Productivity Commission Interim Report

National Workers' Compensation and Occupational Health and Safety Frameworks

ACTU Submission

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Contents

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A. TERMS OF REFERENCE

1. The Productivity Commission ("Commission") has been asked to report on options "*within the context of the national objective to improve the workplace health and safety of workers*". (Terms of Reference (i))

2. The *National OHS Strategy 2002-2012* outlines initial national OHS targets, which are "*a step towards achieving a national vision of Australian workplaces free from death, injury and disease*." (*National OHS Strategy 2002-2012*, p.3)

3. The national objective is to reduce death, injury, and disease, however, the Commission's Interim Report ("Interim Report") is not focussed on action to reduce death, injury, and disease but rather to reduce compliance costs on business.

4. The Commission has been asked to address the boundaries of responsibility for the costs of work-related injury/illness and fatalities between the employer, employees and the community. (Terms of Reference (j))

5. The Department of Employment and Workplace Relations ("DEWR") advised the Commission that the economic cost of workplace accidents is over $30 billion per annum (Interim Report, p.39). The ACTU understand that the National Occupational Health and Safety Commission (NOHSC) is developing an estimate of the total cost of work-related injury and illness. The Commission notes that workers' compensation premiums totalled $6 billion in 2000-01. The Commission, however, emphasises the costs to employers rather than to workers in its Interim Report.

B. INCIDENCE OF INJURY AND DISEASE

6. The Interim Report, at 3.1, does not accurately reflect the incidence of death, injury and disease.

7. The July 2003 ACTU Submission advised the Commission of Commonwealth Government reports on:

   (a) deaths (paragraphs A 2-3);
   (b) work-related conditions (paragraphs A 6-7); and

(c) international comparisons (paragraph A 8).

The Commission has ignored this information and its assessments does not address, for example, deaths from diseases.

8. Dr Jukka Sakari Takala of the International Labour Organization (ILO) has since reported at the *Australian OHS Regulation for the 21st Century* conference that the ILO estimates that work causes 7,000 deaths per annum in Australia, largely from disease.

9. The Commission should not claim that "*the incidence of work-related fatalities, injury and illness has been declining*." (Interim Report, p.39) This is based on compensation data, which covers a decreasing proportion of death, injury and disease (eg. through growth in self-employment in hazardous industries).

C. REGULATION

10. The Commission advocates restricting any form of prescriptive regulation "*to a small number of clearly agreed areas…*" (Interim Report, p.65) The Commission does not explain why it considers that this would reduce the incidence of death, injury and disease.

11. The Commission ignores the position of the parties to the *National OHS Strategy 2002-2012*, that:

> *There must be a balance between allowing for flexibility in achieving the required outcomes and prescribing certain actions or processes where necessary.* (*National OHS Strategy*, p.10)

11. The Commission relies on the observations of the Royal Commission into the Building and Construction Industry ("Royal Commission") about regulation (Interim Report, p.41). However, it does not report that the Royal Commssion 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.*" (Royal Commission, *Final Report*, vol.6, p.26)

12. The Commission notes claims made by the Western Australian Chamber of Commerce and Industry to Mr. Laing during the review of WA OHS legislation ("Laing Review") (Interim Report, p.42). However, the Commission does not report the Laing Review's observations that:

> *A review of the material suggests that the prevailing attitude is that some measure of prescription is important for securing occupational safety and health* (Laing Review, p.222)

and

> *There seems little argument that for cases where the risks and appropriate control measures associated with standards for a specific hazard are well known and accepted or where it is necessary to protect the public, regulations should specify prescriptive minimum standards.* (Laing Review, p.222)

D. OHS REPRESENTATIVES AND COMMITTEES

13. The Commission does not report on the presentations to the *Australian OHS Regulation for the 21st Century* conference, held in July 2003.

14. Presentations at the conference pointed out that:

    (a) Health and safety performance is better where joint arrangements are in place and/or where unions are involved in worker representation in workplaces. (Professor David Walters, p.9)

    (b) Preconditions for effective representative arrangements include:

    - legislative provisions for worker representation actively supported by regulatory inspectorates; and
    - support for workers' representation from trade unions outside workplaces, especially in the provision of information and training.(Professor David Walters, p.11)

    (c) Sustainable health and safety arrangements in small firms are promoted through the use of regional health and safety representatives and the legislation and collective agreements that underpin their activities. (Professor David Walters, p.18, also Professor David Walters and Dr Felicity Lamm, pp.20-21)

E. ENFORCEMENT

15. The Interim Report supports differing emphases between enforcement and education, depending in part on the capacity of small business (Interim Report p.46). This does not recognise that education about health and safety is not an alternative to enforcement. Enforcement of criminal law should not depend on the capacity of the criminal.

16. The enforcement of occupational, health and safety laws and other related legislation sends a powerful and effective message to employers that the failure to abide by occupational health and safety laws has serious consequences.

17. A stronger point should also be made that more and more workers are employed by small business and as such just because a business is "small" should not necessarily justify a more lenient approach when it

comes to OHS compliance. There may be a need to assist small business in meeting their obligations in a practical way, but in the event of non-compliance the law should be upheld, particularly by regulators.

18. The Commission claims that the Royal Commission shares this view, on the basis of a quote from Professor Richard Johnstone which is contained in a report by Barry Durham, a consultant to the Royal Commission (Interim Report pp.46-47).

19. The Royal Commission concluded that:

> *There is persuasive support for the view that the extent of compliance with occupational health and safety obligations is strongly influenced by a reasonable expectation of the likelihood of being inspected, prosecuted, convicted and having a meaningful penalty imposed. The presence of occupational health and safety inspectors is important.* (*Final Report*, vol.6, p.83)

18. In his June 2003 submission to the Commission, Professor Johnstone invited the Commission to take full account of the proceedings of the *Australian OHS Regulation for the 21st Century* conference, July 2003. In his presentation to the conference, Professor Johnstone observed that:

    (a) There is very little, if any, empirical evidence that the 'advise and persuade' mode does reduce workplace injury and disease. (Johnstone Presentation p.9)

    (b) There must be higher maximum fines and a broader range of sanctions, including possible imprisonment for culpable corporate officers. (Johnstone Presentation p.46)

    (c) Prosecutions should focus not only on punishing organisations for contraventions resulting in illness, injury or death, but also on organisations which expose workers to significant risk of injury, illness or death. (Johnstone Presentation p.49)

19. The Commission quotes the enforcement policy of the South Australian Workplace Services (Interim Report p.44), without acknowledging that:

    (a) South Australia prosecuted one OHS case in 2000-01. (WRMC, *Comparison of Occupational Health and Safety Arrangements in Australia and New Zealand*, August 2002, p.88)

    (b) In June 2003, Michael Wright, the SA Minister for Industrial Relations, expressed concern at "*the unacceptably high toll of workplace injury, deaths and disease*", and funded a 50% increase for the current year in the number of OHS inspectors. (News Release, 24 June 2003)

F. CHANGING WORKING ARRANGEMENTS

20. The July 2003 ACTU submission to the Commission pointed out that:

> *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.* (ACTU submission, K.4)

21. The Commission has ignored this in its Interim Report. The Commission has not addressed health and safety problems arising from changing working arrangements.

22. The Commission quotes from Michael Quinlan's submission, including his review of 188 studies on changing work arrangements and OHS. It is inaccurately reported in the Commission's Interim Report as "*more than 90 Australian and international studies.*" (Interim Report, p.51)

23. In his presentation to the *Australian OHS Regulation for the 21st Century* conference, Professor Quinlan made a number of proposals, including action to:

    (a) rectify design flaws in legislative duties limiting coverage of certain sub-contracting arrangements; (Quinlan Presentation p.6)

    (b) provide regulations, codes of practice, guides and other information clarifying responsibilities in relation to particular work arrangements or categories of workers; (Quinlan Presentation p.8)

    (c) impose and enforce minimum standards in government tender requirements; (Quinlan Presentation p.14)

    (d) regulate supply chains, using contract-tracking mechanisms, licensing/registration, guaranteed union and community vetting, and integrated multi-agency enforcement regimes; and (Quinlan Presentation p.16)

    (e) use business, taxation, industrial relations and labour market laws and policy to ensure effective protection of the rights of contingent workers. (Quinlan Presentation p.18).

G. OHS AND INDUSTRIAL RELATIONS

24. The Commission does not recognise that health and safety and industrial relations are intrinsically linked. Working conditions determined through industrial relations impact on health and safety. For example, excessive working hours and work intensification impact on both safety and health.

25. The August 2003 ACTU Congress adopted an OHS Policy which

provides that unions should promote health and safety in workplace organising and recruitment activity, including through linking the activities of workplace delegates and health and safety representatives, and through provisions in enterprise agreements and awards which advance health and safety.

26. The Commission also quotes the Laing Review which, unlike the Royal Commisison, considered that:

> *there is a legitimate basis for continued payment of wages to employees who cease work because of a genuine and serious safety concern.* (Laing Review)

27. The Laing Review also supported the WA Industrial Relations Commission being able to deal with disputes over health and safety matters. (Laing Review, p.108)

28. In NSW the Industrial Relations Commission of NSW play an integral role in resolving occupational health and safety disputes between unions and employers. It is an effective forum for the parties to address occupational health and safety issues and implement workplace changes in a cooperative manner.

H. NATIONAL COORDINATION

29. The Interim Report misunderstands the rationale and functions of NOHSC.

30. The experience of the National Road Transport Commission (NRTC) and Food Standards Australia New Zealand (FSANZ) (Interim Report, pp.77-80) do not provide a basis for the removal of government, employer and union representatives from NOHSC.

31. Professors Bohle and Quinlan have noted that:

> *The establishment of tripartite bodies to review and make recommendations on OHS standards was a central feature of post-Robens legislative reforms.* (P.Bohle and M.Quinlan, *Managing Occupational Health and Safety*, 2000, p.276)

31. The 1983 *Statement of Accord* by the ALP and ACTU provided for the establishment of NOHSC, to involve employers and unions in setting OHS standards at the national level. (*Statement of Accord*, 1983, p.12)

32. In its May 1984 Report, the Interim National Occupational Health and Safety Commission stressed the importance of tripartite decision-making, reporting that:

> ***1.27*** *A tripartite approach will serve to heighten awareness amongst employers and employees of their individual and*

> *collective roles in creating and maintaining healthy and safe working environments. The role of governments in providing for appropriate consultative mechanisms should be to ensure that balanced groups of those directly responsible and directly affected by decisions in this area are involved in the decision-making process.* (1984 Report, p.4)

33. The Interim Commission added that:

> ***1.28*** *Two distinct processes of participation in decision making in occupational health and safety can be identified.*
>
> ***1.29*** *One is the assessment of the nature and probability of a risk to health and safety, and provision of options for eliminating or controlling the hazard. This process is essentially a scientific or technical activity in which further information and knowledge are generated.*
>
> ***1.30*** *The other is the social process of determining the degree of risk to which a population, work group or individual worker is to be exposed. This decision making should be in the hands of a wider tripartite group; it should not be left exclusively to experts and scientists. Individuals or groups who are directly affected by a particular work process or hazardous substance should participate in decisions about the acceptability of the risk. Such decisions can be made only where there is adequate information and knowledge.* (1984 Report, p.4)

34. The Interim Commission noted that governments, employers, employees and others all have particular functions and responsibilities. The Interim Commission added that:

> ***1.33*** *A policy which assigns such responsibilities must also provide for the consultative mechanisms for exercising those responsibilities. These may include tripartite committees at the government level, and occupational health and safety committees and representatives at the enterprise level.* (1984 Report, p.4).

35. The functions of NOHSC are set out in s.8 of the Act. These are not distinct from the involvement in NOHSC of representatives of government, employers and unions. The Productivity Commission is mistaken in claiming that there are such separate roles. (Interim Report, p.54)

36. The OHS Policy adopted by the August 2003 ACTU Congress supports the revitalisation of NOHSC into a body which develops contemporary health and safety standards and codes of practice. [ACTU OHS Policy, 4 (e)] The Union support NOHSC as a body to be properly resourced to continue valuable work in the field of OHS research and development.

I. NATIONAL OHS STRATEGY 2002-2012

37. The Commission does not acknowledge that its recommendations conflict with commitments by governments, the ACCI, and the ACTU under the *National OHS Strategy 2002-2012* ("Strategy"). (Strategy, pp.iii,v)

38. The Commission does not report the agreement of Workplace Relations Ministers that the Strategy will operate for ten years, and be monitored by the WRMC. (Joint Communique from Commonwealth, State and Territory Workplace Relations Ministers, 24 May 2002)

39. The Interim Report also does not acknowledge that the Strategy, like the framework recommended to the 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)

40. The recommendation in the Interim Report, that corporations be able to elect to be covered by Commonwealth OHS legislation (Interim Report p.84) is inconsistent with the Commonwealth Government's preference for a cooperative approach, leaving primary responsibilities for health and safety legislation with the states.

41. The Commission does not recognise that the nine "*Areas requiring national action*" are an integral component of the Strategy which has replaced the 1999 National Improvement Framework. (Strategy, pp.10-12)

42. The ACTU submission pointed out to the Commission that:

    (a) Governments should learn from their achievements with road safety, where there are different roles for the Commonwealth and the states. (ACTU submission, D 1-10)

    (b) The ACTU, like other parties to the Strategy, recognises that there will be division of responsibilities between tiers of government in implementation of the Strategy. (ACTU submission, E 1)

    (c) The Strategy establishes a central role for NOHSC. (ACTU submission, E 3-4)

43. The Commission is not clear on why there has not been greater progress towards implementation of national standards (Interim Report p.60). This problems with implementation are not of NOHSC's making. The July ACTU submission pointed out that, in May 1997, the Labour

Ministers Council (now the WRMC) agreed to less emphasis on development and/or promulgation of national OHS standards and codes of practice. The Labour Ministers Council saw this as a response to the 1995 Industry Commission Report, *Work Health and Safety*. (Labour Ministers Council, Joint Communique, 30 May 1997)

44. The ACTU also provided the Commission with the example of the construction industry standards and codes of practice, which were opposed by one Commonwealth Minister, and deferred at the request of his successor (ACTU submission, F 3-9). The ACTU also advised the Commission of the Commonwealth's resistance at NOHSC to regulatory measures for chrysotile. (ACTU submission, F 16-17)

J. NATIONAL FRAMEWORK MODELS

45. The July ACTU submission did not support "*a common OHS regime across Australia*", as claimed by the Commission. (Interim Report, p.65)

46. The ACTU is a party to the Strategy, which reflects a nationally coordinated approach.

47. The ACTU supports the development and implementation of national standards and codes of practice, and the adoption of national standards in a consistent manner.

48. The union movement will seek adoption by states and territories of standards, codes of practice and guidelines where there are no national standards or codes. (ACTU OHS Program 2003-2006, paras 5.4 – 5.7)

K. COMMISSION'S FRAMEWORK

49. The Commission considers that corporations should be free to choose to operate under either a Commonwealth or a state OHS regime. (Interim Report, p.84)

50. Choice of regime for corporations under criminal law is a radical position. The Commission does not claim that this would improve OHS. Similarly, it could not be claimed that providing thieves with a choice of jurisdiction would reduce theft.

51. The Commission does not acknowledge that different health and safety rules and regulations for either different worksites or the same worksite would create major problems.

52. The July ACTU submission pointed out that:

> *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)

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.

53. The Commission advocates "*a single uniform national OHS regime*" as well as competing regimes. (Interim Report, p.81) The Commission does not outline the features of such a national regime. It notes the model for OHS regulation put forward by the National Research Centre for OHS Regulation, but does not indicate whether it envisages that the national model would adopt the best provisions from current OHS statutes. (Interim Report, p.72) Any move to a national framework would be resisted in NSW if it involved a watering down of current NSW Legislation.

54. The Commission is unduly hopeful that the states would support an inter-governmental agreement under which they adopt legislation, regulations and codes of practice developed by a commission from which they are excluded. (Interim Report, p.81)

55. The Commission envisages that the WRMC would receive reports from four bodies – NOHSC, a departmental heads committee, a technical expert committee, and an employer/employee representatives committee. These four bodies operating separately from each other would each be seeking the support of Ministers. This would impair national coordination, compared with a single body (NOHSC), which comprises representatives of government, employers and unions, and has access to technical experts.

L. WORKERS COMPENSATION

56. If accidents or hazards in the workplace require workers to spend time away from work then workers should be appropriately compensated for both wages they could have expected to earn if they were able to remain

at work and for non-economic loss.

57. If injured workers require medical assistance then this assistance should be of the highest standards available and tailored to the needs of individuals.

58. Injured workers require unconditional guarantees that when they are able they can return to the workforce in the knowledge that their job is still open for them, or failing this, an equivalent and meaningful job is open for them.

59. Workers compensation insurance is a system that has its origins as social legislation to compensate workers and their families for their loss of earning capacity as a result of injury or illness. Legislation exists to assist workers and their families to cope with the after-effects of an occupational injury, illness or death. It is social legislation not an insurance model or business incentive program.

60. Unions oppose in principle the concept of self-insurance because we believe the system should be one in which everyone is contributing to and part of the same scheme.

61. Accordingly we believe the starting point should be that self insurance within the workers compensation system is a privilege not a right. Employers wishing to become or remain as such must earn that privilege by bringing to workers compensation systems a superior performance in all areas of injury prevention, claims management and occupational health and safety standards. Self insurers should be role models for other employers in terms of workplace safety, claims management and occupational rehabilitation by virtue of their special status.

62. There is insufficient monitoring of the performance of self insurers. Although the self insurance system operates on the premise that if employers are able to financially manage their claims then better standards of OHS will result, the major experience of unions with self insurers is that this is not the case.

63. Union experience of self insurers is that few could be regarded as role models providing a superior service to workers. In a bid to save money self insurers can take a very mercenary approach to their injured employees.

64. Since Federation each jurisdiction has developed a unique workers compensation scheme based primarily on the industry mix, economic activity, population and political and legal structures of each jurisdiction. This has resulted in differences in each jurisdiction between benefit levels and structures, common law access, premium design and collection methods and administration.

65. The direct comparison of benefits across systems for the purposes of

determining consistency is a spurious exercise if isolated from the other essential elements of total scheme design.

66. National consistency is desirable. National consistency does not mean a national workers compensation system. National consistency objectives and policies should be developed through a tri-partite representative body of employer, employee and government members.

67. We reject the adoption of 'lowest common denominator' worker benefits in the pursuit of 'national consistency'. We believe that the proposals contained in the Interim Report will give rise to this.

68. Access to common law damages is a fundamental element of any workers compensation system. Awards at common law can more closely reflect community standards and expectations with regard to proven employer negligence. Awards at common law also provide scope for those more seriously injured as a result of the negligence of their employer to exit the workers compensation system while maintaining financial surety.

69. Advice to the Commission from the Australian Government Solicitor is that the corporation's power will not provide for complete coverage of Australian workers (Interim Report p 83). In 2000 the DEWR released a discussion paper on a similar use of the corporation's power to establish a national industrial relations system. DEWR reported that:

> *The key features of a corporations power based system could be . . . an expanded federal workplace relations system that could cover the vast majority of Australian employees (State workplace relations systems would cover other employers and employees). As many as 85 per cent of Australian employees could be covered by the federal system.* (A New Structure, Appendix A, Key Features of a New System)

70. We reject the proposal that big businesses could abandon state schemes for self insurance, Comcare or the private insurance market. In doing so they would leave behind their long-tail liabilities to be covered by those employers confined to business within the borders of a particular jurisdiction, too small to acquire national self insurance and not a constitutional corporation or a public sector employer.

71. The shift of companies, generally large employers, from statutory funds to specialised insurer status would have the effect of diluting the pool of funds available for workers compensation generally. There is no doubt that there is a level of cross subsidisation by large employers. The exit of employers from the collective pool would place greater financial pressures on statutory schemes and no doubt force State Governments to reduce benefits or increase premiums. History shows it is usually the former that is adopted

72. We are concerned that the proposals would make small and medium sized business and State Government agencies who remained in State systems liable for additional costs as a result of the reduction of premium cross-subsidising through a diminished premium base. It is our experience that at times of perceived financial crisis Governments' will either reduce injured worker benefits or increase employer premiums.

73. We reject the notion the ' *. . . multi-state firms . . . face significant compliance costs from having to deal with multiple workers compensation schemes and OHS regimes.*' It is totally unreasonable and rejected by unions that the optimum mechanism to reduce employer compliance costs is to reduce worker rights.

74. The Interim Report expresses a preference for "private underwriting". The grounds given for this preference are that risk is then accepted by capital markets and not taxpayers. However, the political reality is that ultimately the public purse will pay the bill for workers' compensation. The spectre of incapacitated workers' denied benefits would be too difficult for any government to contemplate. As a result the taxpayer will ultimately be at risk if private underwriters default. Accordingly it is bad public policy to return profits to investors who in reality take no risk.

75. The Interim Report rejects common law remedies because: it does not necessarily act as a deterrent to unsafe work practices; there can be significant legal costs; and it may impede early return to work schemes. These are factors for consideration but they are not in themselves conclusive. The most telling argument in favour of common law is that the law seeks to put the injured worker who can establish fault back in the position that he or she would have been but for the injury. This means considering economic loss, medical costs, pain and suffering, adjustments to house or car payments and if need be, full time round the clock care in the worker's house. The decision about common law is made by a judge who is independent. In suggesting and an end to common law the rhetorical question must be asked: why should workers incapacitated at work through the fault an employer not be properly compensated ?