and the peak employer and employee organisations (ACCI and ACTU) committed to minimum national targets and national priorities for improving OHS. Ministers agreed that the OHS Strategy operate for ten years and be monitored by the Council." (Joint Communique from Commonwealth, State and Territory Workplace Relations Ministers, 24 May 2002)
5. In May 2002, the Federal Minister for Employment and Workplace Relations, on behalf of the WRMC, endorsed the release of the Strategy. Ministers welcomed the national approach engendered by the Strategy and stated their commitment to achieving the national targets. (*National OHS Strategy 2002-2012*, NOHSC, May 2002, p.iii)
6. The ACTU and ACCI, as well as federal, state and territory governments, as parties to NOHSC:
  - (a) have accepted responsibility for development and implementation of the Strategy;
  - (b) are committed to working cooperatively on the priorities and actions identified in the Strategy; and
  - (c) are committed to regularly reviewing achievements against the plans and targets in the Strategy, and to further develop the Strategy in light of these achievements.(*National OHS Strategy*, p.v)
7. The Strategy sets out the basis for nationally strategic interventions that are intended, over the coming decade to:
  - foster sustainably safe and healthy work environments; and
  - reduce significantly the numbers of people killed, injured or made sick at work.(*National OHS Strategy*, p.1)
8. In November 2002, the WRMC endorsed five National Priority Action Plans for 2002-2005 under the Strategy. At this meeting the states questioned the need for the Productivity Commission Inquiry. (Joint Communique from Commonwealth, State and Territory Workplace Relations Ministers, 8 November 2002)
9. These five National Priority Action Plans cover:
  - Reduce high incidence/severity risks;
  - Strengthen the capacity of business and workers to manage OHS effectively;
  - Prevent occupational disease more effectively;
  - Eliminate hazards at the design stage; and
  - Strengthen the capacity of government to influence OHS outcomes.NOHSC had endorsed these Plans in October 2002.  
(<http://www.nohsc.gov.au/nationalstrategy/>)

10. NOHSC also has endorsed National Action Plans for three areas requiring national action under the Strategy – skills development, data and research. In April 2003, NOHSC also agreed to develop a national standards action plan.
11. The *National OHS Strategy 2002-2012*, like the framework recommended to the Productivity Commission by the Federal Government, encompasses “a cooperative approach between the Commonwealth and State governments while still leaving primary responsibility for these systems with the States”. (Ian Campbell, Parliamentary Secretary to the Treasurer, “National Workers’ Compensation and Occupational Health and Safety Frameworks, Terms of Reference”, 13 March 2003)

### **C. ACTU Involvement in the National OHS Strategy**

1. The ACTU welcomes the endorsement of the *National OHS Strategy 2002-2012* and expects parties to the Strategy to work energetically to implement the Strategy and its Action Plans.
2. In November 2002, the ACTU Executive resolved:
 

“That the ACTU, Trades and Labor Councils (TLCs) and unions work to achieve national action under *National OHS Strategy 2002-2012* to address:

  - (a) High incidence contemporary workplace hazards of work-related stress, dangerous working hours, violence and bullying;
  - (b) OHS impacts of labour market changes, such as contracting out: and
  - (c) Prevention of occupational diseases, such as cancer, heart and respiratory diseases.”
3. The ACTU is advocating national targets for reduction under the Strategy which acknowledge the full extent of work-related death, injury and disease.
4. The ACTU has involved unions in the Strategy. We are seeking tripartite industry involvement in national actions under the Strategy. We consider that there should be tripartite forums for the initial target industries identified by NOHSC in April 2003 – manufacturing, construction, transport and storage, health and community services.
5. Implementation of Action Plans under the Strategy involves a range of government agencies, as well as union and employer representatives. For example, under the Strategy’s ten-year OHS Skills Development Action Plan, there are responsibilities for federal and state education and training agencies, in addition to union and employer representatives involved in education and training.
6. The ACTU believes that under the Strategy there must be improved

cooperation between OHS agencies and other government funding, regulatory, program-delivery and service agencies.

7. The ACTU expects the Strategy to assist the application to OHS of lessons from other areas of public policy, including from public health and transport safety.

#### **D. National Road Safety Strategy**

1. The Australian community correctly expects increased government action to reduce the work toll, as well as to reduce the road toll.
2. Governments should learn from their achievements with road safety in their work under the National OHS Strategy.
3. Road accident fatalities in Australia have declined significantly. In 1975, there were 26.6 fatalities per 100,000 population in Australia. By 2000, this rate had decreased to 9.5 per 100,000. Australia's reduction in the rate of road fatalities has reflected an improvement greater than the OECD median. (*International Road Safety Comparisons, The 2000 Report*, Australian Transport Safety Bureau (ATSB), 2002, p.7)
4. This improvement in road safety has been produced by ongoing comprehensive work on safety – involving standards, enforcement, investment in infrastructure and equipment, education and training, research and data analysis.
5. This approach is reflected in the *National Road Safety Strategy 2001-2010*, adopted by the Australian Transport Council (ATC), which, like the WRMC, comprises federal state and territory ministers.
6. The Road Safety Strategy recognises that road safety strategy and policy measures are principally driven by state, territory and local governments. The role of the Commonwealth is in statistics, research, road funding, vehicle standards and facilitation of sharing of information. (*National Road Safety Strategy 2001-2010*, Australian Transport Council, p.1)
7. The Road Safety Strategy has a target to reduce the number of fatalities per 100,000 population by 40% by 2010. The governments aim to achieve this through a comprehensive approach which includes road user behaviour, safety of roads, vehicle compatibility and occupant protection, and use of new technology to reduce human error. (*National Road Safety Strategy*, pp.3-4)
8. The Road Safety Strategy promises greater use of both widespread and targeted intelligence-based enforcement action, involving campaigns, effective cross-border operations, and enhanced activities in rural areas. The Strategy notes that “strong synergies exist between education, enforcement and information in developing safe behaviour in road users,

and each is of limited effect alone.” (*National Road Safety Strategy* 2001-2010, pp.5-6)

9. The National Road Safety Strategy is supplemented by two-year Action Plans. The current plan is the National Road Safety Action Plan 2003 and 2004.

#### **E. National Occupational Health and Safety Commission (NOHSC)**

1. The ACTU, like other parties to the National OHS Strategy, recognises that there will be a division of responsibilities between tiers of government in implementation of the Strategy. This will require effective national action and coordination between governments and the industry parties. The tripartite NOHSC is crucial to implementation of the Strategy.
2. The *National Occupational Health and Safety Commission Act 1985* requires NOHSC to provide:
  - (a) “a forum by which representatives of the Government of the Commonwealth, the Governments of the States and of employers and employees may consult together in, and participate in the development and formulation of policies and strategies relating to, occupational health and safety matters”; and
  - (b) “a national focus for activities relating to occupational health and safety matters”.(*National Occupational Health and Safety Commission Act 1985 – S.7*)
3. The National OHS Strategy requires the parties to the Strategy to report annually through NOHSC to the WRMC on progress in implementation. (*National OHS Strategy 2002-2012*, p.13)
4. A central role for NOHSC is also entailed in:
  - (a) the five National Priority Action Plans endorsed by the WRMC in November 2002;
  - (b) the Plans for Areas Requiring National Action – skills development, data and research – endorsed by NOHSC; and
  - (c) The Standards Action Plan, which NOHSC agreed in April to develop.
5. The Federal Government reduced its funding for NOHSC, despite Australia’s scandalous levels of work-related death, injury and disease.
6. After the election of the Liberal/National Coalition in 1996, the Federal Government decided that:
  - the NOHSC budget must be cut by \$5.9 million each year;
  - a further 5% cut was imposed across the board; and
  - redundancies had to be covered from within the NOHSC budget.This represented a cut of \$6.6 million (35-40%) to the NOHSC annual budget. The ACTU opposed these severe cuts.

7. The April 1996 NOHSC decision on allocation of its \$14 million budget cut OHS research and information, and education and training. National standards work was also decreased. These areas are central to a national approach to OHS.
8. The 2003/04 Federal Budget provides for appropriations to NOHSC of only \$14.3 million. This compares with the 2003/04 appropriation for the Productivity Commission of \$24.2 million.
9. Appropriations to NOHSC should be increased to permit achievement of the targets and actions endorsed by the Commonwealth and other governments under the National OHS Strategy.
10. In May 1997, the WRMC agreed to new directions for NOHSC which included:
  - less emphasis on the development and/or promulgation of national OHS standards and codes of practice; and
  - implementation of a national comparative performance monitoring system for OHS jurisdictions under the auspices of NOHSC.
11. The political composition of most governments represented at the WRMC has changed since that 1997 decision.
12. The then Ministers expressed the view that their decisions on the future directions of NOHSC provided a continuing response to a number of recommendations from the Industry Commission 1995 Report, *Work, Health and Safety*. (Labour Ministers Council, Joint Communique, 30 May 1997).

#### **F. Responses to the Industry Commission 1995 Report – Standards**

1. Following the May 1997 response from the WRMC to the recommendations of the Industry Commission, NOHSC agreed in October 1997 that material which it had developed as draft standards and/or codes of practice would be provided to the states and territories for use within their own jurisdictions. Areas covered comprised construction work, prevention of falls, demolition, occupational diving, certification of pest controllers, spray painting and first aid.
2. Following the decisions of the Federal Government and the WRMC, NOHSC moved from a national focus to a jurisdictional, optional approach to adoption or variation of these standards and codes of practice. The ACTU and ACCI opposed that decision. The ACTU supported completion and declaration of all those standards and codes of practice. The tragedy of these decisions is manifest in the construction industry.
3. The ACTU has continued to advocate national standards and codes of practice, which should be adopted by governments in a consistent way, within a defined time frame.



4. In October 1998, the ACTU asked NOHSC that the standards and codes dropped from the NOHSC work plan in October 1997 be completed. We subsequently requested again completion of the work on construction, demolition and falls, but were not supported by the Commonwealth representatives.
5. Construction industry parties supported the release of the national construction standard and codes for demolition and prevention of falls from heights:
  - an industry OHS seminar in 1998 called for completion of the work, but then Minister Reith rejected this; and
  - an industry summit in 1999 with representatives of employer groups, major builders, unions, state governments and the Property Council – also agreed on the need for completion of the work.
5. Following the 1997 NOHSC decision, the non-government and non-tripartite organisation Standards Australia moved to partially fill the gap, and produced an Australian Standard for demolition. The November 1997 WRMC considered that Australian Standards were intended to be voluntary. (Joint Communiqué from Commonwealth, State and Territory Labour Ministers, November 1997)
6. From 1996/97 to 2000/01, there were 131 compensated fatalities from traumatic incidents in the construction industry, excluding commuting claims. (*WRMC Comparative Performance Monitoring Fourth Report*, August 2002, p.35)
7. In November 1999, NOHSC published *Work-related traumatic fatalities involving construction activities in Australia, 1989 to 1992*, which reported that:
  - only 70% of traumatic construction fatalities were covered by the workers' compensation system (p.21); and
  - the construction industry had a fatality incidence rate double the all-industry average (p.1).
8. *Work-related traumatic fatalities involving construction activities in Australia, 1989 to 1992* reported that falling from heights was the most common mechanism (28%) of fatal injury for construction workers. (p.8) Some states have moved to partially fill the gap left by NOHSC with their own codes of practice for the prevention of falls.
9. In October 2002, NOHSC agreed to advise the WRMC that it had decided to proceed with development of a national standard for construction and codes of practice for prevention of falls and for demolition work. In December 2002, Ministers agreed to NOHSC undertaking scoping work on the need for a national standard, but, on the urging of the Commonwealth, agreed to await the report of the Cole Royal Commission into the Building and Construction Industry.

10. The February 2003 report of the Royal Commission recommended that the Commonwealth take such steps as are available to it to ensure that:
  - (a) drawing up and giving effect to uniform national standards in the building and construction industry is a priority under the National Priority Action Plans of the National OHS Strategy; and
  - (b) the WRMC, its members and NOHSC adopt a timetable and be accountable for the progress and completion of this work.
11. Royal Commission commented that:
 

“It therefore appears that work on uniform national standards for the building and construction industry is at last under way again. Our concern is that the work should not be compromised, abandoned or diverted.” (*Final Report of the Royal Commission into the Building and Construction Industry*, February 2003, Vol.6, pp.28-29)
12. The Royal Commission supported a mix of prescriptive and performance-based standards, provided that “they give clear instruction to participants in the industry about what they must do in areas that are obviously critical to workers’ health and safety”. (*Final Report*, Vol.6, p.26)
13. The National OHS Strategy states in respect of the regulatory framework that: “There must be a balance between allowing for flexibility in achieving the required outcomes and prescribing certain actions or processes where necessary.” (p.10)
14. This is at odds with the 1995 Industry Commission report, which recommended that mandated safety requirements should “avoid prescribing either the particular inputs into or processes to achieve the outcomes desired, unless it is more efficient to do so”. (*Work, Health and Safety*, Industry Commission, September 1995, p.xi)
15. In April 2003, NOHSC agreed to recommend to the WRMC that new national regulatory material be developed for the construction industry.
16. There has been other resistance by the Commonwealth at NOHSC to national regulatory measures. Following the November 2000 decision of the ACTU Executive to conduct a campaign on asbestos, the Commonwealth and state governments agreed in May 2001 to ban the import and use of chrysotile and other forms of asbestos from December 2003.
17. When NOHSC had discussed this issue in October 2000, the Commonwealth representative had requested that public comment be sought on voluntary approaches to the phasing out of the use of chrysotile. Australia has the highest incidence of asbestos-related disease in the ‘developed’ world. The incidence in Australia has been rising steeply since 1970, and it is estimated that the total number of asbestos-related deaths will reach at least 40,000 and perhaps as many as 60,000 by 2020.

18. The OHS Policy adopted by the ACTU Congress in 2000 contains the following provisions on national standards and codes of practice:
- (a) "The ACTU, TLCs and unions will continue to promote effective regulation of OHS and to support the development and implementation of national OHS standards and codes of practice.
  - (b) ACTU, TLCs and unions will pressure governments to require completion of the national standards and codes of practice for construction, demolition, and prevention of falls from heights, in the first instance, and to progress other components of the National Uniformity Program, which were dropped by National Occupational Health and Safety Commission (NOHSC) in 1997.
  - (c) ACTU, TLCs and unions will campaign for national standards where they are required for OHS hazards.
  - (d) TLCs and unions will advocate that state and territory governments adopt national standards in a consistent way to provide Australian workers with equal protection irrespective of where they work.
  - (e) ACTU, TLCs and unions will continue to challenge the notion that OHS standards should be solely 'performance-based' standards, and will campaign for prescriptive provisions in OHS standards where required to protect health and safety.
  - (f) ACTU, TLCs and unions will advocate that NOHSC reinstate tripartite industry specific committees."
- (Available at [www.actu.asn.au/public/papers/2000ohs.html](http://www.actu.asn.au/public/papers/2000ohs.html))
19. In April 2003, NOHSC agreed to develop a national standards action plan. This had been agreed to by the NOHSC Strategy Committee in October 2002.
20. The ACTU advocates that NOHSC develop a long-term program for standards and codes of practice which would:
- prevent death, injury and disease;
  - implement the National OHS Strategy;
  - reduce pressure on states and territories to act separately on standards and codes;
  - assist other regulators (eg. National Road Transport Commission); and
  - assist employers to meet their obligations to provide safe and healthy workplaces
21. The ACTU will campaign for new national standards and codes of practice where they are required for health and safety hazards, including dangerous working hours, violence, bullying and stress.
22. The ACTU also will campaign for revised national standards and codes of practice where they are required for health and safety hazards, including manual handling, plant, hazardous substances, noise and environmental tobacco smoke.
23. TLCs and unions will seek state and territory government adoption of

standards, codes of practice and guidelines for industries and hazards where there are no national standards or codes of practice.

#### **G. Responses to the Industry Commission 1995 Report – Performance Monitoring**

1. In response to the 1995 Industry Commission report, *Work, Health and Safety*, the Labour Ministers Council decided in May 1997 that comparative performance monitoring of OHS would be carried out under the auspices of NOHSC. (Labor Ministers' Joint Communique, 30 May 1997)
2. However, the Federal Department of Workplace Relations and Small Business convened a Department of Labour Standing Committee (DOLAC) working group to develop comparative performance monitoring.
3. Through their reliance on compensation data, the working group has provided a misleading picture to ministers and the community about the state of OHS in Australia.
4. The December 1998 NOHSC report, *Work-related traumatic fatalities in Australia, 1989 to 1992*, which excluded work-related suicides, reported that 43% of work-related deaths were not covered by compensation agencies. (p.235)
5. A recent review of coverage of work-related fatalities by compensation data has pointed out that: "Published compensation information therefore significantly underestimates the magnitude of work related traumatic death of workers and provides virtually no information on the deaths of non-working persons killed as a result of someone else's work, whether in a workplace or on the road." (T.Driscoll et al, "Coverage of work related fatalities by compensation and occupational health and safety agencies", *Occupational and Environmental Medicine*, 60:2003, p.199)
6. The extent of compensation data coverage of traumatic fatalities depends on factors such as growth of self-employment in hazardous work and changing eligibility (eg. dependency arrangements).
7. The ABS survey, *Work-Related Injuries, September 2000, Australia*, reports that:
  - 43,000 people (40%) of the 111,000 absent from work for more than ten days because of work-related injury or illness did not receive workers' compensation, while 68,000 did receive compensation; and
  - 288,000 people (60%) of the 478,000 who received a work-related injury or illness in the year to September 2000 did not receive workers' compensation, while 189,000 did receive compensation. (*Work-Related Injuries, September 2000, Australia*, Australian Bureau of

Statistics, October 2001)

8. The NOHSC report, *Work-related aspects of patient presentations to general practitioners in Australia: Analysis of the first two years of BEACH data*, December 2001, found that workers' compensation was paid in 39% of new work-related problems presented to general practitioners. (p.46)
9. Coverage by workers' compensation is low for psychological (especially anxiety/stress), respiratory, digestive, and dermatitis problems. Most diseases are not well covered by workers' compensation. (*Work-related aspects of patient presentations to general practitioners in Australia*, pp.46-47)

#### **H. ACTU Position**

1. The ACTU is working towards improved OHS throughout the areas contained in the Policy adopted by the 2000 ACTU Congress, which covers:
  - (a) enhanced union workplace involvement;
  - (b) legislation, awards and industrial agreements;
  - (c) OHS standards and codes of practice;
  - (d) inspection and enforcement of OHS legislation;
  - (e) information, education and training;
  - (f) OHS research;
  - (g) OHS data and analysis;
  - (h) international OHS activities;
  - (i) duties of employers;
  - (j) priority OHS areas, such as stress at work, work-related violence, bullying, labour market change, working hours, chemicals, electromagnetic radiation, and environmental tobacco smoke.([www.actu.asn.au/public/papers/2000ohs.html](http://www.actu.asn.au/public/papers/2000ohs.html))
2. The ACTU Congress which will be held on 18-21 August 2003 will consider a revised OHS policy for the union movement.

#### **I. OHS Arrangements**

1. In its *Issues Paper*, the Commission asks whether existing OHS arrangements are able to deliver appropriate levels of work health and safety. (*National Workers' Compensation and Occupational Health and Safety Frameworks – Issues Paper*, Productivity Commission, p.11)
2. The ACTU submission has pointed to some changes being implemented to OHS arrangements. In addition, OHS legislation has been, or is, subject to review in NSW, Queensland, WA, SA, and the ACT. The Victorian Government also has promised to review its legislation.
3. Improving enforcement and arrangements for precarious employment are important issues in these reviews.

## J. Enforcement

1. Recent reviews have recognised the need to broaden the scope and range of enforcement and penalties.
2. The 2000 ACTU OHS Policy required the union movement to pursue:
  - (a) a range of methods to promote the effective implementation of OHS standards and codes across industries and workplaces;
  - (b) upgraded capacity of government inspectorates;
  - (c) ongoing enforcement campaigns;
  - (d) penalties broadened in scope and range;
  - (e) the rights of unions to initiate prosecutions for breaches of OHS laws; and
  - (f) increased understanding in the courts of the human impact of OHS breaches.
3. Penalties for OHS offences are minimal. In 2000/2001 there were a total of 613 prosecutions resulting in convictions across Australia, with total fines of only \$7.9 million – an average of \$12,900. Excluding NSW and Victoria, there were 102 prosecutions in other jurisdictions, with total fines of \$800,000 – and average of \$7,800.  
(*Comparative Performance Monitoring: Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand*, WRMC August 2002, pp.88-89)
4. In December 2001, the Queensland Department of Industrial Relations produced an issues paper for the review of the *Workplace Health and Safety Act 1995*. The paper noted that:
  - “While the adoption of a more robust penalty regime may provide a greater level of deterrence against wilful and aberrant behaviour, the real effectiveness of the penalty regime can only be properly measured by analysing the size and nature of the penalties actually imposed by the courts.”
  - In 2000/01 the average fine imposed in Queensland on a corporation for breach of the employer’s OHS obligation was \$10,251. The highest fine for breach of the employer’s obligation was \$40,000 in two cases where the breach caused a death. The penalty of \$40,000 represents just 13% of the maximum possible penalty.(*Review of the Workplace Health and Safety Act 1995 – Issues Paper*, Queensland Department of Industrial Relations, December 2001, pp.19-20)
5. The ACTU advocates:
  - (a) increasing actual penalties imposed for OHS breaches by corporations and individual employers;
  - (b) imposition of criminal sanctions, including imprisonment, for corporate recklessness or negligence;
  - (c) establishing and enforcing the accountability of corporations, their

- directors and senior officers;
  - (d) prosecution of government agencies;
  - (e) increased sanctions for repeat offenders;
  - (f) prosecution of both host and agency employers;
  - (g) non-monetary penalties, such as removal of licences; and
  - (h) public exposure, including requiring employers to publicise breaches.
6. The ACTU Policy also seeks the application to OHS of lessons learned from effective enforcement in other areas, such as transport safety. (2000 Congress - Occupational Health and Safety Policy, section 6 – available at <http://www.actu.asn.au/public/papers/2000ohs.html>)
  7. In Australia there is much more effective enforcement of road and air safety, for example, than of work safety. Transport safety agencies recognise more clearly than OHS agencies that enforcement needs to be applied vigorously.
  8. The Royal Commission into the Building and Construction Industry argued that: “In the same way that marked police patrol cars on a highway operate as a salutary reminder of the need to obey the traffic laws, the presence of occupational health and safety officers on site will serve to raise the profile of the importance of workplace health and safety.” (*Final Report*, vol.6, p.83)
  9. There is a greater emphasis on the protection of commercial interests through enforcement than there is on protection of the health and safety of workers. At the national level, organisations such as the Australian Competition and Consumer Commission (ACCC) and the Australian Taxation Office (ATO) have enforcement experience of value to OHS.
  10. There recently has been a welcome examination of penalties for non-OHS offences compared to those for OHS offences.
  11. The 2001 issues paper released by the Queensland Department of Industrial Relations for their review of the *Workplace Health and Safety Act 1995* included comparisons of maximum penalties for breach of the employer’s general OHS duty with maximum penalties applicable in Queensland for offences under other legislation. Queensland had significantly higher maximum penalties under fisheries, environment and dangerous goods legislation than under OHS legislation. (*Review of the Workplace Health and Safety Act 1995, Issues Paper*, Queensland Department of Industrial Relations, December 2001, p.19)
  12. The November 2002 final report of the WA review of the *Occupational Health and Safety Act 1984* notes that: “Existing penalties under the *Occupational Safety and Health Act 1984* are manifestly inadequate and the maximum fine levied so far in Western Australia in the case of a workplace fatality is \$35,000. In recent times a fisherman was fined \$90,000 for not recording his abalone catch and a medical association

reportedly faced fines of \$240,000 for engaging in non-competitive practices. It is difficult to accept that the lives of employees are worth considerably less than abalone records or allegedly inappropriate fee arrangements.” (Robert Laing, *Final Report of the Review of the Occupational Safety and Health Act*, November 2002, p.133)

13. Laing’s report notes considerable public debate over the possibility of prison sentences being applied in some additional areas for corporate financial misbehaviour. The report observes that: “Unless the community considers dollars more important than workplace safety and health, no lesser penalty should apply to culpable executives who ignore their occupational safety and health obligations.” (*Final Report of the Review of the Occupational Safety and Health Act*, November 2002, p.124)

## **K. Precarious Employment**

1. The expansion of precarious employment has had serious OHS consequences. Professor Michael Quinlan, the University of NSW, and colleagues have reviewed international studies. See, for example:
  - (a) Philip Bohle, Michael Quinlan and Claire Mayhew, “The Health and Safety Effects of Job Insecurity: An Evaluation of Evidence”, *The Economic and Labour Relations Review*, June 2001; and
  - (b) Michael Quinlan, Claire Mayhew and Philip Bohle, “The Global Expansion of Precarious Employment, Work Disorganisation and the Consequences for Occupational Health: A Review of Recent Research”, *International Journal of Health Services*, 31 (2) 2001;
  - (c) Michael Quinlan and Philip Bohle, “Precarious employment and work related stress: A review of Australian and international research”, *Occupational Stress Workshop, Academy of Social Sciences in Australia*, 28-29 November 2002.
2. Professor Quinlan recently wrote that there is “a large and compelling body of evidence that a number of pervasive flexible work arrangements pose a serious threat to the maintenance of existing standards of OHS”. Professor Quinlan reported, for example, that:
  - (a) sub-contracting, labour leasing and much home-based work creates more complicated webs of legal responsibility;
  - (b) the short-term nature of temporary employment affected the attitude of employers to the need to provide adequate induction and training and to ensure OHS representation; and
  - (c) use of sub-contractors causes problems in obtaining representative input from workers.(Michael Quinlan, “The Global Expansion of Precarious Employment: Meeting the Regulatory Challenge”, available at [www.actu.asn.au/public/ohs/quinlan.html](http://www.actu.asn.au/public/ohs/quinlan.html))
3. Barriers to the effectiveness of occupational health and safety management systems (OHSMS) due to fragmentation in workplaces have also been reported. These include:
  - (a) difficulties arising from inconsistencies between the OHS



management systems of the sub-contractor and the principal contractor; and

- (b) the 'disorganisation of work' associated with contracting which may weaken existing OHSMS.

(Clare Gallagher, Elsa Underhill and Malcolm Rimmer, *Occupational Health and Safety Management Systems: A Review of their Effectiveness in Securing Healthy and Safe Workplaces*, NOHSC, April 2001, p.38)

- 4. The problems of precarious employment under a single jurisdictional regime are compounded if different legislative regimes apply to different employers in a state or territory.

#### **L. Doubled Legislative Regimes**

- 1. Health and safety protection would be undermined if different employees at a worksite or related worksites in the same state or territory are subject to different legislative provisions of different governments. The Royal Commission into the Building and Construction Industry argued that: "the confusion that inevitably would arise from having two systems on one site would compromise and undermine safety on that site". (*Final Report*, vol.6, p.22)
- 2. Such different regimes would escalate the complexity as well as undermining the effectiveness of OHS arrangements. Under doubled regimes, for example:
  - (a) different employers interacting at the same workplace would have responsibilities under different regimes;
  - (b) different employers would be prosecuted under different regimes for offences associated with the same OHS failure; and
  - (c) workers would be subject to different legislative regimes at different times, and to different legislation to others in the same workplace.

#### **M. Terms of Reference**

- 1. The only specific references to OHS that the Productivity Commission has been given by the Commonwealth Government are 9 (a) and 9 (i), apart from 9 (l) which concerns frameworks.

##### ***Term 9 (a)***

- 2. The Commission has been asked to identify and report on a consistent national definition of employer, employee, workplace, and work-related injury, illness and fatalities for workers' compensation and OHS.
- 3. The National Research Centre for OHS Regulation was requested by NOHSC to develop a description and comparison of existing work-related definitions for OHS and compensation. In April 2002, the Centre published its report, *The Legal Concept of Work-Related Injury and Disease and Workers Compensation Systems*, by Alan Clayton, Richard

Johnstone and Sonya Sceats.

([http://www.ohs.anu.edu.au/publications/pdf/working\\_paper\\_3.pdf](http://www.ohs.anu.edu.au/publications/pdf/working_paper_3.pdf))

4. The authors noted that:  
“...the notion of work-relatedness, and in particular the manner in which this concept has been utilised – either explicitly or implicitly – as a control device in setting system boundaries and mandating threshold requirements for entitlement or system coverage, is one that varies according to context and time. Particularly in the workers’ compensation context, this variation represents the playing out of political and economic struggles and their reflection in the balance between the broadening of entitlement (both in terms of access to, and level of, compensation benefits) on the one hand and scheme affordability (in terms of the level of employer premiums) on the other. In the OHS statutes, there has been a significant expansion in regulatory reach, but the precise scope of these developments, and the concepts upon which they have been built, have varied from jurisdiction to jurisdiction.” (p.3)
5. They also pointed out that:  
“The duties and obligations to be found in the general duties and regulations in each of the OHS statutes are notably different from the workers’ compensation and OHS injury, illness and dangerous occurrence reporting provisions discussed so far in this paper. Whereas the workers’ compensation and OHS reporting requirements are triggered by injuries and disease (or, in the case of OHS reporting requirements, ‘dangerous occurrences’ not resulting in injury or death), the standards in the OHS statutes are preventive, and require OHS duty holders (see below) to remove or reduce work risks arising from workplace hazards.” (p.39)
6. The authors conclude that:  
“Any attempt to identify a particular notion of ‘work-relatedness’ characteristic of workers’ compensation regimes is an illusory hunt for an elusive quarry since there are many (at least seven) different notions of ‘work-relatedness’, the resort to which varies over time and in respect of context. There are similar difficulties in attempting to isolate the concept of work-relatedness in the OHS statutes. In part this is because the reach of such statutes is broader than that of workers’ compensation statutes, in that they generally go beyond the employment relationship, and are generally not confined to the actual incidence of illness, injury or death.” (p.45)
7. In July 2002, the NOHSC Information Committee, which has ACTU representation, agreed that NOHSC not further attempt to reach an “agreed definition of work-relatedness”.

### ***Term 9 (i)***

8. Under 9 (i), the Productivity Commission has been asked by the Commonwealth Government to report on “options to reduce the

regulatory burden and compliance cost imposed on businesses... by the existing legislative structures for workers' compensation and OHS, within the context of the national objective to improve the workplace health and safety of workers".

9. However, the Productivity Commission's October 2003 Issues Paper raises the issue of "reducing the regulatory burden imposed on businesses" within "the context of maintaining or improving work-related health and safety outcomes". (*National Workers' Compensation and Occupational Health and Safety Frameworks – Issues Paper*, Productivity Commission, April 2003, p.10)
10. Maintaining work-related health and safety outcomes is inconsistent with the national OHS objective contained in the National OHS Strategy.
11. The *National OHS Strategy 2002-2012* outlines initial national OHS targets, which are to:
  - sustain a significant, continual reduction in the incidence of work-related fatalities with a reduction of at least 20 per cent by 30 June 2012 (and with a reduction of 10 per cent being achieved by 30 June 2007); and
  - reduce the incidence of workplace injury by at least 40 per cent by 30 June 2012 (with a reduction of 20 per cent being achieved by 30 June 2007).
12. These national targets are "a step towards achieving a national vision of Australian workplaces free from death, injury and disease". (*National OHS Strategy, 2002-2012*, p.3)
13. The National OHS Strategy outlines for OHS the relevant "social and economic goals of the Commonwealth Government", in terms of cl.8(b) of the *Productivity Commission Act 1998*, as well as the "national objective" referred to in the Terms of Reference provided for the Inquiry.
14. The national objective is to reduce the burden of injury, illness and disease, not to "reduce regulatory burden and compliance costs imposed on business".