°` **Department of Consumer and Employment Protection**
f Government of Western Australia

WorkSafe

Your ref:
Our ref: 099182
Enquiries:

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National Workers' Compensation and OHS Inquiry
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Mr Plunkett

PRODUCTIVITY COMMISSION REPORT: INTERNATIONAL WORKERS' COMPENSATION AND OCCUPATIONAL HEALTH AND SAFETY FRAMEWORKS

Thank you for the opportunity to provide comment on the interim report on workers' compensation and occupational health and safety frameworks. While my Department is not seeking to participate in the public hearings at this point in time, I will take this opportunity to present a Western Australian occupational safety and health perspective on the proposals, based on my experience in the occupational health and safety environment.

In general terms the Department of Consumer and Employment Protection supports moves toward national consistency of arrangements. Not-withstanding it is considered important to retain some flexibility at the local level in order to respond to local issues or local imperatives. To this extent it is considered the report pays insufficient regard to the positive aspects of localised arrangements and tends to overemphasise the value of a `one size fits all' approach.

In addition, the report does not sufficiently recognise the considerable progress made with the commitment, by all members of the Workplace Relations Ministerial Council (WRMC) to a National Occupational Health and Safety Strategy (National Strategy). The importance of this agreement should not be underestimated and it is the Strategy that can be used as the key driver of consistency (and uniformity where practical) across the nation.

In addition, the report pays little attention to the value of arrangements whereby occupational health and safety (ohs) and workers' compensation arrangements are separately administered. Consequently, it tends to focus on the problems of the larger (multi-State) employers and over-states the extent to which there are variations between the schemes.

As is demonstrated in Table 3.1 (page 48) of the report, Western Australia is one of only two jurisdictions where the separation exists. The interim report acknowledges that there is a greater degree of co-operation, consistency and progress in the occupational health and

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safety area than in the workers' compensation system but then tends to dismiss this in favour of a national system.

The solution to providing local flexibility is seen in ensuring a regulatory framework is outcomes based with prescription only in essential areas, eg. hazardous substances. While philosophically sound, practical difficulties are envisaged, particularly in the time taken to respond to issues and/or achieve consensus on uniform arrangements. Cases in point are current moves to strengthen certification requirements. While it is recognised that there are weaknesses that potentially place the credibility of arrangements under threat, current NOHSC processes mean it will take almost twelve months to effect the change (which all the States have now agreed to). In another context, debates related to national construction standards emphasise a considerable divergence of views, which in part relate to different construction methods utilised across jurisdictions and the need for systems to recognise such differences. Quite frankly the example of the National Road Transport Commission is not particularly judicious - as there is little evidence to suggest that the arrangements have led to significant and timely progress. A case in point would be fatigue management for commercial vehicle drivers.

From a Western Australian perspective the problems of 'multi-State' operations are less evident than on the east-coast, and the `one size fits all' approach being promoted is not necessarily the answer.

For the statistically minded, the current system in Western Australia, where there is separation of prevention and compensation operations, has delivered, since the new *Occupational Safety and Health Act* came into operation in 1988, a 60% decrease in the number of lost time injuries and diseases. In addition, there has been a decline of over 40% in the rate of fatalities. Subsequent reviews of the WA legislation (and there have been three), have vindicated the approach contained within the legislation as being not only appropriate but delivers better outcomes in terms of the working environment. I note in the report that a number of references have been made to Commissioner Laing's report on the *Occupational Safety and Health Act* and the system operating in Western Australia.

In quoting LTI and Disease data I think it important to note in Western Australia this reflects one day or more off work. In other jurisdictions it is either five or even ten days.

In terms of the interim recommendations, I comment as follows:

I do not agree that there is a need to significantly change the structure and direction of NOHSC. The model being proposed will, I believe, create greater confusion and in effect undo much of the good work that has been achieved as a result of the development, acceptance and endorsement of the national strategy. The National Commission is delivering outcomes at last. Most of its failures of the past have been documented and many of these can be traced back to its endeavour, in developing national standards and codes of practice, to always try and re-define duties of care in various States and re-define terminology used in various jurisdictions. This is why many of the States have not picked up the standards in full and in some cases have omitted key elements.

I suspect that we have reached a time where a certain maturity has evolved which will ensure under the national strategy that NOHSC will develop standards which will be

relevant and can be easily transported into each jurisdiction in fairly much the same way that they are promulgated at the Federal level.

Despite my reservations at the core elements of the report with respect to occupational health and safety arrangements, I believe that improvements can be made to the occupational health and safety framework. These should commence with changes to the *National Occupational Health and Safety Commission Act* as opposed to focussing on State jurisdictions. As previously indicated a recent issue arose in terms of the certification standard. This standard was introduced in 1995 and under COAG principles would be subject to review in 2005. Despite there being a "uniform" standard, an issue arose whereby a number of interpretations were being placed on that standard around the land which in some instances led to allegations of corruption perpetrated by registered assessors. When the concerns came to light the jurisdictions met to develop a position and agreed on a process to be adopted. Each jurisdiction has committed to effect the necessary changes and are moving to do so. At its October 2003 meeting, NOHSC included the standard for review however as the Commission is not scheduled to meet again until April 2004 the matter is unable to be referred (as the legislation requires) for public comment for three months. Consequently, in practical effect there will be a minimum twelve-month delay, before changes aimed at restoring the integrity of the system can occur.

The States on the other hand agreed that urgent action needed to be taken on three separate issues despite the fact they believe the nationally agreed Standard remains the most appropriate vehicle through which to guide reform. These corrections can be undertaken quickly and specifically in each jurisdiction. Federally, the current Act as it stands, would not allow this to happen.

This example of the inflexibility of the national approach exemplifies why I believe some jurisdictions are technically out of step with other jurisdictions. I would suggest many of the concerns and issues, which lead to inconsistencies across the jurisdictions, arise as a result of the in-built inflexibility contained within the Federal National Occupational Health and Safety Commission legislation. Therefore I submit that the focus of attention should be on this piece of legislation, especially where we are talking about the development of codes and standards, to provide for greater flexibility to allow issues to be resolved quickly and any corrections to be made to standards in such a manner that delivers a very speedy outcome.

As a result, I do not see any value in creating three separate committees to assist Workplace Relations Ministers' Council (WRMC) when essentially the committees that are being proposed really reflect little more than a break up of the existing NOHSC environment.

The report unfortunately, and probably unfairly, prescribes a role for WRMC which is quite inappropriate. WRMC meets twice a year for possibly five to six hours in total of which health and safety and workers compensation are but one item on an industrial relations agenda.

It may be that a more strategic approach would be to allow NOHSC to meet more often to be far more effective. Having been involved in the occupational health and safety environment

over a period in excess of twenty years I believe that since the mid eighties and early nineties that a certain maturity has occurred, which, with the framework provided by the national strategy, will allow this body to develop better working environment outcomes.

Further, the model being proposed is drawing upon the *National Road Transport Commission* and the *Food Regulation Agreement Act of 2002*. Unfortunately, I do not believe either of these two are good models on which to draw comparisons. The Road Transport Commission has been operating for some time and different systems operate in different States. Logbooks are a common curse in the eastern seaboard and do not apply in Western Australia. Fatigue management has been introduced in Western Australia using the occupational health and safety legislation but has not been introduced in other States. Further, I can see no value in the States being asked to contribute further funds to agree to a system which in all probability will not deliver any better outcomes.

This does not mean that the States should not be expected to work toward consistent (and even uniform) outcomes. For instance, as the States have fairly consistent general duty of care legislation, NOHSC should be able to develop a template duty of care legislation, with consistent definitions and with consistent penalties to be incorporated into law into each of the States.

Throughout the report, comments have been made to the effect that it is estimated the cost to comply with multiple workers' compensation and occupational health and safety arrangements adds about 5-10% to the cost of workers' compensation premiums. I find this is a little confusing. The general duty of care legislation is fairly consistent around the land. The duty of care owed in Victoria is no less than the duty of care owed in Western Australia so I cannot see where people can infer that occupational health and safety legislation around the land contributes to increased costs. Different workers' compensation systems delivering different benefits have the ability to increase the costs but this has nothing to do with the obligation in terms of satisfying duty of care requirements. This is further emphasised by the fact that reciprocal arrangements exist under mutual recognition obligations so that design reviews and like processes undertaken in each State are accepted around the nation.

In offering suggestions for improvements to the system, one of the key benefits the Productivity Commission could explore would be the effect of reversing the onus of proof under general duty of care legislation.

In my view, this would then put the onus on each and every employer to provide a safe system of work. In turn, in the event of an accident/incident, they would have to demonstrate they were operating to the appropriate system for their industry. Western Australia has legal advice which suggests that the present law, for the purposes of a prosecution for a breach of duty of care obligations under most Occupational Health and Safety Statutes, requires the prosecutor to carry the onus by establishing that there were "practicable" procedures available, different to those adopted by the employer, which are said to fall short of the standard required by the Statute. The inherent difficulty of proving what is tantamount to a negative and the fact that an accident itself is not evidence that an alternative practicable work system was available, mean that it is often difficult to secure a conviction, even when one ought properly be secured.

Consequently our advice suggests that the policy of the Occupational Health and Safety legislation would be better and more practically served by shifting the onus onto the employer to prove that the relevant working environment was "so far as practicable" hazard free.

It is my contention that this would largely reduce the level of regulation required, as most industries would be working towards developing industry specific codes of practice with which to comply. Such a change, introduced in tandem with a review of the evidentiary status of codes of practice, could bring substantial benefits.

Together with refinements to the National Commission's legislation to ensure that any changes to current standards or codes could be effected in a quick and responsive manner by a NOHSC body, would substantially reduce the frustration of States who, in the absence of such flexibility break ranks and introduce their own laws. It should be acknowledged that political imperatives do drive legislative reform and no Government, regardless of political persuasion or sphere of influence (State or Federal) is immune to the pressure to be seen to respond in a timely manner.

It is my contention that there is currently a stronger commitment to national consistency than I have witnessed in my time (over two decades) in the occupational health and safety arena. The national strategy is a key to sustaining this commitment and to potentially weaken its value through an imposed centralised system would not be advantageous.

Finally I would take this opportunity to note some of the inconsistencies that appear in the interim report:

Unfortunately, the interim report wrongly asserts that "NOHSC develops draft legislation". NOHSC's role is centred on the development of national standards and codes of practice (reference page 4).

2" ^{d} **dot point:** The Commission surveyed the members of the business Council of Australia (page 12). Two-thirds of respondents consider that non-uniformity imposes costs on their operation but only three were able to quantify the costs - hardly a justification for basing a premise that occupational health and safety leads to increased costs.

3rd dot point, pages 14 & 15: Differences Between Jurisdictions - the Case for National Frameworks - Comment:
All examples are to do with workers' compensation, not to do with health and safety.

In addition I provide further comments:

Page 53:

- Overlooked the legislative provision of S.28A of the *Occupational Safety and Health Act* for both employer and employee (Disentitled Employee and Employer commits and offence if they pay wages).
- NOHSC does not develop regulations.

Page 60: Peak Employers Organisations Contribute to Fragmented Approaches, eg:

(a) Western Australian employers are unlikely to support a uniform approach to the issue of forklift certification certificates;

(b) NOHSC endeavour to re-define duty of care obligations. Compare the previous Manual Handling Standard for NOHSC and Western Australia - it achieves the same yet the Western Australian code is more succinct, achievable and outcome orientated.

Page 64

The delay in adoption in Western Australia is because it is part of the Mines jurisdiction.

Page 66:

Heading towards a single national regime to replace State and Territory schemes.

The text here is confusing as it really is relevant to workers' compensation as opposed to health and safety.

Page 69: The Provision of an Alternative National Scheme

It is my view this model would create unnecessary confusion in the market place. You will have more workers subject to different regimes. At the present the differential is obvious whereas this will not be the case under this model.

Page 164:

As a further observation it is incorrect to refer to 16% impairment for Western Australia at Table 7.1.

In Western Australia it is 16% disability. This is a significant issue as 16% disability captures far more than 16% impairment.

Thank you for the opportunity to comment.

Yours sincerely

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Director General