VECCI Submission.

National Worker's Compensation and Occupational Health and Safety Frameworks.

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About VECCI.

The Victorian Employers' Chamber of Commerce and Industry (VECCI) is Australia's largest multi-industry business organisation.

VECCI represents a diverse range of small and medium sized businesses, as well as many of Australia's largest companies, across a diverse range of industry sectors.

It serves almost 8,000 member companies, together with a range of affiliated organisations, through offices in Melbourne and the major regional centres in Victoria. It offers high quality, cost effective industrial relations advice and expertise to Victorian employers, together with a range of consulting services in business management, occupational health and safety, workers' compensation and human resource management.

VECCI also provides support to employers through its international trade group, as well as through a comprehensive range of training and personal development courses in more than 50 different areas to support the needs of Victorian employers and their employees.

VECCI is an important advocate of business in forums at all levels of Government - local, State and Federal. In recent times it has pursued a range of issues including tax reform, workers' compensation, education and training, business regulation and labour market matters.

VECCI also has a particular role in supporting the interests of small business with around two-thirds of its members employing less than fifteen employees.

For further information about VECCI please contact the Membership Department on 8662 5462.

VECCI - Leading Business into the Future.

2 Essential Principles.

The following principles have been adopted by VECCI and provide a reference when developing a policy position.

2.1 Premium.

Over time, the premium paid by an employer should reflect the costs of claims incurred by that employer. This is a user pays principle but one which introduces a concept of payment over time rather than harsh up front adjustment following a claim.

Improved performance should result in reduced premium for all employers. Small

employers should be protected from excessive premium volatility.

A premium system should be sufficiently transparent to allow employers to make reasonably accurate budget predictions for coming premium periods. The insuring body must provide a sufficient number of staff to provide premium explanations to employers at key premium periods.

The premium scheme should provide incentives for behaviours that assist in achieving the objectives embraced in legislation.

The Workers Compensation scheme must be fully funded.

The Workers Compensation Scheme should not be privatised unless it can be demonstrated that private underwriting will benefit all employers.

2.2 Benefits.

Compensation should only be provided where there is a substantive contribution between the worker's employment. and the workers incapacity.

Benefits should provide fair compensation for lost income but contain incentives which encourage a return to suitable employment.

Weekly benefit scales should include a periodic step down in payment levels. Benefits should be jointly linked to both pre-injury earnings and in the second entitlement period, to the degree of injury or loss.

Medical and like costs should be compensated but only those medical and like services which can demonstrate evidence of outcomes.

Choice of medical practitioner should remain with the worker unless the claim exceeds normal "natural healing" expectations or the workers doctor is not supportive in a return to suitable employment. In these circumstances the Victorian WorkCover Authority or independent medical assessors may direct that specific approved treaters provide certificates and co-ordinate treatments.

There is no place for common law in a no-fault compensation scheme.

2.3 Dispute resolution.

A non adversarial informal dispute settling process should be mandatory on all parties. Participation in the conciliation process should remain a requirement before courts can commence to hear a matter.

For compensation disputes which proceed to court, employers should be given a choice of legal representation and be included in the legal processes relating to their claims.

2.4 Accountability

Employers should be able to seek relief from damage which result from decisions, omissions or actions by the employers WorkCover Agent or actions or omissions of providers over which the Agent had control.

Sanctions should apply to Agents who fail to meet the requirements of the Act.

Compensation Authorities on behalf of employers should recover costs from medical providers, who through negligence, add to the cost of a claim.

2.5 Return to Work.

An employer who provides an injured worker with suitable employment should never be worse off for having done so.

A worker who participates in a return to work program should never be worse off for having done so.

Return to work needs to be redirected towards achieving a real and sustainable return rather than a mandatory unproductive created position offered and accepted only for the sake of satisfying compliance.

Workers who fail to make a reasonable effort to participate in a return to work plan or other rehabilitation program should have their weekly compensation payments ceased and determined as provided for in legislation.

2.6 Essential Principals OHS.

Once a person employs another they assume a series of responsibilities not applicable to a normal citizen. These include obligations relating to the employees' safety and health. These responsibilities may be extensive and onerous. The act of employing a person does not automatically bring enlightenment. An employer will commence with minimal awareness of these responsibilities and little information regarding what is required to satisfy them.

The Authorities have a responsibility to effectively provide information and assistance to industry (and in particular new employers) as an essential precursor to enforcement by penalty.

The WorkCover Authorities should arrange independent evaluations to determine the effectiveness of legislation, regulations and Codes of Practice they have introduced or intend to introduce. The results of these evaluations should be made public. It is suspected these efforts to legislate, regulate and then operate compliance programs are having little or no impact on safety.

While extensive stakeholder consultation is necessary in developing legislation, regulation, Codes of Practice and guidance materials, the final outcome must be based on the probability of producing a desirable outcome rather than expedient agreement or compromise or even a majority view.

3 Introduction.

The existence of multiple jurisdictions in Australia for both Worker's Compensation arrangements and Occupational Health and Safety law is becoming increasingly absurd in a globally focused business economy. The thousands of employees boarding interstate flights each week day at domestic airport terminals are just one indication of how out of date this current arrangement is. This fact was acknowledged in the previous Industry Commission Reports of 1994 and 1995.

Recommendations were made in those reports and generally accepted by interested parties. As a consequence the Heads of Workers Compensation Authorities was established and that organisation in 1997 published the "Promoting Excellence" report. That report identified a set of principles and recommendations. The report was endorsed by the Labour Ministers Council. Last year the jurisdictions signed onto the National OHS Framework.

To date slow progress has been made to resolve the cross jurisdictional problems identified in the 1994 and 1995 reports. As an example complimentary legislation in Queensland, NSW and Victoria to restrict workers working short term in another state from claiming compensation in that jurisdiction has been legislated in NSW and Queensland and is to be proposed as legislation in Victoria later this year.

Employers most effected by cross jurisdictional issues are the Self Insurers, the interstate transport industries, employers who operate on state borders, employers who have employees work in other states and those national employers who must try to implement uniform OHS and rehabilitation programs in multiple jurisdictions.

This week Victorian WorkSafe announced that they had met with NSW WorkCover to discuss major cross-border construction projects that are expected to commence in the near future. These include the Hume Highway Albury/Wodonga bypass, a new bridge over the Murray River between Robinvale and Euston, and a large hotel and marina complex in Mildura. The discussions related to developing a consistency of approach. While the two authorities are to be congratulated for recognising the

existence of cross border issues and the advantage of a co-operative and uniform approach between the authorities, there ought not be a need for it in 2003/2004.

There are a few positives in having multiple jurisdictions. It allows experimentation and evaluation of initiatives rolled out by a jurisdiction. Victoria's Industrial Manslaughter Bill allowed other jurisdictions to benefit from the debate without incurring the investment. It is also true that if an initiative in either worker's compensation or OHS succeeds in one jurisdiction before it is adopted by other states the originating state often offer suggestions for improvement learnt from their roll out experience. While this refinement is an advantage it also means a shift from uniformity.

It might also be suggested that rather than import a legislative program, regulation or Code totally most Authorities will refine the product so they can claim it as their own and claim it as best practice. Again this provides a shift from uniformity.

The lack of significant progress in achieving national consistency in both worker's compensation and OHS is probably due to the fact that it has been up to the jurisdictions themselves to advance it. The Jurisdictional Authorities do not see this as a pressing issue. It is not a priority in their work plans if it appears at all. The authorities focus is jurisdictional.

A burst of activity from the Heads of Workers Compensation Authorities originated following the Industry Commission reports. Much of that was driven by Andrew Lindberg then Chief Executive of the Victorian WorkCover Authority. Since his departure activity has slowed. As an example the six monthly jurisdictional compensation comparison publication was last produced in November 2001. There appears to be a motivational vacuum in addressing the border and cross border issues.

4 The Issues raised in the issues paper.

This section should be read in conjunction with the essential principles previously stated. ***4.1***

National Frameworks.

Previous Inquiries identified the issues and costs imposed on Australian industries operating at or across borders. These inquiries quantified some of these costs. While their was some contention about the solutions recommended by the Commission there was wide acceptance regarding the inequities and costs caused by the lack of uniform legislation and regulation. Rather than revisit and duplicate what has previously been established this commission needs to consider options for advancing more quickly to what the Labour Ministers Council have endorsed as desirable. The precise model should be open to consultation and research.

As stated the jurisdictions themselves have advanced towards uniformity and consistency very marginally. The temptation is to then establish a National body to advance the cause by developing a National framework. This may not provide a solution. The inquiry may seek to look at the success of the National Road Transport Commission established in 1990 to achieve uniformity in state road transport laws across jurisdictions. While a number of

templates have been established we understand from industry that only in the areas of driving hours and the transport of dangerous goods have the states adopted the templates.

VECCI has always expressed a concern that there was considerable distance between the floor of the panel beating shop and the state authority developing and implementing legislation, regulation and guidance material. The distance between the shop floor and a national authority would be even greater. OHS compliance falls mainly to those without expertise in the area. Legislation and information therefore must be geared to that audience. World best practice legislation is of little benefit if it is largely technically precise and not translatable by those it is aimed at.

While the National OHS framework developed by NOHSC has received general support and has been signed off by the jurisdictions it will take time to witness any movement towards uniformity or consistency.

More merit may be found by offering a National option particularly in workers compensation.. A national standard for OHS in the construction industry has been recommended by the Royal Commission. Adoption by the jurisdictions might yet occur.

4.2 Premium setting.

In line with the performance based premium principle preferred a number of formulas exist across the jurisdictions. What differs is the trade between volatility and performance sensitivity. Victoria appears to be moving towards a model that will offer quicker more pronounced rewards for good performance periods. The price of that is harsher and steeper increases when a substantial claim occurs.

While most employers support a premium which takes into account claim performance they recognise that many of the more expensive claims have a minimal work contribution because compensation is extended to workers for the worsening of existing conditions which the employer (and sometimes the worker) is unaware of. With an aging work force this issue is becoming more pronounced. The definition of injury can mean an employer receives a premium increase they do not deserve.

Once a claim is accepted the costs are dependent on the motivation and management ability of the insurer or management agent. This is a major issue in Victoria where the WorkCover Authority itself has recognised that past Agent performance has contributed to costs. A new model has been introduced but initially it seems to have removed the employer from the claims management process.

At times various efforts have been made to encourage OHS improvement through premium incentives. While this is an option for large employers the cost of a degenerative MSD injury against a small employers payroll limits the ability to incent only those few larger employers who generally have ample other drivers to seek OHS improvement anyway. The more an employer sees that their claims costs are outside their control or influence the less useful the premium system becomes as a driver of OHS improvement.

Across all jurisdictions the number of claims received has reduced (an indicator of improved safety) but claim costs have increased. There is no evidence that injuries have become more severe. However employers are paying more premiums as a consequence.

While the Commonwealth argues that compensation systems are transferring costs associated with injury to the social security system by limiting compensation entitlements, employers may argue that they are being forced to pay for workers who have lost the physical or mental capacity to work through factors which may be partially triggered by a

work event but which would have had the same consequence had the worker not been employed.

Compensation premiums are a tax on jobs. If the community decides the employers should meet the costs of medical incapacity to which there employment is only a contributing factor then the community eventually carries that cost through less jobs or higher costs for goods and services.

4.3 Rehabilitation and return to work.

Compensation systems have moved from financial settlement of to an emphasis on rehabilitation and return to work. Most jurisdictions place extensive obligations on both workers and employers to participate in rehabilitation. A look at the National Monitor on return to work seems to indicate that the return to work rate is not much different to that which would occur in the absence of such legislation and the costs and energy invested in rehabilitation.

Stress claims which frequently commence as adversarial and accusative are almost impervious to rehabilitation efforts. It may be worthwhile shifting the emphasis to curing incapacity rather than accommodating it. Where that is not possible re-training to enhance employability may be the most realistic option. In general a cultural shift from simply achieving a return to the workplace to a focus on restoring the ability to compete on the labour market is needed. This culture has been able to develop because the employer and their preferences have been left out of the process. Employers have been legislatively forced to have rehabilitation done to them. Without their input and support it simply delays the inevitable rather than prevent it.

Rehabilitation should be cost reducing. Too often, as it is currently practiced, it transfers costs from the premium to the operating costs of a business. That is not a sustainable solution.

4.4 Self insurance.

Self insurance is attractive to large organisations because it eliminates third party intrusion into the management of human resources. It allows injury management to be complimentary to the management policies applying to other aspects of the business. It provides real incentive to reduce injury and achieve worker restoration. Self insurers generally perform better than the scheme in generally It is inexplicable that a national self insured employer is required to have multiple licenses and in some jurisdictions not be able to self insure at all. In each jurisdiction they must meet variable re-insurance requirements that prevents the spread of risk and economies of scale that would otherwise would be available could they seek a single re-insurance policy on the world market.

A deletion of the requirement to be in competition to a commonwealth body to be permitted national self insurance would allow a greater number of national companies to access a national licence.

4.5 Prevention.

OHS authorities have a joint role of providing information and assistance and enforcement. From time to time as governments and government priorities change the pendulum swings more in favour of either enforcement or assistance. Compliance has increasingly been

measured by emphasis on documented process. This seems adverse to the human function and is not assisted by regulation which is akin and as useful as the technical manuals provided with computer software. The language is foreign.

Victoria has tried industry based and hazard specific seminars which identify a handful of problems (gleaned from statistical data) and with industry participants and OHS expertise combined develop useable practical guidance. The fork lift guidance package on CD is an example. This inclusive approach seems to be producing measurable improved outcomes in construction and the food industry.

It is our view that excessive emphasise on employer enforcement reinforces the concept that prevention is the employers concern alone. Until the concept of shared interest and shared responsibility is embraced, real improvement will be retarded.

The use of information technology to get the right information, in the right format, to the right people, at the right time provides promise. The use of existing relationships with third parties (accountants, suppliers, etc.) to provide information (particularly to small business) needs to be further explored. As an example it is pleasing to see some labour hire providers adding value to their service by providing risk assessment and control advice to clients while also ensuring the safe placement of their employees.

4.6 Benefits Structure.

The majority of injured employees return to their employment following injury as soon as it is possible for them to do so. Because initial benefits in most schemes are generous and because awards may provide make-up pay obligations on employers the majority of compensated workers incur minimal income loss.

Some workers may wish to return to work but are unable to do so because of the impact the injury has on their capacity to work. These workers may incur financial loss at a step down point. These workers may have access to a lump sum for impairment or through common law which compensates that loss to a degree.

The biggest costs to the schemes are the small percentage of claims where the injury is minor but the duration and costs disproportionate. It is these claims where most of the legislative and claims management effort is directed in an attempt to reduce the number of and the costs associated with these claims.

Fraud is a deliberate intention to obtain a benefit that you know you are not entitled to receive. Evidence suggests fraud is a minimal contributor to scheme costs. An opportunity to disclose and conclude fraud usually presents itself.

More difficult to control and conclude are those claims where the injury seems to triggers an injury focus. That reaction results in the injured worker retreating from work (and often other areas of life) and becoming cocooned in the system. It is these claims that frustrate and cost. Having just one of these claims often results in considerable premium increases for the employer. Often the cause is gradual process rather than a single event and often a multitude of life and work issues cloud management of the claim. There is a striking sameness about these claims. In Victoria there are only about 2,000 of these claims received each year but they account for much of the cost of the scheme.

It appears reducing benefit levels is not a significant driver in reducing these type of claims once they are entrenched. Insurance experience shows that "moral hazard" multiplies with benefit increases. Moving the benefit step down closer to the commencement may provide a greater incentive than having the step down at 26 weeks or greater. The existence of

accident make up pay and top up insurance for some workers negates this impact and increases moral hazard.

Any development of a national system needs to address the cost impact of these long term high cost claims which defy medical explanation and treatment. Because work is only one of many factors in these claims the concept of limited liability could be considered. At the moment if work was a trigger and there is a lack of a history of similar incapacities it seems work is treated as being the sole cause long term. The fact that many of these workers are much worse two years after ceasing work than they were when they last worked indicates that employment can no longer be a substantive influence.

Lump sums for impairment and common law increase with the level of impairment and loss incurred. That can cause an perverse incentive. In Victoria since the reintroduction of common law benefits few if any matters have commenced. This may be due to delays in establishing protocols and guidelines or be due to the success of the legislated thresholds. However the fact that employers are all paying a 17% surcharge on premium to pay for common law indicates that claims are anticipated by the Victorian WorkCover Authority actuaries.

VECCI believes common law costs will get out of control eventually, because they always have in the past. In the past we have seen legislators and authorities confident that this time they had it under control. We retain the view that there is no place for common law in a no fault compensation scheme. Given the political realities it is unlikely any future Victorian government will seek to remove common law from the benefit platter.

Because studies in the past by the Victorian WorkCover Authority showed that 35% of recipients of lump sums for common law had exhausted the award 18 months after receiving it there is a strong case for structured settlements. The sooner the authorities and the Tax office can implement structured settlements the better.

4.7 Coverage.

The definition of deemed workers and eligible contractors is difficult. Courts have struggled to make decisions about who is and who is not a contractor or deemed worker whose remuneration must be included in WorkCover certifications. The question then arises which part of the remuneration In a world of non traditional working arrangements. This confusion and complexity results in innocent error.

Governments and the community want as many workers to be provided with a safety net should they incur injury while working. The question then becomes one of who pays the premium. It has been decided that principal contractors should pay if a number of criteria are met.

Workers compensation coverage is not available to a partner or sole proprietor who works across a range of clients and does not earn a majority of their income from a single employer. These workers must seek income protection insurance or carry the risk themselves should they be injured. Should they become the sole employee of an incorporated company they are then entitled to purchase workers compensation coverage. However should they perform work for a Principal for more than 90 days in a year or should their income from that employer exceed 80% of that years income the Principal is legally required to include remuneration in their certified remuneration. It is not hard to imagine that a contractor may work for more than 90 days (a part day is a day) and the Principal remain oblivious to that.

Principals do not see why they should assume responsibility for the coverage of workers engaged by someone else's business. There is much confusion between tests to determine whether a master servant relationship exists and tests to determine if an obligation to include remuneration in declarations exists. Being clear that no employment relationship exists many assume no worker's compensation liability exists.

The opportunity for partners and self employed persons to purchase compensation insurance needs to be costed and considered. At the moment those who would be prepared to pay the premium are excluded from doing so. At worst employers who engage contractors and sub contractors seek a certainty of obligation that would be delivered by a simpler test.

4.8 Reducing the regulatory burden and compliance costs.

The knowledge of regulations is poor. Authorities keep developing regulations and Codes of Practice while there is minimal knowledge and poor compliance with what was there previously. Little evaluation is done to determine if this cascade of additional or new obligations has a beneficial result.

At a recent meeting a representative of a jurisdiction lamented that while they appreciated the desire to make regulations and Codes simple and useable by small to medium business it also had a compliance and enforcement role and the regulation had to be technical and legally precise. It was almost an admission that regulation could not be both useable by business and enforceable. If your main focus is enforcement you will favour regulation that makes that easier.

As an example if a complaint of workplace bullying was made a WorkCover inspector may be confronted by conflicting versions and be uncertain about which version was correct. To prosecute the inspector would have to have evidence that bullying had occurred. By introducing a code of practice which requires an employer to establish a policy, conduct training and establish a process of receiving and investigating complaints the inspector would be relieved of the need to determine whether or not bullying had taken place and would issue a notice or prosecute because the employer had no policy etc. The Code of practice draft in Victoria was initially 71 pages. Eventually it was issued as guidance material of 30 pages.

Had the Code been approved by the Minister every Victorian employer was at risk of being non compliant unless they fully implemented the Code. This even if no bullying existed in their workplace. The effect of the regulatory burden is that most employers are probably non compliant with something they are unaware of. But to ask the question "what do I need to do?" would see them swamped with a truckload of legislation, regulation, Court precedents, Codes and guidance material. Most of it may not apply to their business but they would need to read it all first to decide what did and did not apply.

Has all this regulatory activity improved safety for workers? Since little evaluation has taken place the question probably cannot be answered. It is likely that technological improvements such as robots, and the move from manufacturing and agricultural based industries towards service and recreation industries have contributed more to injury reduction then the regulatory avalanche. The Productivity Commissions checklist for regulatory quality needs to be applied in future. Strategies need to be piloted before being made regulations. After implementation they should be evaluated for awareness, compliance, practicality and effect.

5 Summary.

Employers seek national consistency in both workers compensation and OHS regulation. The economic case for delivering this was made in previous Industry Commission Inquiries. Commitment has been made to a national OHS framework and the Labour Ministers Council have signed off on a set of principles relating to compensation best practice developed in 1997.

Employers would now like to see an accelerated movement towards achieving national consistency. Employers want to see resolution of the border issues relating to compensation and OHS.