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Workers' Compensation and OHS
Productivity Commission
PO Box 80
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Dear Sir or Madam,

INQUIRY INTO NATIONAL WORKERS' COMPENSATION AND OH&S FRAMEWORKS

The appended document is my submission to your review of this legislation. Thank you for the opportunity of making this submission.

Yours faithfully,

P. S. Clark

SUMMARY

This submission is a response to questions posed by the Inquiry Issues Paper together with some additional comments on topics which are perceived as related to the issues. The comments are based on 20 years' experience with a number of the identified issues in Australia, New Zealand and Canada.

The core of this submission is:

- that public interest requires significant, timely and continuing achievement of improving workplace health and safety performance across Australia as a primary objective,
- that this is not being achieved under present OH&S and workers' compensation assumptions,
- to identify for the Commission's review some changes with potential for achievement of that primary objective.

Two supplementary documents (*indir96c.rtf* and *backgrnd.rtf*) form part of this submission. Additional documentation is available if required by the Commission to support particular aspects of this submission, but have not been included at this stage for brevity.

OCCUPATIONAL HEALTH & SAFETY

PREVENTION

The Inquiry Issues Paper identification that 'a key goal of any new model would be to facilitate improved workplace safety' poses the question of how to measure progress of achievement toward that goal. As advocated below, improved workplace safety should be measured in terms of reduced injury total claims cost achievement.

The Issues Paper asks 'what lessons, if any, do the existing approaches provide for the development of alternative national frameworks for workers' compensation and OHS?' It is submitted that the most obvious lesson is that as 'the existing approaches' have *not* provided acceptable safety, health or cost performance, it is necessary to rethink some the basic assumptions underlying OH&S and workers' compensation legislation in Australia. The national approach to road trauma performance improvement could provide some lessons, with its cost-beneficial focus on specific issues such as seat belts, speed and alcohol, rather than diffused 'comprehensive' programs. While road safety performance is simply measured by fatality numbers with no partials or 'maybe' issues, rather than for example the aggregated cost of soft tissue injuries individually reliant on medical diagnosis and opinion, specific focus on timely achievement of socially-beneficial and clearly measurable outcomes has been the key to our road safety performance success.

The Issues Paper notes that 'early and effective rehabilitation is ... a crucial element in reducing the human and economic cost of work-related injury and illness once it has occurred. *'Once it has occurred'*, yes. But the key element is to avoid occurrence, by effective prevention. Unfortunately and arguably as a result of inappropriate incentive signals, more effort and resources tend to be focused on 'after the event' activities such as rehabilitation than are expended on *effective* prevention-related activities.

PERFORMANCE-RELATED CRITERIA

The 'OH&S industry''conventional wisdom' definition of 'duty of care' regulation as 'performance-based' is flawed jargon, as it relates only to 'compliance performance' in meeting specific line-items of OH&S regulation - rather than to the community expectation of 'outcome

performance' measured as reduced workplace injury and illness impacts. The 'cause-effect' assumption that regulatory 'compliance' is the unique and sufficient requirement that will promptly, completely and automatically result in elimination or reduction of workplace injury impact outcomes has not been demonstrated as reliable, apart from a few anecdotal cases.

The flawed 'performance' assumption has resulted in continuing development of 'new and improved', more 'comprehensive' regulations to replace legislation which failed to provide any measurable injury impact improvement. That the 'justification' documentation accompanying the new regulatory proposals only differ in their level of hypothesis and hyperbole from those associated with the failed regulations does not seem to concern those advocating their adoption.

There is a clear need to consider some changes in the direction of OH&S and workers' compensation legislation to recognise the obvious - that the river of legislation over the past 18 years has not proved effective in reducing the impact of workplace health and safety failures in Australia. The 'balance' between so-called 'performance-based' regulation and more detailed regulation should be seen as a 'red herring' deflecting attention from the real issue - achieving prompt, substantial and measurable reductions in the social and economic impact of workplace health and safety failures in Australia. It is time that we started to focus more directly on accountability for outcomes rather than 'compliance.'

PERFORMANCE MEASURES

Improved OH&S performance outcomes, measured in terms of reduced compensation claim costs - rather than 'line-item' compliance with the existing but ineffective 'nationally consistent' regulatory regimes - should be the first line measure of 'benefits.' On the assumption that premiums are adjusted appropriately, reduced injury claim costs should benefit employers, employees and the community through reduced injury and illness social and economic impacts.

NATIONAL MODELS

What models of national frameworks are considered to be workable for workers' compensation and OHS? The assumption that 'national consistency' is the priority objective needs reconsideration, when there is an arguably more appropriate objective of achieving prompt, measurable and significant improvements in Australian workplace health and safety outcomes.

How effective have these (NOHSC) arrangements been in promoting greater consistency? If 'national consistency' is the sole objective, 'a pass', albeit a sterile one. On the other hand, if improved workplace health and safety performance measured as reduced injury claim costs is the priority objective, the efforts and resources spent on NOHSC 'arrangements' could and should have been much more effectively utilised.

Can this be improved, and if so how? Addressing the arguably more relevant issue of effectiveness in achieving socially-useful outcomes, NOHSC could be useful as a national secretariat coordinating development of appropriate strategies by individual state, academic, independent and other appropriate organisations, managing the funding of those developments, their confirmation and acceptance for implementation by jurisdictions and for national performance reporting.

What are the areas in OHS regulation and implementation where differences between the jurisdictions impose the most cost? Is it in the wording of the legislation; differences in regulations; differences in standards and codes of practice; or differences in implementation between jurisdictions? No evidence of significant cost differences between jurisdictions due to

OHS legislation alone, but differences in implementation, enforcement and undocumented OH&S authority policies can pose significant cost impacts without achieving appropriate jurisdiction-wide performance gains.

DOES OH&S 'CONSISTENCY' ENSURE GOOD SAFETY PERFORMANCE?

While there are some minor differences between jurisdictions in contemporary Australian OH&S legislation, the differences are of no significance for most if not quite all Australian employers and employees. The issue of 'national consistency' is basically a red herring, particularly aimed at consistency of *process* rather than of improving injury performance achievement outcomes. As none of the variants of the OH&S legislation theme has demonstrated significant effectiveness in reducing the cost impact of workplace injury claims, 'national consistency' is unlikely to achieve anything except continuing waste of resources and delays in achieving any positive impacts on the social and economic costs of workplace injuries.

The 'consistency' and 'comprehensive' objectives have combined to inhibit the potential effectiveness of the truckloads of undoubtedly well-intentioned OH&S standards, legislation, codes and guidance materials prepared at great expense over the past 15 years in Australia. The 'consistency' party line of 'one size fits all' is demonstrably ***in****consistent* with reality. While the government administrative sector and other large employers might well perceive benefits from 'consistent' OH&S legislation, 'consistency' between jurisdictions has no significance for the much greater numbers of small employers. And 'comprehensive' legislation does not enter the small employers' lexicon, unless their business is with a government department or instrumentality requiring 'documentation.' Only in the long term of say ten years hence will the 'comprehensive' objective become consistent with optimising workplace injury claim reduction outcomes, as distinct from in the minds of the drafters of these standards. For now, we need better focused legislation aimed at short term objectives.

Jurisdictions that congratulate themselves on regularly replacing large numbers of 'obsolete', 'prescriptive' and 'subjective' standards and legislation with less numbers of documents invariably glowingly described as 'improved', 'performance-based', 'objective' and 'comprehensive' are fooling themselves - and the community. Pouring in all the previous content together with all the incremental duties that could conceivably fall within the ambit of 'comprehensive' results in more rather than less shelfspace documentation, less focus on needed beneficial outcomes, diversion of skill, effort and resources toward overall 'ticking off line items' audit compliance, and total confusion for the 90 plus percentage of small employers.

Small employers addressing the plethora of other government-imposed legislation and changes, taxation, privacy, employment and the like, have no real interest in OH&S legislation - particularly when written to satisfy parliamentary drafting and prosecution criteria. "What's in it for me?' applies equally for small businesses, prosecutors and parliamentary draftsmen. When the drafting criteria exclude large segments of the community, it is foreseeable that they will have no involvement or interest.

Even for large employers, comprehensive legislation diverts management focus and diffuses skill, effort and resources away from safety issues to 'compliance' with the legislation. e.g. away from proactive strain injury prevention to completion of legislatively- or administratively-required documentation to 'prove' compliance and 'protect your back' against prospective future prosecutions.

COMPREHENSIVE STANDARDS

'Comprehensive' standards and regulation are advocated by a number of interest groups, such as union advocates with agendas extending beyond workplace safety and 'OH&S industry' people 'protecting their back' and/or seeking enhanced influence, funding, income and/or security of tenure.

Their advocacy rarely if ever considers whether any or all of the 'comprehensive' components might result in significant beneficial injury impact outcomes or even whether the prospective compliance costs might exceed the possible benefits.

'Comprehensive' standards are 'justified' at national and state level as a package without responsible consideration of potential subset alternatives, either via the NOHSC-mandated 'cost-effectiveness' approach - to avoid consideration of potential future benefits if any by limiting the justification to compliance cost issues only - or by hypothetical and improbable combinations of future benefit rate and timing predictions, indirect benefit assumptions and discount rates, among others.

As proponent authorities have effective control of the quality 'certification' process prior to legislation and know that the reality outcomes of their predictions will never be audited, there is no effective accountability for fraudulent process in framing and justifying OH&S standards and legislation.

Issues of effectiveness, probability and practicability are rarely if ever considered when advocating 'comprehensive' standards. Limitations or skewness in knowledge databases also receive negligible attention.

COMPLIANCE

'Degree of compliance with legislation' has become the regulators' 'conventional wisdom' measuring stick for evaluating the effectiveness and objective achievement of OH&S legislation. While the contemporary 'OH&S industry' fashion is to report 'positive performance indicators' rather than statistics which are perceived as negative and 'failure' measures, it is clear that regulators are most reluctant to acknowledge unpleasant realities. Mandatory compliance with 'line item' legislation and audit tools poses the probability of employer 'paper compliance' with relevant audit tools, rather than focus on known injury prevention needs.

Using Victoria as an example where the sole *outcome* objective of the OH&S legislation is 'to secure the health, safety and welfare of persons at work' with four subsidiary 'how to' process requirement objectives, the objective achievement measurement method is evaluation of process (means), rather than effective achievement of improved injury incidence and severity performance (ends). The Victorian regulator overlooks its own stated vision of 'workplaces free from injury and disease' and mission 'to work with all Victorians to progressively reduce the incidence, severity and cost to the community of work-related injury and disease', and selectively reports positive-sounding achievements and upbeat 'initiatives' in its annual reports rather than reporting its performance against the objectives of its legislation.

For example, the 2002 VWA annual report highlighted reduced fatality achievements, but 'buried' other data on 'the incidence, severity and cost to the community of work-related injury and disease' on pages 21 and 22. The report avoided its previous 'error' of identifying the continuing 12 percent annual increase in injury claim costs by instead reporting *numbers* of reported claims and open long term claims, each being significantly understated due to the well-known 'incurred but not yet reported' (IBNR) lag, to provide a more favourable performance

illusion than the reality. The IBNR lag also enabled the claim that 'overall claim numbers have dropped by 8% over the past six months.'

'OH&S INDUSTRY' JARGON

One of the more significant problems for most if not all Australian employers and employees who are not 'OH&S industry' members, is the use of jargon language, including:

OH&S regulators' jargon. Use of 'technical' words such as 'manual handling', 'physical handling' and 'body stressing' as descriptions of injuries (noted in the recent NOHSC consultant's report: Issues Paper 1: *Summary of current and emerging issues (other than psychosocial) in the physical handling work environment* by the Work Environment Research Centre, La Trobe University February 2003) is not consistent with normal Australian vocabulary or understanding. Incomprehensible jargon use is increasing rather than improving, with the recent adoption of the term 'musculoskeletal disorder' with an ambit definition paragraph which attempts to explain what it includes rather than its meaning or significance. The engineers' 'stress-strain' approach is much simpler and easier to understand. Excess 'stress', whether physical or mental, can result in a range of conditions globally described as a 'strain' outcome. And the more stress, the greater probability of strain.

Another significant jargon issue is associated with the words 'outcome', 'prevention' and 'performance', which have been narrowly redefined by Australian OH&S regulators to mean 'performance of OH&S legislation compliance process obligations' rather than the wider community usage and expectation of 'performance' relating to socially-relevant 'ends' such as reduced incidence *and* severity of injury impacts. And when the process 'means' are reliant on a 'cause-effect' assumption which has not been demonstrated as significant across Australian statistics over past years, this jargon issue identifies a policy problem.

An associated jargon issue is Australian Standard AS1885, which advises measurement of injury performance in terms of the number of defined lost time injury events per million manhours worked (approx. 500 employee-years), commonly known as the LTIFR or 'lost time injury frequency rate.' As this statistic does not differentiate between deaths, permanent disabilities and minor cut injuries, and excludes no lost time disabilities such as hearing loss as well as deferred injuries such as asbestos-related mesothelioma, AS1885 needs revision to more appropriately reflect the social realities of injury. It is noteworthy that the Victorian WorkCover Authority quotes LTIFR (in the form of incidence rate per 100 employees) in its recent 2002 year annual report!

A third jargon issue is associated with the word 'comprehensive' so often applied to OH&S legislation. It has been said that big problems are best solved one step at a time, but this approach is inconsistent with Australian OH&S regulators' preference for 'big bang' legislation. While employers are spending skills, time, effort and resources attempting to comply with the manifold obligations and documentation associated with 'comprehensive' legislation, they are not addressing the more focused injury prevention need areas such as reduction of strain injuries.

Legal jargon. A soft tissue injury which resulted from one identifiable event is defined as an 'injury', whereas if it resulted from two or more events, it becomes a 'disease.' Such differentiation is not merely inappropriate, it is counterproductive and a significant inhibiting factor adversely affecting injury prevention initiatives and motivation.

DISEASE

Workplace related disease has been defined as 'a problem' by (a) legal definition and (b) other than for the recognised impact of asbestos industry-related disease, by 'steering committee' definition.

The first is due to legalistic workers' compensation and common law semantic differentiation between sudden onset injuries and those for which no specific causal 'event' can be identified.

The second is exemplified by the NOHSC-funded so-called 'Kerr report', *Best estimate of the magnitude of health effects of occupational exposure to chemicals*. The Commission has noted diseases of long latency as an area of limited knowledge and uncertain responsibility boundaries, warranting attention. NOHSC and others have given wide publicity to the Kerr report estimate of 2239 deaths during 1992 which its authors attributed to workplace chemical exposures, an estimate subsequently 'expanded' by NOHSC to '3,000 deaths each year due to workplace chemicals.'

The Kerr report estimate was developed through an indirect 'attribution' approach specified by a NOHSC steering committee, an approach which avoided the need to consider available Australian data and realities. Criticism of the 'attribution' approach using dated overseas study results as inappropriate and that the report findings were totally inconsistent with available Australian statistics were summarily rejected by NOHSC. Nevertheless, it is apparent that the Kerr report authors have been able to re-assign a significant proportion of smoking-related disease into a newly defined category of 'disease caused by chemicals at work' through mandated adoption of the indirect 'attribution' approach.

MANAGEMENT

Good quality management includes employee safety and welfare within the manager's ability to influence. A culture of commitment by the right people for the right reason is absolutely basic for achievement of safe workplaces, and the manager/employer is central to setting that culture. Marketing claims by OH&S authorities and 'OH&S industry' members that good safety standards axiomatically deliver economic benefits to businesses are 'cause-effect relationship' hypothesis - the real common denominator underlying both outcomes is employer and management quality, commitment and focus.

Any factors which have the effect of diminishing either management commitment or the employer's ability to manage, tend in turn to diminish the probability of beneficial outcomes for the business, employees and the community. A specific example is where insurers 'take over' management of injury claims that could be beneficially managed directly between the employer and the injured employee. The other side of the same coin is where employers 'opt out of' managing injury claims which they should be handling in the employee's interest.

One important factor inhibiting employer commitment toward compliance with OH&S legislation is the legal fiction that small business employers are more qualified than either their regulators or legislators, with full competency in the whole panoply of commonwealth, state and municipality rules and regulations. The ever-increasing and uncoordinated deluge of legislation covering the full range of business activities necessitates continuous employer reliance on professional advice and intermediaries. In turn, managers of medium and large businesses employing specialist staff rely on those people for competent advice and management of regulatory issues within their expertise areas. OH&S compliance is relegated from being a core management issue by the constantly intrusive impact of financial, taxation, statistics gathering, food safety and similar mandates.

It is submitted that Australian workplace safety performance is unlikely to improve until the legislative focus changes from auditable 'compliance' with 'comprehensive' legislation to a narrower focus on timely achievement of reduced injury incidence *and* severity.

SMALL BUSINESS

The two basic objectives of any private business enterprise are (1) to make a profit and (2) to stay in business (i.e. continue making a profit). Employers endeavour to make rational decisions toward achieving those objectives, but their ability to do so depends on a range of factors including availability of relevant information and knowledge of how, when and where to use it effectively. As the present topic covers the range of employee welfare and relationship issues, it is submitted that employers should receive continuing and unambiguous information and incentives toward making rational employee welfare decisions. This is particularly important for small employers, who have the least access to relevant information and assistance focused on their businesses.

For small employers, 'brevity is the soul of wit' rather than whether regulations are prescriptive or 'performance-based.' While profit-related dollar incentives are important for *all* employers, small employers need brief, practical and focused information that they can understand and apply in their business with confidence that what they are doing will have a positive injury prevention effect. And advice on issues within the control of the small business operator - not shelfloads of well-meant regulations, codes and advisories written by 'camel' committees.

OH&S MARKETING

Marketing efforts by OH&S authorities have included major television advertising campaigns, a wide range of publications and financial support for sporting groups. Evaluation of television advertising by whether the advertisements were remembered rather than safety performance outcomes poses cost-benefit effectiveness questions. On the other hand, there is a perceived publicity role for occasional 'show trial'-driven prosecutions for poor-performing occupations and industries. It is submitted that resources spent supporting sporting groups would be more effectively spent providing direct prevention solutions and aids for workplaces.

It is further submitted that OH&S marketing resources should be utilised through focused regular newspaper advertisements to inform employers, employees and their families as well as suppliers of safety and handling aids on practical workplace injury prevention. Not how to comply with legislation, but common sense 'how-to' advice from people actually involved in problem industries and occupations, such as brief articles focussed on *involving* readers in agreeing with three - at most four - key propositions that they can actually use in practice - with clear explanatory graphics. A single consistent message, no political 'photo opportunities' and closing with 'an offer that's too good to refuse' such as "Call our 24-hour hot line 9641-1XXX for your copy of Merv's Back management booklet. It's available in *your* language!"

A longer term marketing opportunity is through the education system, but here again there is a need for focus on understandable practical issues rather than diffused and confusing regulatory 'comprehensive' philosophy.

WORKERS' COMPENSATION

WORK-RELATED INJURY

The definition of 'work-related' injury has a major impact on workers' compensation legislation. The contemporary definition identifies its role as *de facto* social security legislation, particularly

where individual medical professionals are empowered to determine - without necessity for informing themselves of any or all relevant facts or issues - that a person is both injured *and* that the injury is 'work-related.' The social security definition is further entrenched by legal rather than medical determinations that cancer and heart attacks are 'work-related.' The ageing workforce demography could also impact on the dominant strain injury claim cost category due to this definition.

A downstream issue of some significance - employer and employee alienation by treating professionals - results from 'how dare you contact my client' and 'I will not discuss my patient' exclusion problems, which are particularly significant for small employers.

A NATIONAL WORKERS' COMPENSATION SCHEME?

The position of OH&S and workers' compensation as subsets of the 'industrial relations' environment with its wider agendas, poses a range of downside impact exposures. One national workers' compensation scheme would expose everyone to the possibility of downside risks - a significant issue when the problems of the various Australian schemes are considered. It would be naive to assume that we could just identify all the 'best bits' of present schemes and somehow cobble them together without creating new problem issues, apart from the political problems of getting nation-wide agreement to participate in the new scheme and allocating responsibility for the excess cost of 'wrong scheme' deficiencies between and within sectors of governments, employers, employees and/or the community.

Establishment of a national body for workers' compensation has been canvassed, with the States handling implementation, as applies to the regulation of road transport and food safety. As implementation of food safety legislation has been varied significantly in Victoria to serve sectional interests without appropriate community consultation, downside issues need consideration.

Employer experience with 'burning cost' schemes - except in Queensland - prior to the monopoly government insurer regimes from 1985, demonstrated that this quasi-self-insurance approach can be effective and cost-beneficial for a wider market.

It is perceived that this Inquiry could benefit from experience of the Canadian provincial workers' compensation schemes. While previous workers' compensation scheme inquiries have sought specific information from selected provincial Boards, it is submitted that there are some valuable lessons to learn from Canadian regulators, employers and employee groups.

COMMON LAW

Pleading by articulate interest groups for common law access and benefits poses questions about the unstated agendas underlying their pleading. As Shakespeare put it, 'methinks yon Cassius doth protest too much.' Common law litigation diverts employer, employee, insurer and judicial time and financial resources away from positive employer-employee health and safety outcomes, for the benefit of a small number of plaintiff legal businesses. It is submitted that the effort and resources committed to common law litigation should be redirected toward achievement of improved workplace health & safety outcomes.

Should access to common law damages be part of any national workers' compensation framework? No. Access to common law is based on flawed assumptions. It is submitted that the downside aspects of the common law process have and continue to significantly inhibit timely achievement of reduced injury claim cost impacts, especially for the more costly, longer duration injury claims. The common law process diverts management commitment and focus toward adversarial claim cost impact minimisation rather than injury prevention activities and significantly inhibits and prolongs the return to work process for injured employees. Workers' compensation scheme cross-subsidisation and deficient premium incentives combine to minimise and defer the supposed employer 'deterrence' impact of common law settlements. Along with the regulators' 'fear' ploy of 'maximised' OH&S legislation penalties and 'exemplary prosecution' fines, common law 'blame' litigation polarises relationships away from cooperative and cost-beneficial resolution of workplace health and safety deficiencies.

Diversion of insurer effort and resources due to common law litigation must have a negative impact on the effort and resources available for compensation. As access to common law damages foreseeably prolongs recovery duration, it poses negative impacts on compensation and rehabilitation funds. With soft tissue injury claims posing the majority of claim costs, the probability of negative impacts is increased. Addition of 'psychological overlay' to reach the common law threshold also poses diagnostic uncertainties.

It is submitted that access to common law ultimately is cost-beneficial only to the sectional interest group of plaintiff legal businesses. It is not perceived as cost-beneficial for employers, employees or the community. It is further submitted that as common law litigation and settlements misallocate community resources, common law should be excluded from all 'no fault' compensation systems.

EQUITY

The question of 'equity' for injured employees is unlikely ever to be resolved to everyone's satisfaction, particularly when considered in the same context as 'national consistency.' There are unresolved issues of access to 'workers' compensation' *versus* 'unemployment (or other government-funded) benefits' for e.g. seasonal, rural, 'downsized' and marginal workers, with workers' compensation benefits arguably more remunerative, easier to access and maintain, and without regard to employer closure, downsizing or continuation. While one side advocates full income maintenance as a 'right' for injured employees, their counterparts point to the resulting positive reinforcement for *not* returning to work - at the compensation scheme's cost. While schemes have addressed this issue for longer term claims to some degree, management of these claims - and the associated access to benefits guidelines - are still a significant 'work in progress' needing resolution.

It is relevant to record that while employed people have immediate and guaranteed access to workers' compensation benefits, the unemployed and people not in the workforce do not have access to anything like comparable prompt care and benefits. As one result, rumoured and actual business 'downsizing' and 'closure' situations are associated with increased injury claim reporting. And arguably for similar reasons, workers' compensation legislation changes are also associated with increased claim reporting, in some cases effectively doubling the number of claims lodged as claimants attempt to optimise their perceived outcome probabilities. This has been a 'double-edged sword' adversely affecting the quality of claim performance reporting and of justifications for regulatory changes, resulting from selection of particular change-affected years as the base year from which to calculate the supposed impact of regulatory changes.

DISABILITIES

One issue which has received little publicity is the impact of OH&S and workers' compensation legislation on individuals with disabilities, for example due to age, physical, intellectual or other factors. The legislation makes implied assumptions about employees' abilities to be trained and to use that training for their own and others' safety benefit. While not advocating reduced safety standards for prospective and current employees with disabilities, it is submitted that it is in the public interest for public funding to be involved to assist with any premium impacts associated with employment of such people. This has been done in Victoria for some apprentices to assist their employment. It is understood that the Quebec WC Board has arrangements for workers with employment limitations which could be beneficial for similar Australians.

MONOPOLY

Some community assumptions about government warrant review. Some of the assumptions touching on the present Inquiry issues include that 'government knows best', 'government manages in the public interest, 'government management is efficient, effective and better than private enterprise' and 'there ought to be a law' about current issues of concern.

It is submitted that the bigger the organisation, the less likely it is to result in satisfactory performance in the public interest, for a range of internal and other self-interest reasons. A number of adverse impacts has already resulted from the direct and indirect effects of monopoly and monopsony powers of existing government OH&S authorities, the most notable being the continuing failure to improve Australian workplace safety performance despite massive expenditures generating and complying with OH&S legislation, training, research, etc. Other impacts include ability to represent the increasing cost of deficient workplace safety as 'improving injury numbers' and effective control over the 'conventional wisdoms' articulated by 'OH&S industry' members.

A significant problem with government monopoly insurance - and government oversight - in industrial relations-related areas such as workers' compensation is the superposition of political agendas unrelated or only indirectly related to the arguably key scheme objectives of prevention, equity, care and revenue neutrality. For example, political intervention to skew premiums outside responsibly-determined levels has been an adverse feature of some current Australian schemes. The 'conventional wisdom' of criticising private sector insurers for '*unsustainable discounting of premiums*' applies equally to government and government-controlled insurers, who can rely on legislation to recover any losses. The combination of legislatively-enforced insurance and monopoly market control is not necessarily associated with optimal public utility.

Where a government legislates monopoly control of workers' compensation insurance, it should also accept liability for failures at any level. If an employer fails owing entitlements, the relevant government-sponsored compensation scheme assumes that responsibility, and premium rates should be set to match the probability of that risk exposure. A similar principle should apply for any alternative self-insurance options.

COST SHARING

While cost sharing between employers, employees and government social security and medical/health support services was estimated in some detail by the previous Commission inquiry, the necessary aggregation of estimates in its 1995 report conceal some underlying distribution realities.

It is submitted that governments who shift the cost-sharing goalposts between themselves and others *and* between community sectors by approving legislation such as workers' compensation legislation which defines 'work-related' in 'coach and horses' ambit terms, should be accountable for deficiencies resulting from that legislation. As such social legislation foreseeably imposes costs on employers that are outside their control, it is equally foreseeable that those employers will be aggrieved and have diminished incentive to address prevention issues which might be within their control. The regulators' conventional wisdom (or fiction) that 'employers are in the best position to change what can or should be changed' is negated by claims which are - rightly or wrongly - perceived to have arisen from circumstances outside the employer's control, including flow-on impacts due to word-of-mouth concerns about other employers' situations.

The Issues Paper statement that '*if the cost of ... injury is borne by the wider community ... may lessen the incentives for preventing such incidents and for the effective rehabilitation*' makes several questionable assumptions. It assumes that such incentives exist, that they are provided by existing compensation legislation and that there might be a 'cause-effect' relationship between 'who pays' and prevention outcomes. It is submitted that none of these assumptions is effectively appropriate. A case of 'leading the witness'?

It is also submitted that the ambit redefinitions of 'work related' in Australian workers' compensation legislation has significantly skewed the share-out of workplace injury claim-related cost impacts in Australia at increased cost to Australian employers. If the Commonwealth perceives that it, the states and territories, injured workers or the community are disadvantaged to any significant extent, there is a number of options which it could pursue. While renegotiation of Medicare involvement with workers' compensation claim-related expenses might be one option, it is submitted that the most appropriate actions involve (a) getting serious about actually reducing the cost of workplace injuries by proactive and timely prevention activities, rather than publication of standards, long term research and other peripheral issues, (b) encouraging a uniform (identical) definition of 'work related' in all workers' compensation legislation, (c) to the extent that the resultant uniform definition expands employer liability beyond their reasonable scope of control (as it does at the present time), appropriately address the 'excess' employers' economic impact cost shift disadvantage by some form of subsidy, and/or (d) similarly address other adversely affected parties. The arguably simpler approach - if politically problematic - is to revert to an exclusive rather than globally inclusive form of words to define 'work related.'

It is further submitted that where legislation is based on inappropriate and/or false assumptions, its implementation lacks focus on meaningful and timely outcomes, and there is no effective performance reporting and accountability, equity requires that government should be accountable and responsible for the costs incurred rather than hiding the impact by cost-shifting onto the parties subject to the legislation. Workers' compensation and OH&S legislation in Australia are an example of these failings, with regular changes and deficient reporting by regulatory authorities employed to conceal inadequate performance.

Where a government legislates for OH&S and workers' compensation insurance, it should also accept liability for failures at any level. However, the evidence is that governments do not accept any liability for failure of their legislation, particularly where there is monopoly government control of workers' compensation insurance. The cost of monopoly scheme legislation and management failures can be transferred to insured employers, albeit with a 'new and improved legislation' sticker attached to the invoice.

INCENTIVE

Our mixed economy requires appropriate incentive signals for employers and management, injured and uninjured employees and their families, treating professionals, OH&S regulators ***and*** workers' compensation authorities for its operation. To the extent that incentive signals are perceived by any one of those groups as inappropriate, scheme operation, effectiveness and efficiency will be less than optimal.

Contemporary workers' compensation scheme premium incentive schemes are too complex and incomprehensible for the majority of employers, and provide no significant incentives for injury prevention initiatives. When the incentives are both attenuated and lagged, any potential incentive is effectively negated. And when premium changes imposed by political manipulation of scheme benefits and premium rates 'drown' potential incentives, scheme 'incentives' lose all credibility.

The potential incentive impact at workplace level of premium changes due to past claims experience can be adversely affected by such factors as:

- perceived-as-arbitrary, periodic and significant changes in base premium rates associated with political agendas and subsequent attempts to remedy scheme funding problems,
- premium cost impacts on businesses being significantly more than total claim cost dollars (compounded by deficient marketing and information supply by workers' compensation authorities),
- premium cross-subsidisation, including premium effects associated with employees in more than one premium classification,
- 'incentive' premium changes which are perceived as significantly less than the arbitrarily-imposed premium changes due to issues outside the individual employers' control,
- the widespread perception that premium payments are essentially identical to other service and insurance payments, and are a *fixed cost* of being in business,
- widespread lack of understanding of the premium system - as a non-core and non-negotiable issue for small businesses,
- clerical rather than management processing of premium and other workers' compensation payments in non-small businesses,
- the tendency for premium rates to be constant - no incentive - for many businesses from year to year, which progressively erodes management attention for improvement, and
- changes of business ownership, management or supervision which might adversely affect 'ownership' of past events.

It is submitted that there is a role for a degree of 'uncertainty' in workers' compensation schemes. The Victorian 'employers' excess buyout' option enables employers to avoid all employers' excess payments. While this 'certainty' option might be very convenient for some employers, it is submitted that 'excess buyout' schemes are counterproductive due to removal of incentive for employer involvement.

At the other end of the spectrum, regulatory authorities need to be held accountable for their performance against empowering legislation by appropriate incentive signals from government. And in turn, there is a need for the public interest in timely achievement of significant workplace safety performance to be more effectively communicated to governments.

PREMIUM SETTING

The Issues Paper statement that '*premiums should be reflective of the costs that activities potentially bring to the system'* implies some issues needing clarification. There is a need to identify the range of '*activities'* for which direct or indirect workers' compensation scheme funding is appropriate to avoid definition-caused resource misallocation . One issue is inclusion or exclusion of journey injury claims outside the employer's control.

Two important premium setting policy decisions are:

- the levels of compensation to be provided and how they are to be calculated *versus* the alternatives of 'pre-injury average wage' and 'unemployment (or other government-funded) benefits', *and*
- the provision of incentives for improving health and safety performance and how these should be determined *versus* 'consistency' (i.e. fixed or at least 'predictable' premium rates) of premium costs.]

The current 'conventional wisdom' is fixed premiums for the majority, with premiums for larger businesses varied on the basis of past years' claim costs with some discounts for compliance with particular OH&S management schemes.

It is submitted that premium discounts/incentives for compliance with approved safety management systems, while well-intentioned, is premature as it is based on the flawed assumption that audit compliance will certainly and promptly result in significantly improved injury claim performance. It has already been noted that this assumption has not been demonstrated as appropriate for the equally well-intended but similarly-based OH&S legislation.

While employers might argue for caps to limit their premium liabilities, any compensation scheme with a serious preventive objective should not cross-subsidise performance failures. Achievement of safe working conditions is an integral cost of business operation, and there should be no scope for cross-subsidisation to limit the impact of failure. This is one of the key reasons why self-insurance is perceived as the optimal preventive regime.

Present day premium setting arrangements are not significantly effective overall in providing incentives for employers to reduce the incidence of work-related injury or illness and facilitate rehabilitation and return to work. And for the majority of insured businesses on fixed or substantially fixed premium rates, not at all effective. For larger businesses affected by 'incentive' premium structures, only marginally, due to such policies as 'industry rating', averaging claims over a number of years and premium rate capping. Existing premium setting policies do not offer the timely and effective feedback to management provided by self-insurance. The present premium schemes could only be described as marginally different in their management impact from other 'utility' costs such as power, gas, water and sewerage. They are handled by clerks and accountants, rather than managers.

The Issues Paper question on whether '*OHS arrangements provide an appropriate mix of incentives to reduce the incidence of work-related injury or illness'* implies the assumption employed by a number of Australian OH&S regulatory authorities, that '*incidence'* is a relevant performance statistic. As the term '*incidence'* does not differentiate between a minor uninfected scratch and a fatality, it provides no useful measure of health and safety performance. In the absence of any other meaningful and measurable impact statistic for workplace safety failure outcomes, it is submitted that dollar-evaluated claim costs should be the basic OH&S performance criterion measure.

The continuing increase in workers' compensation claim costs demonstrates that the '*current interaction with OHS arrangements'* has no significant positive impact. On the contrary, claim cost performance could be said to demonstrate that they have a *negative* impact.

There are no significant administrative or compliance costs impacts due only to different premium *setting* arrangements, but there is potential for '*significant benefits to be derived from allowing a variety of arrangements'*, particularly if appropriate self-insurance alternative options are facilitated rather than inhibited as at present.

Jurisdiction moves toward a consistent 'payroll/wages/remuneration' definition for base premium calculation are commended, particularly if the definition is wholly consistent with those used for taxation, superannuation and other financial purposes. Apart from employer utility, the consistent remuneration dataset for premium calculation will provide more comparable premium rate information.

SELF-INSURANCE

Workers' compensation employer self-insurance has a number of advantages, identified in other submissions to this Inquiry. The downside risks are essentially identical with all other insured schemes except for the unlimited access to insureds' pockets enjoyed by government schemes. Because self-insurance is perceived as potentially cost-beneficial for employers, Australian regulators garner a share of the expected benefits for themselves through a variety of licensing policy controls. The first arises from the 'conventional wisdom' that there is only one self-insurance option - full self-insurance. A second results from requiring prudential standards that could only be met by some if not all government schemes through recourse to legislation. A third is the enforced requirement for self-insurers to be 'compliance models' for other employers, maintaining mandatory OH&S regulatory compliance requirements which are legislatively assumed to be directly related to improved workplace health and safety outcomes - an assumption that has not been demonstrated as significant during the 15 years of similar regulation. And the fourth 'profit-sharing' control requires unquantified mandatory contributions toward funding of the regulator's diverse activities, some of which duplicate required self-insurer activities.

While regulators might argue that self-insurance removes a significant proportion of the better 'claim cost per premium income' performers from their schemes, with adverse premium impacts on remaining policyholders and scheme fixed cost recovery, their key underlying rationale is the political impact of minimising the cross-subsidisation favouring poorer performers. The logic of charging better employers more to keep poor performers in business is akin to subsidising unsafe drivers to ensure they continue driving.

It is submitted that the 'full self-insurance' option policy needs rethinking to include alternative self-insurance options. One alternative is canvassed in the next section of this submission. Another is industry sector cooperative group self-insurance similar to that which is understood to be operating for the retail pharmaceutical industry in NSW.

EMPLOYERS' EXCESS

When the 1992 Victorian WorkCover Act increased employers' excess from 5 to 10 days, employers were foreseeably unhappy but accepted the revised compensation package. It is submitted that there is scope for further albeit selective increases in employers' excess in all Australian workers' compensation schemes, to facilitate employer handling of the larger numbers of minor claims while focusing insurer handling and administration on longer duration

claims and to improve the social and economic performance of the workers' compensation system overall. This proposal is aimed at addressing the many complaints of employer and employee alienation due to third party intervention and of disadvantageous premium cross subsidisation impacts on employers with few and/or minor injury claims. Subject to documentation of each incident against potential future recurrence, it would regularise the actions of well-meaning employers and employees who 'handle' small claims directly. While concerns have been expressed about the need for remedial action to address small claim injury *causes*, it is submitted that there are more significant preventive imperatives than remedying *every* workplace or work system deficiencies, however minor, as required by contemporary Australian OH&S legislation and policies.

The following text is from a year 2000 submission to a Victorian inquiry.

> In 1996, the VWA Chief Executive reported that "the purest form of experience rating is self-insurance, where employers are fully exposed to their workplace safety risk. The effect is that self-insured employers make workplace health and safety a key business priority. Expanded opportunities for self-insurance and self-management - while paying careful attention to safeguards for both workers and employers who might participate - must be a priority."
>
> However, this 'must be a priority' objective has not received the attention that it deserves. While WorkCover has approved controlled self-insurance for a small number of very large employers, there is significant scope for "expanded opportunities for self-insurance" for medium-sized and even small employers.
>
> This would require a refocus *from* the present 'only full self-insurance, and only for top 1 percent employers' approval regime, *to* approaches recognising the medium (20-99) and small (<20) businesses which employ 6 and 93 percent respectively of the Victorian workforce. Some potential alternatives are proposed below to broaden the options for employer self-insurance and self-administration, with the aim of achieving improved outcome performance incentives.
>
> ***ENHANCED EMPLOYER INCENTIVES***
>
> Three proposals (A to C) are advocated under this heading, with the aim of the workers' compensation system having more effective injury claim cost management incentives.

A EMPLOYER TO PAY FIRST THREE WEEKS' EXCESS

The WorkCover scheme varied the employer excess from the WorkCare "first five days" to "first ten days." While it is recognised that employers might well resist accepting further direct costs, a change of the employer excess to "first three weeks" should be considered. This period is closer to the average of 22 days duration quoted in the Industry Commission 1995 report for injuries involving return to work on full duties after 5 or more days off. With less than 5 days off injuries, this category accounted for two-thirds of all injuries, but only 6 percent of the estimated total social and economic costs, of which employers were paying 90 percent.

Allowing employers to self-insure and self-administer these non-serious injury categories would broaden their options and enhance their incentives for effective injury prevention and return to work activity.

It is recommended that the s.125A(3) '*employer's excess*' be increased from "*first 10 days*" to "*first three weeks*", to improve employer focus - and incentive - for injury prevention and management

B STAGED SELF-INSURANCE

The workers' compensation incentive system with the most effective impact on management commitment, is where employers are directly, fully and immediately financially responsible for the outcomes of inadequate workplace safety, subject to appropriate levels of catastrophe and claim tail insurance to ensure protection of seriously-injured employees from any form of default. It is disappointing that WorkCover has failed to promote the s.125A(6) option of increased employer excess.

Implementation of a s.125A(6) "staged self-insurance" system with (as a simplified example) four levels of employer indemnity excess should have the three positive effects of improving workplace safety outcomes through making employers and managers more directly accountable for their performance, of significantly reducing the volume and cost of unproductive smaller claim processing through the WorkCover system, and thereby allowing enhanced claim management focus on the more significant workplace injuries. The three self-insurance levels suggested are:

(1) the present CPI-flexed base level,
(2) $5,000 or its lost work day equivalent, as the first self-insurance indemnity level,
(3) $25,000 or its lost work day equivalent, as the second level, and
(4) the present self-insurance scheme for large employers.

It would be mandatory for all employers seeking levels 2 to 4 rating to demonstrate appropriate financial resourcing for their self-insurance responsibilities, as well as the maintenance of current and appropriate levels of catastrophe and claim tail insurance with approved insurers for level 4 self-insurers.

It is recommended that employer staged partial self-insurance be introduced for medium and large employers. This would involve increasing individual employer's s.125A(3) excess in appropriate steps, viz "first $5,000 of total incurred compensation costs" or an equivalent number of work days lost, with "first $25,000" as the next step**.**

An update to that submission would require regular periodic appropriate reporting to the regulator. A total claims cost limit is a possible prudential issue which could be periodically negotiable.

ASSOCIATED ISSUES

DATA

There are massive data resources on claims associated with Australian workplace injuries. As a result of continual - and continuing - complaints from bureaucrats, technocrats and academics that necessary information was not available, not detailed/meaningful/accurate enough, not in suitable form, did not enable making necessary policy decisions, etc., a national data set system was established some years ago at very significant cost. It is submitted that bureaucratic obsessions with 'data' for its own sake rather than for achieving socially-relevant OH&S performance outcomes has caused major data compilation, reporting, processing and publication costs without commensurate benefit outcomes. It has been obvious for at least twenty years

without need for supporting data that work-related deaths, strain injuries, falls and machinery impact injuries are and continue to be the dominant issues needing prompt remedial action.

Expending resources on enhanced - or even on the present excessive level of - data collection is poor public policy, unless academic publication is our primary OH&S objective.

Information feedback loops can and should be important drivers of OH&S policy right through from government to workplace level. Injury claim cost feedback can be optimised in self-insured workplaces but tends to be minimised by deficient premium incentives and lags for insured workplaces. There is evidence that government-level feedback loops can be skewed and distorted by the data fudging and 'goalpost shifting' noted elsewhere in this submission.

Although injury claim cost feedback loops are 'after the fact' (of injury) lagged and attenuated by premium schemes rather than 'up front' preventive for insured businesses, it is appropriate to identify that the dollar is the performance measuring stick for businesses of all sizes and for employers and managers at all levels. The greater the dollar economic impact felt by each employer and manager, the greater his or her motivation and focus on the impact issue. While overall claim costs roughly correlate with days absent from work, the most appropriate economic measure is the dollar impact. In order to achieve effective employer feedback and in the absence of a universal measure for social impact, it is submitted that OH&S 'performance' should be measured in terms of total dollar workplace injury claim costs.

INDIRECT COSTS

The Commission's 1995 report included indirect cost estimates prepared from Australian sourced data. The estimates for employers are consistent with published studies - see the appended ***indir96c.doc*** report on indirect cost studies to 1996, which is still appropriate.

A number of Australian OH&S authorities (including NOHSC, Victoria and Queensland) continue to claim that their higher estimates, selected to enable development of hypothetically positive benefit-cost outcome estimates for proposed legislation, should be accepted as valid and appropriate. Although NOHSC claimed to use a 1:1 indirect to direct cost ratio in its submission to the previous Commission inquiry, it has continued to employ higher ratios to 'assist' state OH&S authorities circumvent their Subordinate Legislation approval requirements. A recent example is the 6:1 indirect to direct cost ratio employed by NOHSC to inflate the prospective future benefits of its Dangerous Goods (Storage & Handling) Standard, with the comment (reported in the corresponding Victorian RIS) that it "may well understate the situation with respect to dangerous goods" to justify sensitivity testing of this assumption at the even more improbable 8:1 and 10:1 indirect to direct cost ratios.

It is no defence that these estimates were provided to NOHSC by an consultant (who lacked competence to provide the estimate, which was in turn based on error), as NOHSC has knowingly used similar ploys for at least 15 years to 'justify' its proposals - and relevance.

The accuracy of the Productivity Commission's 1995 indirect cost estimates for employees and the community has not been checked, and they are accepted as reasonable estimates. The overall indirect cost impact of 1.8 to 1 direct cost, based on the South Australian benefit scales, has however been consistently 'reinterpreted' by several Australian OH&S authorities to justify a selection of higher ratios more in tune with their political and legislative aspirations. There is scope for a review of the Commission's 1995 estimates to bring some needed honesty into the estimates being published around Australia. Updating the earlier (1992-93) $20 billion estimate

would also provide a measure of whether our OH&S processes have achieved any significant impact over the past ten years.

Indirect cost impacts associated with workplace injuries are also an issue for members of the 'OH&S industry' in Australia, whether academics, health & safety representatives or officers, professionals or others. As justification of workplace changes is often associated with prospective benefit-cost questions, the add-on impact of indirect costs should be clarified. The NOHSC-sourced numbers already quoted to the present Inquiry indicate that even those claiming professional OH&S skills have imperfect knowledge of the impact of indirect workplace injury costs.

RESEARCH

The cost to our nation of the outcomes of inadequate injury prevention poses imperatives which need to be addressed promptly. While past workers' compensation and OH&S authority-sponsored research activities and studies have resulted in few if any significant or timely injury reduction achievements, there are opportunities for studies and developmental work with real prospects of positive injury reduction impact. One of the most obvious areas is addressing needs associated with strain injury prevention, for example development of (a) a wider range of practical industrial handling aids, and (b) how to ensure their distribution and effective use in workplaces, particularly small and medium businesses. While developmental studies of this type might well be poorly regarded by research academics and other advocates with their own employment and funding agendas, the increasing cost of handling-related injury needs to be addressed by practical rather than academic - or for that matter, legislative - means.

The prospect of government funding will always attract special interest group pleading, particularly where 'big dollar' problems can be identified. There is not much evidence of significant or effective outcomes relating to prevention resulting from past years' OH&S 'research', with too much reinventing of existing wheels, minor 'potboiler' studies, reports justifying further research and reports exaggerating 'the OH&S problem' for a variety of identifiable reasons. Is research about training and providing employment for 'researchers' or is it about achieving timely and measurable impacts on Australian injury-prevention performance outcomes?

While the Victorian carpet manufacturing industry improvement study example was not a small employer example, there is wide scope for essentially similarly focused 'low level' studies throughout the SME sectors of Australian industry. Subsidies for roll-over protection on farm tractors have been very significant for that small business sector.

My own experience has shown the benefits of hiring newly qualified engineers on short term contracts to assist a number of the many workplace handling tasks for which 'off the shelf' solutions were not known, could not be applied, were not promptly available or were prohibitively expensive. Their focus on resolving the problems with the workplace employees enabled prompt development of practical solutions.

In short, focused practical shop floor level studies that would assist small employer sectors with identifiable injury claim cost problems would be much more useful than shelfloads of academic reports and legislation. Forget the 'political correctness' of compliance with comprehensive legislation for the time being and get our hands dirty providing some effective practical help with the real workplace OH&S problem issues.

NOHSC

The National OH&S Commission has been developing national standards, codes and guidelines since 1986, many of which have been adopted substantially verbatim by other jurisdictions. The very significant expenditures of skill, time, effort and resources by NOHSC, the jurisdictions and Australian businesses on developing, implementing and enforcing the requirements of all those 'nationally consistent' guidelines have not been matched by timely achievement of significantly improved workplace safety outcomes.

While 'comprehensive' national standards sound good in theory, the practice is arguably deficient, with standard development and regulatory implementation influenced by a range of political, industrial, technocratic, parliamentary drafting and prosecution-related agendas not necessarily related to current scientific evidence or timely achievement of improving workplace safety performance. There is little evidence that the expensive development and implementation of national standards over the past 15 years has achieved anything of significance beyond delaying achievement of improved workplace safety performance.

NOHSC can be described as a 'sacred cow' for many 'OH&S industry' advocates, particularly those who have benefited or anticipate benefiting economically either directly or indirectly from its existence and funding. The roles of NOHSC and some state OH&S authorities as significant cash flow, CV flag and authority sources for a range of 'OH&S industry' members, academic researchers and consulting businesses have and continue to raise questions of professional and ethical integrity.

Since its inception, NOHSC is perceived to have pursued a policy of avoiding benefit-cost analysis of its proposals whenever possible. When that policy cannot be achieved by alternative marketing approaches, hypothetically inflated prospective future benefit assumptions are inserted to provide an illusion of positive benefit-cost outcomes. State OH&S authorities should be able to accept NOHSC impact assessments as honest and unqualified professional evaluations of the likely economic, environmental and social benefit and cost impacts of NOHSC proposals. It is submitted that the deficient quality of NOHSC justifications do not meet those criteria.

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- Full and part-time employment in a range of industries from 1944, including mining, metals, gas and packaging manufacture.
- Practical occupational experience includes industrial and mining plant commissioning and operation, staff training, economic analysis and planning, administration management and OH&S, environmental and property risk management.
- Corporate risk manager for a multinational manufacturing group for ten years with particular focus on OH&S performance, workplace safety improvement, audit and workers' compensation self-insurance acceptance.
- Member of the Victorian employers' OH&S Forum from its 1986 inception.
- Seconded from industry during 1987 to the Commonwealth Business Regulation Review Unit to assist its review of the first NOHSC draft Manual Handling code.