

NATIONAL REVIEW INTO MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS

SUMMARY

The Issues Paper focuses on ‘harmonisation’ of existing albeit possibly modified Australian OH&S laws into a Model statute capable of being adopted by all jurisdictions.

The present Review, as with all previous similar inquiries into OH&S legislation, has been limited by its terms of reference. It is perceived as appropriate to examine whether assumptions and agendas have adversely affected the terms of reference and the probability of the Review leading to significantly improved OH&S outcome impacts across Australian workplaces.

Publications on the issue of OH&S – of which the present Review *Issues Paper* is the latest – have been substantially continuous since the adoption of Robens style legislation more than 20 years ago. There is a need to ask why OH&S remains a significant agenda item after such a long period of implementation of legislation advocated as representing ‘world’s best practice’ with impact assessments for proposed OH&S legislation confidently estimating dramatic outcome improvements in workplace-related injury claim numbers and social and economic costs to businesses, employees and the Australian community. Billions of dollars have been spent complying with OH&S legislation and reported to have achieved up to 90 percent compliance in a context where 97% of deaths and injuries are claimed to be preventable. (Feyer and Williamson, 1991) (1)

The answer is an indictment of past and present OH&S legislation and administration. Apart from minor variations attributable to periodic workers’ compensation legislation changes, the unacceptable death and injury numbers and cost impact outcomes have remained essentially stagnant across all Australian jurisdictions for the past 20 years. This submission identifies some of the key reasons behind the continuing ineffectiveness of Australian OH&S legislation and how that failure is concealed from public scrutiny, while making some recommendations aimed toward achieving reduced social and economic impacts of workplace deaths and injuries through changed legislation.

CONTEMPORARY AUSTRALIAN OH&S LEGISLATION

The most recent Australian OH&S legislation – the Victorian *Occupational Health and Safety Act 2004* (2) and the similar New South Wales Act of 2000 (3) – are acclaimed as examples of contemporary ‘world’s best practice.’ While that statement might satisfy the advocates, ‘stakeholders,’ parliamentary draftsmen and legislators involved in their preparation, documentation and approval, there is a need to ask whether they and prior similar legislation have achieved any significant positive impact on their legislated outcome objects. While the primary object of ‘securing the health, safety and welfare of employees and other persons’ at workplaces may sound appropriate, it is essential to evaluate whether and to what extent that primary object has been achieved. There is also the more basic question of whether ‘securing’ implies that the object of the legislation is to provide a process – *means* - rather than particular essential social and economic outcome *ends*. The ‘process means’ implication is perceived as a most significant weakness which adversely affects all that follows in the legislation.

The following objects in those Acts are explicit *process* ‘means’ rather than objective outcome impact ‘ends.’ The legislation presumes that those process means will achieve the primary objective of the legislation. As a result, the administration of all contemporary Australian OH&S legislation focuses on ‘compliance with mandated process.’

The Victorian Act ‘principles of health and safety protection’ specified at clause 2(2) ‘objective’ makes it quite clear that the *process* of ‘risk management’ is to be followed in the administration of their OH&S Act. The NSW Act objects 3(c) to (h) are essentially similar *process* specifications. A consequent and fundamental weakness in the Victorian Act is that the s.7 ‘functions of the Authority’ substantially ignore the principal object of that Act to focus instead on the secondary ‘process’ *means*, which are *presumed* to result in the principal object implied *end*. There is a key need to realign the focus on

socially-relevant ‘end’ impact outcomes, and minimise the focus of activities and resources on assumed ‘best practice’ process requirements.

It is relevant to note that the principal object (a) (‘to reduce the incidence of accidents and diseases in the workplace’) as well as object (h)(i) (‘to improve the health and safety of persons at work and reduce the social and economic costs to the Victorian community of accident compensation’) of the *Victorian Accident Compensation Act 1985* (4) are the real cornerstone objectives of effective OH&S legislation in that state, rather than the OH&S Act focus on process matters. Unfortunately, the predominant focus under workers’ compensation legislation has been on equity for injured employees rather than being directed toward achievement of that important legislative objective, although there have been limited injury claim performance incentive schemes for a minority of businesses in some jurisdictions.

TERMS OF REFERENCE LIMITATIONS

Past government-initiated reviews of OH&S laws are perceived as significantly limited by both their terms of reference and a number of tacit assumptions, of which the most significant are clearly the assumptions that Robens style legislation, the ‘risk-management’ approach and inputs from selected ‘stakeholder’ agencies and lobby groups are the optimal process means for achieving the socially appropriate objectives of eliminating or minimizing workplace-related deaths and injuries. As a consequence, past reviews have tended to validate and continue the demonstrably ineffective ‘process’ focus of the reviewed legislation rather than identify the need for focus on prompt, effective and continuing achievement of minimised workplace death and injury numbers and their social and economic impacts on the Australian community.

This Review’s ‘Terms of Reference’ similar presumption that existing OH&S legislation has achieved significant and timely improvements in workplace health and safety failure outcomes measured in terms of the number and severity of workplace death and injury claims is not well founded and is perceived to have predetermined the possible outcomes of the Review.

The ‘Principles for the Review’ mandate ‘an inclusive approach’ and ‘no reduction or compromise in standards for legitimate safety concerns’ with ‘consideration of the resource implications for all levels of government in administering harmonised laws’ without any mention of achievement of improved workplace death and injury impacts or the resource implications for the Australian economy. The Terms of Reference for this Review are perceived as ‘leading the witness’ toward the prevailing ‘comprehensiveness’ ethos and the foreseeable outcome that the ‘harmonised’ Model statute must include all the quasi-OH&S and industrial issues included in existing Commonwealth, State and Territory OH&S statutes. Extension of OH&S legislation beyond core OH&S issues and the consequent diffusion of focus away from reduced deaths and injury impacts have significantly impaired the effectiveness of past and present legislation. A ‘harmonised’ Model statute which included all the present non-core issues would further degrade the probability of achieving positive workplace death and injury outcome impacts.

While it has been estimated (Hendy, 2005 (5)) that ‘regulation costs the Australian economy approximately \$86.0 billion per year or 10.2 per cent of GDP,’ there are no credible benefit-cost estimates for OH&S regulation. Nevertheless, there are clear public policy imperatives that the cost of OH&S-associated regulation across the Australian economy should be considered rather than the too limited Review scope of ‘resource implications for all levels of government in administering’ OH&S laws.

WHAT ARE THE OUTCOME IMPACT OBJECTIVES?

Apart from s.7(1) of the *Queensland Workplace Health and Safety Act 1995* (6), ‘the objective of this Act is to prevent a person’s death, injury or illness being caused by a workplace, etc.’ supplemented by s.7(4) ‘achievement of this Act’s objective will help—

(a) reduce the human cost to individuals, families and the community caused by these deaths, injuries and illnesses; and

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- (b) reduce the financial burden on individuals, families and the community caused by these deaths, injuries and illnesses; and
 - (c) reduce the burden on the workers' compensation scheme caused by these deaths, injuries and illnesses, which in turn reduces costs imposed on industry; and
 - (d) maintain the community standard for workplace health and safety, which is eroded when persons gain an unfair competitive advantage by not implementing appropriate standards'
- Australian OH&S legislation contains no measurable outcome impact objectives.

NATIONAL OH&S TARGETS

The 2002 'major initiative' of the Workplace Relations Ministers' Council's *National OHS Strategy* (7) of minimum national targets is perceived as ineffective 'being seen to be doing something about OH&S' government. Adoption of the 'incidence' statistic for its targets enables subsequent reporting of apparently-positive outcomes without significant actual improvements having been achieved. Even so, the Workplace Relations Ministers' Council's 2008 *Comparative Performance Monitoring Report* (8) indicates that their modest mid-2007 targets were not being achieved.

Australian Standard AS1885 (9) specifies the 'Lost Time Injury Frequency Rate' (LTIFR) reporting method used by many businesses and OH&S agencies, but has been recognized for many years to have limited if any impact outcome relevance, as it does not differentiate between a death and a scratch injury. The secondary 'LTI Incidence' statistic is essentially a re-packaging of the irrelevant LTIFR numbers divided by five.

Further, as none of the associated 'five initial national priority areas for action' were measurable objectives for any of the 'stakeholders,' there does not appear to have been appropriate effort or resources applied toward achieving enhanced outcome performances in any of the specified 'priority areas.' It is doubtful whether enhanced performance in the 'priority areas' would have enabled achievement of the 'minimum national targets' of 10 percent fewer fatalities and a 20 percent reduction in LTI Incidence by mid-2007 in any event. The more probable outcome is limited to an increased volume of legislation, guidance materials and expenditures on regulation, administration and training. For comparison, some Australian OH&S agencies use estimates of improvements in the number and cost of workplace death and injury claims in the regulatory impact assessments and statements associated with their subordinate legislation proposals.

It is submitted that if national targets are to be relevant, it is necessary for them to adopt a similar evaluation approach – target numbers and costs of workplace death and injury claims. The target numbers should be related to workplace exposure hours as in AS1885, rather than the over-simplistic 'number of employees' used in the 'incidence' measure which does not differentiate between full and part-time employees. And while overall national targets are perceived as a first step toward achieving real rather than illusory improvements in the adverse Australian workplace death and injury picture, there are perceived needs to quickly take the next step of setting targets for each industry sector of the economy, with particular emphasis on the sectors contributing the highest adverse social and economic OH&S impacts.

ARE PUBLISHED PERFORMANCE NUMBERS CREDIBLE?

Australian OH&S agencies' annual reports tend to highlight selected positive figures to convey an impression of continuing effectiveness for the agency and its legislation. Annual reports tend to quote claim numbers resulting from closing off the count early after report year end without inclusion of foreseeable 'incurred but not yet reported' (IBNR) claim numbers and costs. Only about 70 percent of current claims have been lodged by the end of each claim year, with the remaining 30 percent lodged in later years. IBNR claims progressively increase the number and cost impact of injury claims for any one year over time. Closing off the numbers without including an estimate for subsequent IBNR claims facilitates annual reporting *every year* of an 8 percent or similar reduction in claim numbers against the updated (including the first following year's IBNR) claim count for the previous year, even when there

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has been no real underlying injury reduction improvement! Inclusion of a fine print waiver notifying that the claims information has been closed off at a particular date avoids censure for misrepresenting the real underlying position.

With the contemporary 'OH&S industry' fashion of reporting 'positive performance indicators' rather than statistics which might be perceived as negative and 'failure' measures, it is clear that regulators are reluctant to acknowledge unpleasant realities. Australian OH&S agencies' annual reports rarely highlight workplace death and injury claim costs in their up-front 'achievements summary' pages, preferring to 'bury' these data toward the back of their reports and using a variety of alternative reporting methods to minimise inclusion of unfavourable statistics. Reporting 'improving' injury claim numbers while claim costs are increasing at 12 or more percent per year poses unanswered credibility problems for OH&S agencies.

IS AUSTRALIAN OH&S LEGISLATION EFFECTIVE?

As already noted, most Australian 'Robens style' OH&S legislation has no direct focus on achievement of socially relevant death and injury impact outcomes. The only connection between the legislation and impact outcomes is *via* the speculative assumption that 'compliance with mandated process' will promptly and effectively result in significant and continuing impact outcome improvements. Australian OH&S legislation based on 'risk management' process assumptions has not resulted in the death and injury claim number and cost reductions confidently predicted by its advocates. It is time to recognize that the earth is no longer flat and move forward to alternative legislative means which could be more effective in achieving the necessary improvements in the social and economic impacts of deaths and injuries across Australian workplaces.

The sad history of failed workplace safety regulation in Australia and government agencies' role in that failure through lack of focus on achieving prompt and significant workplace death and injury impact outcomes is in part due to deficient workers' compensation legislation and administration. The most significant perceived aberration in Australian OH&S is the separation of OH&S legislation from workers' compensation legislation, with the workers' compensation system focused on death and injury compensation equity and administration. This legislated separation fails to adequately recognize the positive incentive role available for injury claim costs to operate as effective OH&S outcome drivers for the great majority of Australian employers and businesses. This is at its worst where jurisdictions include provision for 'buy-out' options allowing employers to avoid 'excess' or 'deductible' payments for initial periods of employee incapacity.

The 1995 Industry Commission report (10) identified the areas of most need - deaths and the 5 percent (permanent incapacity) of injuries which resulted in 58 percent of the total impact across the Australian economy and half the impact for injured employees. Deaths and the further 8 percent (reduced income) of injuries account for 83 percent of total costs, 97 percent of the employee impact and 95 percent of the community impact. Although the implied need for focus on these already well-known issues has been repeated many times since then, Australian OH&S agencies have continued to pursue 'comprehensive' legislation and administration agendas. It is relevant to add that the majority (67 percent) of recorded injuries were short term (less than 5 days absence) and 'return to full duties' injuries with a combined total impact of only 6 percent.

Claims of reduced legislation over the past 20 years have been based only on numbers of individual pieces of legislation. The reality is dramatic and continuing increases in the number of pages, required shelf space and mandated requirements of legislation and associated guidance documentation. Recent examples include the 185 page Victorian *OH&S Act* (2) and associated 542 page *OH&S Regulations* (11) with their many additional detailed 'explanatory' Guidance Notes and similar publications. The consequent mandated documentation of all downstream consultation, training, risk management activities and associated OH&S requirements further enhances the widespread public perception that Australian OH&S law is about 'paper war' and 'box ticking' rather than improving workplace safety.

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WHY ARE AUSTRALIAN OH&S LAWS NOT EFFECTIVE?

There are several perceived reasons for the failure of past and present OH&S legislation to achieve their assumed significant improvements in the number and cost to the community of workplace deaths and injuries.

Firstly the objectives are a mixture of *ends* and *means*. Secondly, the legislative and administrative focus is on ‘process’ means rather than the ends. Thirdly, because of ‘comprehensiveness’ - continuously expanding the scope and detail of legislation to satisfy lobby group advocacies and parliamentary drafting dictates. These ‘process’ issues have replaced focus on achieving improved workplace death and injury impact outcomes.

Looking at the other side of the same legislative coin, there are no credible public evaluations of whether that principal object of OH&S legislation has been, is being or is likely to be achieved.

WHAT DOES ‘PERFORMANCE’ MEAN?

This submission contends that the major reason for the ineffectiveness of Australian OH&S legislation is the failure to focus on intended impact outcomes. Most if not all Australian jurisdictions and OH&S agencies follow the dogma that duty of care ‘performance’ means ‘compliance with the mandated legislative process’ as the intended outcome to be achieved rather than any other outcome, such as improvements in workplace health and safety number and cost impacts. That re-definition of ‘performance’ is not perceived as in the public interest or consistent with community understanding that achievement of benefit outcomes is of more significance than rote compliance with legislation.

Claims that ‘performance-based’ legislation will be more effective than detailed ‘prescriptive’ legislation has been a ‘red herring’ deflecting attention from the underlying issue of continuing workplace health and safety failures in Australia. There is an urgent need to focus on accountability for impact outcomes rather than ‘compliance’ with process mandates.

IS ‘COMPLIANCE WITH PROCESS’ THE ANSWER?

The mandatory ‘compliance with process’ primary focus on risk identification and risk assessment with associated documentation and ‘consultation’ requirements, compounded by reports of prosecutions alleging deficient documentation and training, has had the foreseeable outcomes of reduced focus on improving injury numbers and severity as well as resourcing of the required ‘risk control’ step. This adverse outcome is made significantly worse by the ‘all hazards are equally important’ assumption of OH&S legislation and its administration by OH&S agencies. Where most if not all employers would address their OH&S issues in priority sequence starting with their most serious first, contemporary Australian legislation and practice simplistically assumes that the potential risk of a scratch is no less important than a potential fatality risk.

Hopkins (2005) (12) reported that ‘It is often assumed that the role of regulatory agencies is to bring about compliance with regulation,’ ‘the meaning of compliance is often problematic and that a focus on securing compliance may not be enough to achieve the regulatory goal of safety’ and ‘What is distinctive about the regulation of safety is that it is the regulation of risk.’

While, for example, the Victorian *OH&S Act* s.7(1)(c) specifies that a key function of the Victorian Workcover Authority is to ‘monitor and enforce compliance with this Act and the regulations,’ there is no apparent accountability for achieving the expected impact outcomes estimated in that agency’s regulatory impact statements. It is submitted that adherence to ‘compliance with process obligations’ as the key OH&S performance measure, without apparent recognition or evaluation of the adverse social and economic significance of the prolonged and continuing failure of the implementation of that concept across all jurisdictions, is seen as the most significant deficiency in Australian OH&S law.

Mandatory compliance with ‘line item’ OH&S legislation poses the probability of employer ‘paper compliance’ with the associated audit tools, rather than focus on known injury prevention needs. Changes to OH&S regulation have caused employers to implement workplace and method modifications

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which are not cost-benefit justifiable and divert management and financial resources away from items of greater significance. The 1998 Victorian Treasury review (13) highlighted that the Victorian Workcover Authority's focus on regulation of process requirements - as opposed to outcomes - increased compliance costs, stifled innovation, deterred competitive entry into the workers' compensation market, diverted resources from relevant outcome need areas, failed to create incentives for effective safety performance or attention to total risk and injury management, was not cost-effective, and had probably reduced overall economic welfare. The Treasury review noted that legislative restrictions, at best, supported the objectives, but at the expense of enhanced incentives for safety, effective prevention and injury management performance, service innovation or administrative efficiency. The review recommended greater focus on outcomes, and considered detailed regulation of processes to be unnecessary, noting that identified legislative restrictions were, at worst, irrelevant to the achievement of the objectives.

DOWNSIDES OF 'PROCESS' OBJECTIVES

The foreseeable result of specifying *process* objectives in OH&S legislation is that 'compliance with process' becomes the requirement, rather than achievement of the arguably much more significant *but unstated* outcome of reduced workplace death and injury impacts. All downstream subordinate legislation, codes and guidance materials have been directed toward the same 'compliance with process' objectives with the implicit presumption that compliance will automatically, effectively and promptly result in significant and continuing workplace death and injury outcome improvements. Unfortunately and despite repeated annual achievement claims by government OH&S agencies, 'compliance with process' and that presumption have not demonstrated any significant association with improved workplace death and injury impacts across Australian workplaces, apart from a very few 'show trial' anecdotal examples.

This submission perceives the assumption by Australian legislators and OH&S agencies that 'compliance with process' equates with acceptable 'outcome performance' as one of the several reasons underlying the inadequate and continuing OH&S impact performance over the past 20 years across Australian jurisdictions.

OH&S agencies tend to lay the blame for the failure of OH&S legislation on those who are regulated by them, rather than accept any level of accountability for that long-term and continuing failure. While it is accepted that there are – and will continue to be - bad examples across the spectrum of Australian employers and businesses, the OH&S agencies' claim fails to recognize the very substantial time, effort and resources that Australian employers have devoted toward compliance with the OH&S legislation dictates – and the agencies' own public recognition of the degree of compliance achieved. One example is the investment in lifting and handling aids across all sections of industry – without the predicted commensurate reduction in workplace lifting and handling injury claim numbers and costs. Another example is the volume of documentation required by OH&S legislation, whose only obvious impact is to 'cover the employers' back' from prosecution by OH&S agency staff, without any clear and direct death or injury reduction impact outcome for the workplace.

There has been little if any audit or consideration of whether the very significant employer and employee time and effort and the billions of dollars of resources diverted from alternative activities toward compliance with past and present OH&S legislation have achieved the death and injury benefit estimates confidently predicted by their advocates over the past twenty years. That *none* of the forecast benefit outcomes has been achieved is a disgrace, particularly for the employees who continue to be injured at work. Successive Governments who have allowed this situation to continue must share the responsibility, particularly when public policy normally requires periodic reviews of the performance outcomes of other activities.

HAS 'RISK MANAGEMENT' BEEN EFFECTIVE?

The global ‘cause-effect’ assumption that the ‘risk management process’ will promptly, effectively and permanently achieve improved workplace health and safety impact outcomes is just that – only an *assumption*. The very substantial compliance with risk management dictates across Australian industry has yielded mountains of employer compliance documentation and resource expenditures but only molehills of outcome impact benefits for employees and the community.

It is submitted that alternative approaches must be considered if there are to be significant improvements in Australian OH&S performance. We must focus on achieving positive impact outcomes rather than the double-negative philosophy of ‘*eliminating risk*.’ A preferred approach focuses on the positive objective of ‘how to manage work and workplaces safely’ rather than the negative and stereotyped ‘risk control’ format adopted since 1985. Clear and positive guidance on good management practice where it is most needed should always be preferred over the unfocused and negative approach of minimising every conceivable potential hazard from inadequate design and practices.

There is only one successful approach - **prevention**. We have to focus on the ‘*how to get it right from the outset*’ approach, rather than fiddle about with whether or not there are risks, and whether or not they’re significant.

THE ‘COMPREHENSIVENESS’ DOGMA

From such mighty acorns, a tiny lemon grew.

The ‘comprehensiveness’ dogma is encouraged by such ‘stakeholder’ lobby groups as OH&S agency policy staff, academic groups and ‘OH&S industry’ members continuously advocating inclusion of ‘necessary improvement’ issues, with the foreseeable result of further inflating the scope and volume of OH&S legislation. The old maxim that ‘Knowledge is Power’ applies to significantly advantage the ‘stakeholder’ lobby groups, workplace and advisory positions nominated in legislation, employer and employee training and advisory businesses and the OH&S agencies themselves, with the foreseeable result of all these groups – albeit unconsciously – perceiving that the most comprehensive, complex and voluminous legislation is in their interest.

The already-quoted 185 page Victorian *OH&S Act (2)* and associated 542 page *OH&S Regulations (11)* are supplemented by innumerable ‘explanatory’ Guidance Notes and similar publications. The resources devoted to preparing, reading and comprehending all this documentation would have been far better spent drafting intelligible legislation in the first place. Equity of access to the parent legislation for the vast majority of employers, especially small businesses, is submerged by the ‘comprehensiveness’ and ‘parliamentary drafting dictates’ built into OH&S legislation.

‘Comprehensive’ OH&S standards and legislation are adopted at national and state level as a package with limited consideration of alternatives and supported by improbable and speculative future benefit estimates. As impact outcomes are not audited, there is no effective accountability associated with drafting and justifying OH&S standards and legislation.

Comprehensive legislation diffuses management focus and diverts skill, effort and resources away from directly addressing the most important safety issues to ‘compliance’ with the legislation through ‘box ticking’ documentation of less significant OH&S detail issues to ‘prove compliance’ and ‘protect your back’ against prospective future prosecutions. It is perceived as unfortunate that similar duty of care ‘compliance’ documentation will continue to divert effort from more effective preventive activities in the future.

THE ‘OTHER AGENDAS’ PROBLEM

The position of OH&S and workers’ compensation as subsets of the ‘industrial relations’ environment poses a range of downside impact exposures. Ferguson (14) has noted that ‘they have always known from bitter experience: that the industrial relations club and the rest of the social players have discovered the billions of dollars and power that reside in work injury at the cost of prevention and rehabilitation.’

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Many of the ‘stakeholders’ involved in drafting OH&S legislation and policies come from industrial relations lobby groups (the ‘IR Club’) with industrial and political agendas extending beyond OH&S.

One obvious example is extension of workplace entry, search and information gathering powers to industrial organizations to workplaces where the organization has no members and on the basis of ‘any suspected breach of OH&S legislation’ – including the hundreds of pages of subordinate OH&S legislation. A further extension permits industrial organizations to initiate prosecutions under OH&S law and to benefit from penalty revenue resulting from successful prosecutions. A third ‘coach and horses’ example extends the ambit of ‘work’ to include ‘all times when the employee is performing work in connection with an undertaking carried on by an employer, whether or not the work is carried out at a workplace.’ While these extensions may have resulted from issues of perceived need at the time of their inclusion, it is submitted that they distract attention from and diffuse necessary focus on the central issue of achieving reduced death and injury impacts.

OH&S agency and stakeholder groups have also funded studies aimed at substantiating viewpoints which could promote their power and influence, for example, through claims that official statistics understate realities. A significant example is the ‘cancer deaths due to workplace chemicals’ campaign which purported to re-define a significant proportion of tobacco-related deaths as ‘workplace chemical’ deaths via a sequence of mandated assumptions.

Lobby group advocacy for ‘more and better’ data is perceived as poor public policy, unless academic publication is a primary OH&S objective. Accuracy and reliability of data are only marginally relevant when the most significant remedial issues are patently obvious, and error rates would increase with greater complexity. With the minor and short term 67 percent of injuries contributing only 6 percent of the total death and injury cost burden, collecting and analyzing data on these injuries contributes very little toward achieving reduced OH&S impacts.

JARGON AND DEFINITION PROBLEMS

The profusion of injury definitions which statisticians and academic researchers might consider relevant such as whether due to an event, a series of events or ‘slow onset’ conditions are ‘red herring’ issues which continue to divert effort and resources away from improved death and injury performance. It is essential to focus on the ‘dog’, rather than have the agenda directed by the ‘tail.’

Definition of ‘performance’ in terms of ‘compliance with process’ mandates heads the list of pseudo-technical, insurance and legal industry jargon words (such as ‘disease,’ ‘illness,’ ‘strains and sprains,’ ‘occupational overuse syndrome,’ ‘repetitive motion’ and ‘multi-factorial’) used in OH&S legislation and supporting documentation, which complicate the issues, divert attention toward particular factors and anecdotal sociological issues while confusing workplace people. Inadequately-defined criteria (such as ‘frequent,’ ‘prolonged,’ ‘repetitive,’ ‘twisting,’ and ‘large’) with ‘safe/unsafe’ implications also tend to confuse workplace users without achieving the prevention objective outcomes. Artificial differentiation between rapid (‘injury’) and slow onset (‘disease’ or ‘illness’) impacts arising from essentially-identical and controllable factors, or between strain (or ‘sprain’) injuries affecting different parts of the body, has minimal utility. While there might well be many factors involved, it doesn’t help to *start* by complicating issues. The best route to resolving problems is to simplify the available alternatives and focus on those which are most likely to lead promptly to the desired outcome. This is very much the case in preventing workplace injuries.

Jurisdictions claiming to have replaced large numbers of ‘obsolete’, ‘prescriptive’ and ‘subjective’ standards and legislation with less numbers of documents invariably described as ‘improved’, ‘performance-based’, ‘objective’ and ‘comprehensive’ are fooling the community. Inclusion of all the previous content and adding all the incremental ‘comprehensive’ ambit duties results in increases shelf-space documentation and reduces focus on key beneficial outcomes while diverting skill, effort and resources toward overall ‘ticking the boxes’ audit compliance and total confusion for the 90 plus percent of small employers.

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NEED FOR FOCUS ON IMPACT OUTCOMES

The central rule of effective management is *the necessity to focus effort and resources on desired end outcomes*. Australian OH&S legislation and associated documentation since 1985 provide an example of ‘*how not to*’ achieve a successful outcome, due to:

- * not being focused on achieving workplace death and injury impact outcomes,
- * unfocussed ‘comprehensiveness,’
- * relying on implicit and demonstrably ineffective ‘process’ assumptions, and
- * not ‘closing the loop’ to evaluate achievement effectiveness.

Mascini (2005) (15) noted that ‘Man-made disasters usually lead to the tightening of safety regulations because rule breaking is seen as a major cause of them. This reaction is based on the assumptions that the safety rules are good and that the rule-breakers are wrong.’

Australian OH&S legislation presumes that when its requirements are implemented, the underlying death and injury minimization objective will be automatically achieved. This assumption places accountability for compliance on employers, without any accountability for effectiveness on the legislators or regulators. If we seek to make effective impacts on our continuing inadequate workplace death and injury performance, it is appropriate to rethink this assumption and revisit our whole approach.

The 1995 Industry Commission report (10) identified the areas of most need - deaths and the 5 percent (permanent incapacity) of injuries which resulted in 58 percent of the total impact across the Australian economy and half the impact for injured employees. Deaths and the further 8 percent (reduced income) of injuries account for 83 percent of total costs, 97 percent of the employee impact and 95 percent of the community impact. The social and economic significance of this subset of workplace injuries necessitates focus on their management. There is an overriding need to minimise the diffusion of effort and resources on assumed ‘best practice’ comprehensive process-based requirements and realign the focus on prompt achievement of socially-relevant impact outcomes.

PERFORMANCE MEASURES

The outcome impact criteria understood by businesses are measured in dollars. Australian governments provide dollar-denominated budget criteria and economic signals to businesses and individuals across the economy. If OH&S legislation, OH&S agencies and the corresponding workers’ compensation packages are to be effective toward improving Australian OH&S impacts, their objectives must be identifiable and measurable beneficial impact outcomes.

Effective workplace measures should start by setting specific performance objectives, in relevant terms such as the number of workplace deaths and injury absence workdays per million man-hours worked, both nationally and by industry classification. These objectives can then be expressed in dollar terms. The workplace outcome performance objectives would need to be supplemented by graduated achievement timescales to enable development and adoption of appropriate prevention management tools and activities. It is also essential for workers’ compensation legislation and its implementation to be consistent with timely achievement of the same outcome impacts.

DUTY OF CARE

The ‘duty of care’ concept is the appropriate cornerstone driving all contemporary OH&S-related legislation. It is appropriate to rely on ‘duty of care’ provisions in the parent legislation, requiring employers to identify and implement whatever measures they recognise as necessary to meet their duty of care responsibility. The employer ‘duty of care’ responsibility must be stated simply – the present four items are adequate – without being diffused by downstream prescriptive and/or process-related requirements. As noted above, there will inevitably be downside documentation issues associated with successfully proving ‘duty of care.’

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THE ‘BEHAVIOUR MODIFICATION’ PROBLEM

Another issue adversely affecting workplace OH&S is the ‘you can’t rely on behaviour modification’ dogma. While that asserts that attempts to modify employees’ behaviour patterns are not an effective or acceptable OH&S process, it is incongruous that all Australian OH&S legislation *requires* behaviour modification programs for their implementation. There is a need to enunciate the rationale underlying why some peoples’ behaviour *must* be modified by legislation while it is presumed that others’ behaviour *cannot* be varied.

It is submitted that expectations have very significant impacts on downstream human behaviour, leading to the conclusion that there is a need to modify expectations if we seek to positively influence human behaviour toward achieving improved workplace health and safety impacts. Putting it in another way, there is a need for significant positive and negative incentives toward the socially-relevant objective of minimized workplace deaths and injury impacts.

THE ROLE OF EXPECTATIONS

Expectations play a very significant role in OH&S. The expectation that ‘compliance with process’ and ‘risk management’ process will achieve the underlying social objectives of OH&S legislation arguably should head the list. Expectations of prosecution (negative reinforcement) can have a recognized salutary impact on employers and employees alike. Other ‘expectation’ issues influencing workplace injury claims and consequent reported OH&S performance include changes to employment-related legislation, where the employer’s viability or the employee’s continuing employment are perceived as under threat or where employment may terminate with completion of contracts, particularly in rural areas with limited employment alternatives. Arguably the most significant and continuing ‘expectation’ issue results from legislative insertion of ‘common law’ into supposed ‘no fault’ compensation schemes, with known downside impacts of prolonged injury durations and significantly increased cost impacts for the Australian economy.

KEEP IT SIMPLE

As noted above, the ‘Principles’ mandate is perceived as a direction for this Review to increase the comprehensiveness of OH&S law, with the probable effect of further diffusing focus away from reduced deaths and injury impacts.

It is submitted that the obvious lesson is that as ‘the existing approaches’ have *not* provided acceptable safety and health social or economic performance, it is necessary to rethink some the basic assumptions underlying OH&S and workers’ compensation legislation in Australia. The recent focus on preventing workplace falls as well as environmental and road safety legislation show the effectiveness of focusing on the ends you want to achieve promptly rather than possible means that might lead to those ends at some time in the future. Specific and *limited* focus on timely achievement of socially-beneficial and clearly measurable impact outcomes has been the rule. One ‘keep it simple’ step at a time, not ‘comprehensive’ aims. For now, we need better focused OH&S legislation aimed at effective achievement of short term impact improvement objectives with quarterly reviews of achievement.

MANAGEMENT COMMITMENT AN ESSENTIAL ELEMENT

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. Employer commitment is essential for achievement of all business objectives, including effective workplace death and injury prevention performance. And the key to gaining employer commitment is ‘money - the one common factor in all business activity.’ Not complex ‘premium incentive’ schemes with no impact on small businesses or shelf-loads of incomprehensible and ineffective legislation or publications perceived as of little relevance by the people running the businesses which employ most of the Australian workforce. In 1996, Caple (16) confirmed that employers are motivated by economic factors, but are generally not motivated by regulation.

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Small business employers recognise that the success or failure of their enterprise depends on their personal commitment and effort toward achieving their principal objective - which is measured in economic terms. Economic incentives – positive and negative – are essential tools and measures for gaining and maintaining commitment to OH&S, as with all other management activities.

Employer interest in OH&S is diluted by the continuous deluge of business legislation necessitating reliance on professional advice and intermediaries. OH&S is relegated from a core management issue by the intrusive impact of financial, taxation, statistics harvesting, food safety and similar legislation. It is therefore essential to simplify and focus OH&S legislation on the most socially relevant impact outcomes to restore its ‘core business’ status for employers.

The most important step is gaining and keeping the personal commitment and direct involvement of all line management and supervisory staff in setting, maintaining and auditing their ‘duty of care’ obligations in workplaces and activities under their control. The utility of OH&S staff, committees and similar non-line functions is substantially limited to translating comprehensive legislative ‘gobbledegook’ into language that can be understood by normal Australian residents. An unfortunate and foreseeable significant downside impact of legislation-mandated OH&S staff and committees is the widespread perception by line managers and supervisors that their OH&S role and responsibilities have been re-assigned by the legislation to the OH&S staff and committees. Their existence also adversely reduces and delays workplace communications on safety-related issues through the ‘normal’ employee-supervisory communication chain.

It is recommended that the legislation and implementation strategies be reconstructed so as to be intelligible and relevant for the more than 90 percent of small business employers. It is also perceived as essential to re-focus from the prevailing diffuse ambit ‘comprehensive birth to death coverage’ legislation philosophy toward the line managers and supervisors controlling the activities in workplaces. Inclusion of mandatory OH&S staff and committees is not recommended as it can have the adverse effect of diminishing line management commitment.

The need is for accountability for effective, continuing and measurable achievement of the principal objective - preventing or minimizing work-related death and injuries to socially-acceptable levels within acceptable timeframes. Accountability should also include OH&S agencies being accountable for timely achievement of their legislated objectives. Shelf-loads of legislation, regulations, codes and guidance notes, and numbers of prosecutions, improvement notices or inspections are *not* measures of health and safety performance achievement.

IMPACTS OF WORKERS’ COMPENSATION LEGISLATION

Administration of Australian workers’ compensation schemes appears based on inappropriate assumptions - that workplace injuries are random, unpreventable occurrences beyond the direct control of the insured entities. While those historic textbook assumptions might be relevant for property and marine insurances, arguably the most basic assumptions behind present day legislation are that workplace injuries *are* preventable and *are* within the direct control of insured employers. Ignoring the Feyer and Williamson deaths study (1) estimate that 97 percent of workplace injuries are preventable, Australian workers’ compensation schemes share the impact cost of OH&S failures across substantially all insured businesses without any significant prevention incentives.

The primary objective of any injury compensation scheme must be prevention of death and injury occurrences at source. The *equity* issues of injury compensation and cost sharing should be seen as secondary objectives and consequences of failing to achieve the primary objective, which is the underlying reason for compensation being necessary. While monopoly government workers’ compensation agencies continue to operate equity-driven compensation schemes which subsidise employer safety management failures at the cost of well-managed businesses, there will continue to be little probability of achieving any significant improvement in the number and increasing cost of workplace-related deaths and injuries.

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The lack of any significant improvement incentives for the great majority of employers is the most critical failure of the present OH&S and compensation package. Although it is necessary to have both positive and negative incentives for optimal effectiveness, only the small minority of self-insured employers face the positive and negative consequences of their own workplace management, arguably the most effective approach to achieving optimal workplace health and safety outcomes. All other employers are more affected by *non*-incentive issues outside their control, such as the performance of other businesses in their Workplace Industry Classification group and periodic Government ‘goalpost shifting’ legislation changes and levy rate adjustments, rather than their own workplace management performance.

Workers’ compensation schemes’ re-definition of ‘work,’ ‘workplace’ and ‘work-related’ and inclusion of common law, commuting, stress and ‘psychological overlay’ injuries over the years by legislation, court decisions and industrial agreements have all posed impacts on OH&S performance. While those changes may in part be equity-based, continuous ‘goalpost shifting’ has adversely affected incentive to address OH&S issues for the majority of employers due to the perception that the changes extend beyond their ability to manage workplace safety.

The most urgent need is to focus on the well-known workplace major issues first, and worry about peripherals later after the major issues have been addressed effectively. Secondly, to maximize the focus on ‘up front’ injury prevention rather than the contemporary workers’ compensation focus on expediting return to work after injury. Appropriate methods of achieving those needs include minimising both the number of claims handled by workers’ compensation agencies to only the most relevant and jargon distinctions that complicate the issues, while focusing on effective prevention strategies combined with a mix of positive and negative incentives.

NEGATIVE ENFORCEMENT OR POSITIVE INCENTIVES?

Enforcement action against defaulting and indifferent employers should continue to be available in the parent legislation, as has been the practice for many years past. However, enforcement options should be simplified to the maximum extent – to prosecution, prohibition and improvement notices with a simplified and relevant table of on-the-spot penalties for non-compliance with those notices.

Optimal legislative effectiveness requires a combination of both positive and negative incentives. Australian OH&S legislation relies on ‘after the event’ negative reinforcement methods such as prosecution, prohibition and improvement notices and the like. Australian workers’ compensation schemes also lack positive OH&S incentives for some 90 percent of employers, for whom premium rates are essentially fixed at or near their industry rate and are not influenced by their employee claims or claim costs. Premium calculation systems are perceived as both complicated and incomprehensible by substantially all employers, without that complication achieving any significant likelihood of improved workplace OH&S performance outcomes. Their premiums are more affected by *non*-incentive issues outside their control, such as the performance of other businesses in their Workplace Industry Classification group and periodic premium rate adjustments due to legislation and policies which may not be consistent with rational management of an insurance business or of positive workplace injury impacts. Examples include funding shortfalls, premium rate change caps and cross-subsidised premiums which subsidise employer safety management failures at the cost of well-managed businesses.

The only positive incentives for OH&S performance improvement are in workers’ compensation legislation, where some of the largest employers have been permitted to self-insure. But only a small minority of self-insured employers face the positive and negative consequences of their own workplace management, recognized as the most effective approach to achieving optimal workplace health and safety outcomes.

The second rank of positive incentives include some larger businesses benefiting through reduced subsequent year premiums for better than average claim cost performance. Unfortunately, these claim

cost feedback loops are ‘after the fact’ (of injury), lagged by years and significantly attenuated by premium schemes rather than ‘up front’ preventive incentives for those businesses.

The third rank of limited, short term, positive incentive schemes for businesses audited as ‘process compliant’ with legislated mandates are rarely perceived as cost-benefit effective unless the businesses are seeking to become ‘preferred suppliers’ for a government agency as a hidden, indirect, non-OH&S incentive.

The Industry Commission 1995 report (10) identified that ‘financial incentives play a powerful role in determining the level of workplace health and safety.’ It is appropriate to identify that dollar measurable performance outcomes – ‘the bottom line’ – apply across businesses of all sizes and 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 relevant impact issue. With injury claim costs roughly correlating with days absent from work, the most appropriate economic measure is the dollar impact. In the absence of a social impact measure, it is submitted that OH&S impact should be measured in terms of workplace claim cost dollars to achieve effective employer motivation and focus.

The next step is to focus employer motivation toward workplace death and injury prevention rather than the prevailing focus on minimizing the injury claim cost impacts through accelerating the return to work process for injured employees. As contemporary Australian OH&S legislation has focused employer motivation and resources on ‘risk management-based’ process compliance without delivering any significant improvements in workplace death and injury cost impacts, there is a vital need for a changed approach.

Despite the speculative and hypothetical positive impact estimates associated with OH&S agencies’ legislative proposals, OH&S improvements can rarely be justified on cost-benefit grounds. A key reason for this deficiency is the major disconnect between the actual or potential death and injury claim costs associated with any improvement proposal and the consequent attenuated and lagged workers’ compensation premium cost impacts to the business, especially for small and medium-sized businesses. Two of the philosophies perceived as underlying this key deficiency are the property insurance philosophy of shared risk and protection of ‘stakeholder’ vested interests. They combine to protect poor performing employers from material adverse consequences of their deficient health and safety management at the cost of better managed businesses, leaving no significant incentives for the great majority of businesses toward achievement of improved OH&S impacts, contrary to the public policy imperative of reducing the human cost to individuals, families and the community of workplace-related death and injury impacts.

In addition, the impact, if any, of workers’ compensation premium incentive schemes is deferred until subsequent years – long after most injured employees have returned to work – the incentive impact on workplace safety outcomes is minimized, especially for small and medium employers. The consequent need is to promptly convey *present day impacts* to employers and employees.

It is therefore submitted that the proposed ‘harmonised’ OH&S legislation is unlikely to achieve any substantial death and injury impact improvements unless and until appropriate changes are made to Australian workers’ compensation legislation and administration. The specific need is to incorporate significant, prompt and effective positive and negative economic incentives. The obvious way to do this starts with elimination of ‘deductible buy-out’ schemes and a substantial increase in all employer-paid ‘deductible’ or ‘excess’ initial components to at least four weeks of injury absence or its equivalent. The above proposal should be supplemented by increasing access to complete self-insurance for larger employers. Both proposals would significantly and promptly enhance the economic signals necessary for effective management motivation.

An essential need for positive OH&S performance impact outcomes, is to re-jig the present workers’ compensation premium schemes to where they can be understood by a majority of employers with inclusion of significant and prompt positive and negative injury claim cost performance incentives.

REVIEW OF IMPACT OUTCOMES

OH&S Codes (e.g. the *National Manual Handling Code*, s.2.27 (17)) regularly include recommendations that *'the effectiveness of the new control measures needs to be reviewed regularly to ensure that the objectives are being achieved and that there are no unforeseen negative outcomes.'* It is submitted that there is a vital public interest need for identical recommendations to apply to legislators and regulators, to demonstrate that their activities are achieving the appropriate objectives without negative outcomes, as the past 20 years has demonstrated failure for OH&S legislation on both accounts.

It is important to identify the optimal cost-benefit impact outcomes for the Australian community associated with OH&S performance achievement directions, levels and periods. Business firms fail if they don't use cost-benefit outcome analysis to evaluate the objectives they're planning to achieve *before* they implement changes. And the best firms evaluate the accuracy of their predictions after implementation, to improve the quality of their future estimates. Governments and their OH&S agencies need to adopt the same evaluation strategies.

There is a public interest need for evaluation of the social and economic impacts of all proposed OH&S legislation, with periodic reporting of the audited *post hoc* impact outcomes against the originally predicted estimates to parliaments and the public.

SUBMISSION RECOMMENDATIONS

This submission recommends that:

- the Review should look beyond the assumptions built into the *Review Terms of Reference and Principles*, to include recognition that the proposed 'harmonisation' of present OH&S laws may reduce the probability of beneficial community impacts below the insignificant impacts of the individual component laws;
- the aim of all OH&S-related legislation should be to achieve employer understanding, acceptance and implementation of the policy that provision of safe and healthy workplaces and working conditions is 'core business' for all employers;
- the principal, indeed sole, legislative objective should be prompt, effective and continuing achievement of significant beneficial improvements in workplace-related death and injury social and economic cost impacts;
- the principal legislative objective should be measured in terms of total estimated incurred injury claim costs, as a proxy evaluation of the social and economic costs of failing to meet the principal objective;
- OH&S - *and* workers' compensation - legislation should be capable of being understood by 90 percent of the people potentially affected by its implementation without the need for voluminous downstream subordinate legislation and explanatory documentation. That would involve *brevis*, *clarity* and above all *simplicity*;
- a further key objective of effective OH&S legislation is *timeliness* – focus on prompt achievement of beneficial impact outcomes. 'Pick the low-hanging fruit' first by focused attention to the well-known OH&S problem impacts and industry sectors, rather than diffusing effort and resources across the comprehensive range of possible issues;
- to improve Australian workplace health and safety performance, the legislation must change its focus from auditable 'compliance' with 'comprehensive' *means* process-based legislation to a narrower *ends* objective focus on the above-noted principal objective;
- it is essential that workers' compensation legislation and administration be aligned with that objective focus instead of the prevailing multiple employee and employer 'equity' conventions. The combination should include an appropriate mix of positive and negative economic incentives, most

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- effectively through increased full and partial self-insurance for the majority of employers;
- enforcement action against defaulting and indifferent employers should continue to be available in the parent legislation, but enforcement options should be simplified to the maximum extent;
 - ‘duty of care’ is retained as the driving principle for employers and employees;
 - the ‘duty of care’ accountability of employers and employees should be focused on workplace or work-related acts and omissions by individuals that have the potential to adversely impact on the health and safety of other persons, whether or not in a workplace;
 - the legislative focus on ‘consultation’ process mechanisms (such as OH&S committees, workplace health and safety officers and the like) should be reduced in order to enhance the accountability for individuals in effective control (line managers) of workplaces and work activities; and
 - OH&S and workers’ compensation agencies should also be accountable for achievement of the proposed principal objective through the implementation of their legislation.

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