

WORKERS COMPENSATION POLICY IN AUSTRALIA: NEW CHALLENGES FOR A NEW GOVERNMENT

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ABSTRACT

Workers compensation arrangements in Australia are currently in a state of flux as a result of a dramatically changing constitutional landscape and the opening up, by the previous federal government, of the Comcare scheme to corporate employers seeking national self-insurance. With the election of the Rudd Labor government and the prospect of a revised industrial relations system, it is also time to review the direction of workers compensation policy from a national perspective. In taking up this challenge, this paper briefly maps the key historical developments that have helped shape the current policy framework before turning to a consideration of some major issues that face the Rudd government.

I. INTRODUCTION

Workers compensation in Australia, as elsewhere, emerged as a belated by-product of 19th century industrialisation. Its public policy significance was fourfold. First, and most directly, it provided financial and related assistance, albeit limited, to workers and their families in the event of work-related injury or death. Second, it instituted the no-fault principle as the primary basis for compensation, an approach designed to ensure compensation was paid irrespective of who was responsible for the injury or death. Third, it established employer liability as the financial foundation for workers compensation, a development which implied that at least some of the costs arising from work-related injury should be borne by industry rather than solely by workers and their families.¹ Fourth, it heralded an important change in the role of the state, involving a shift away from a laissez-faire default setting to one of increased government intervention. This break with the past was a recognition of the need for 'public solutions to social problems',² as opposed to the traditional view that such matters were a private responsibility best left to the market and the courts. Viewed in this light, workers compensation can also be seen as an important precursor to the welfare state.

By virtue of Australia's federalist constitution, workers compensation policy has largely been the prerogative of State and Territory governments. The first workers compensation statute was introduced just prior to federation by South Australia in 1900.³ The other States and the federal government enacted comparable laws over the course of the following decade or so, with Victoria being the last to do so in 1913. All of the Australian jurisdictions used the 1897 and 1906 United Kingdom statutes as templates for their own legislation.⁴

Coverage for compensation was initially confined to workers employed in 'dangerous occupations'.⁵ Similarly, eligibility in the early statutes was narrowly defined to cover only those injuries that arose 'out of and during the course of employment'.⁶ Compensation for lost wages, in the form of weekly payments, was limited to no more than 50 per cent of

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1 It should also be accepted that, as a consequence of the payment of workers compensation premiums by industry, production costs rise and, consequently, the prices of consumer goods also rise. Therefore, it is important to recognise that these costs are not borne solely by employers but by the community as a whole.

2 Peter Bartrip, *Workmen's Compensation in Twentieth Century Britain* (1987) 11.

3 *Workmen's Compensation Act 1900* (SA).

4 *Workmen's Compensation Act 1897*, 60 & 61 Vict; *Workmen's Compensation Act 1906*, 6 Edw 7

5 See, eg, *Workers' Compensation Act 1902* (WA) s 4, which limited the scope of coverage to workers in railways, waterworks, tramways, electric lighting work, factories, mining, quarrying, engineering or building work.

6 See, eg, *Workers' Compensation Act 1902* (WA) s 2.

pre-injury earnings for up to three years.⁷ In the case of death, a maximum lump sum payment equivalent to 50 per cent of three years' average earnings was payable to the worker's dependants.⁸ Where disputes arose as to a worker's eligibility or the level of entitlement, procedures for their resolution through arbitration or the courts were provided in the legislation. Finally, in cases where employer negligence could be established, workers were entitled to common law damages, although in practice common law actions remained a rarity until the last quarter of the 20th century because of the legal defences available to employers and the costs involved in pursuing damages claims.⁹

Over the ensuing decades, the scope of workers compensation laws increased significantly. This took place not so much in a linear fashion but rather through a process of 'punctuated equilibrium', characterised by extended periods of incremental adjustment interspersed with occasional bursts of rapid change.¹⁰ Coverage was extensively expanded, eligibility was eased and both the type and level of compensation payments were increased. More recent decades witnessed the introduction of vocational rehabilitation, the adoption of alternative dispute resolution systems and a greater focus on the nexus between workplace health and safety and workers compensation arrangements.

By the 1970s, workers compensation laws in Australia bore very little resemblance to the template legislation adapted from the UK at the turn of the 20th century, and had become increasingly complicated. As one commentator observed of the Victorian situation, the ever increasing accrual of makeshift amendments to the legislation had meant that 'workers compensation in Victoria has developed into an elaborate but rather disordered scheme'.¹¹ This assessment applied equally to the other Australian schemes which, like their Victorian counterpart, had evolved in an ad hoc and opaque manner over the decades.

The centrifugal forces that characterised Australia's largely State-based framework for workers compensation spawned (and continue to do so) a myriad of inter-jurisdictional inconsistencies. Although they encompassed a wide range of matters, inconsistencies were most conspicuously obvious on those issues that were of direct concern to workers and employers. In the case of workers, the central issue involved was entitlements. Workers in one State or Territory often received widely differing levels of compensation than their counterparts in other jurisdictions even though the injuries were identical. A loss of a hand severed in an unguarded machine might be more adequately compensated in New South Wales than in Queensland, while a work-related death on a building site in Victoria might attract less compensation than had it occurred under identical circumstances in South Australia.¹² Employers were also exposed to the vagaries of geography. This was most notable with respect to the level of premiums they were required to pay. Those in one jurisdiction with the same risk profile as their counterparts elsewhere could nevertheless find themselves paying much higher premium rates. The differences in rates could be attributable to the differences in entitlements for workers, the nature of industry risks and legislative provisions which affected premium setting.¹³

It was against this background that moves towards a national workers compensation agenda began to emerge in the 1970s. Although the results achieved over three decades have, at best, been marginal, there are unambiguous signs that federal governments are now both better placed and prepared to pursue and implement a national agenda.

7 See, eg, *Workers' Compensation Act 1902* (WA) sch 1, clause 2(d).

8 See, eg, *Workers' Compensation Act 1902* (WA) sch 1, clause 1(a).

9 See, eg, *Workers' Compensation Act 1902* (WA) s 7.

10 Kevin Purse, 'The Evolution of Workers' Compensation Policy in Australia' (2005) 14 *Health Sociology Review* 8.

11 Clive W Harris, *Report of the Board of Inquiry into Workers' Compensation* (1977) 11. In fact, the continual updating and amendment of workers compensation legislation was cause for despair within the High Court of Australia. See in particular, *Geraldton Building Co Pty Ltd v May* (1977) 136 CLR 379.

12 The range of entitlements and differences across jurisdictions are noted in Australian Safety and Compensation Council, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand* (2008) <http://www.asc.gov.au/NR/rdonlyres/0DE24A48-028D-49A1-9631-000C899580AC/0/Aust_NZ_Comparison_07.pdf> at 14 January 2009.

13 See 'Premiums': *ibid* 30.

Increasingly, the issue is not about whether there should be a national workers compensation agenda but, rather, how it should be shaped and by whom.

II. FRUSTRATED FEDERALISM

The first and most thorough attempt to address the seemingly never-ending growth of inter-jurisdictional inconsistencies in Australia's workers compensation arrangements was the reform program put forward by the Woodhouse Committee of Inquiry in its report to the federal Labor government in 1974.¹⁴ The Woodhouse Committee was not just concerned with the elimination of inter-jurisdictional inconsistencies in the workers compensation arena but with a fundamental restructuring of compensation and rehabilitation for all categories of injury, irrespective of whether the injury occurred at work, on the road or in the home. Under the Woodhouse recommendations, inter-jurisdictional inconsistencies would be eradicated once and for all as a consequence of the far-reaching proposals for the establishment of a comprehensive national accident compensation scheme based exclusively on the no-fault principle.¹⁵

Legislation to give effect to the Woodhouse blueprint for a national scheme was drafted and introduced into the Federal Parliament in 1975. The Bill attracted fierce opposition from the Coalition parties and the insurance industry, not least because of the proposal to dispense with private underwriting in favour of a publicly operated scheme. The Bill subsequently became bogged down in the Senate which was dominated by the Coalition and, following the replacement of the Whitlam government in November 1975, the Woodhouse reform agenda was quickly abandoned.¹⁶

With the demise of the Whitlam Labor government and, consequently, the Woodhouse proposals, any momentum for a national approach towards workers compensation policy in Australia was effectively extinguished for nearly two decades. During the intervening period there was a fundamental reorientation of the Australian economy. Following the election of the Hawke-Keating Labor government in 1983, tariff protection for Australian industry was wound back, the currency was floated and, in 1993, centralised wage fixation was largely abandoned with a shift to enterprise bargaining. It was in the context of this increasing integration of Australia into the global economy that a renewed interest in workers compensation from a national perspective began to emerge in the mid-1990s.¹⁷

The Industry Commission was directed, in 1992, as part of its terms of reference, to investigate 'the scope for greater national consistency' in relation to workers compensation arrangements.¹⁸ Its response to this issue was based on a two-pronged plan for institutional change. The first was a recommendation for the establishment of a nationally available workers compensation scheme for interested corporate employers. It was proposed that this new scheme would be privately underwritten, provide coverage for both premium-paying employers and self-insurers, and compete with the existing State and Territory schemes. The second prong entailed setting up a national WorkCover Authority. The authority's remit would be to regulate the new national scheme and facilitate and oversee the implementation of key provisions concerning national uniformity, particularly those pertaining to compensation arrangements.

These proposals were viewed by the State and Territory governments as a threat to their autonomy. Their response to the Industry Commission's agenda for change was coordinated through a new body comprised of the CEOs of the State and Territory schemes, the Heads of Workers' Compensation Authorities (HWCA). In rejecting the

¹⁴ Arthur Woodhouse, *Report of the National Committee of Inquiry on Compensation and Rehabilitation in Australia* (1974) vol 1.

¹⁵ *Ibid.*

¹⁶ Mark Considine, *The Politics of Reform: Workers' Compensation from Woodhouse to WorkCare* (1991) 31-2.

¹⁷ John Wanna and Patrick Weller, 'Traditions of Australian Governance' (2003) 81 *Public Administration* 63; Rolf Gerritsen 'The Necessity of "Corporatism": The Case of the Hawke Labor Government' (1986) 21 *Australian Journal of Political Science* 45.

¹⁸ Industry Commission, *Workers' Compensation in Australia*, Report No 36 (1994) xxvi.

Commission's call for a new national scheme and a national WorkCover Authority, the HWCA opted for a program intended to promote 'scheme improvements and greater national consistency through the identification of best practice in workers' compensation'.¹⁹ The HWCA's agenda was much more modest than that put forward by the Industry Commission. More importantly, it had the backing of the Labour Ministers' Council which endorsed its program of national consistency in May 1997 and, in the process, dispensed with the Industry Commission's sweeping proposals for institutional change.²⁰

The national consistency program advocated by the HWCA was essentially voluntary and incremental in character. There was no mechanism for achieving the program's objectives other than through the goodwill of the individual jurisdictions. Despite the rhetoric of 'best practice' it wasn't long before the push for national consistency began to lose momentum. This was most evident in New South Wales. A major review into the operation of that State's scheme in 1997 argued that:

Different economic, geographical and social conditions within the different states and territories make it difficult and, in some respects, undesirable for the national harmonisation of workers' compensation. Introducing a nationally consistent model for its own sake would be detrimental to NSW, as the unique characteristics of the State would not be addressed.²¹

The upshot was that national consistency, which itself was a watered down version of national uniformity, failed to make any significant progress in eliminating the inter-jurisdictional inconsistencies that had become such a deeply embedded feature of workers compensation arrangements in Australia.

In 2004, there was a rekindling of interest in a national workers compensation agenda. The catalyst for this revival was a report by the Productivity Commission, commissioned by the Howard Coalition government, which had as a central theme the issue of 'whether the establishment of national frameworks can deliver comprehensive and consistent workers' compensation and OHS programs across Australia'.²² Its recommendations included a proposal for the restructuring of workers compensation arrangements in three discrete stages. The first entailed providing eligible corporate employers with the option to obtain national self-insurance status under the *Safety Rehabilitation and Compensation Act 1988* (Cth) ('Comcare scheme'). The second envisaged that this would be followed by legislation to establish a new national scheme for corporate self-insurers. Finally, this new scheme would be subsequently modified to provide coverage for both national self-insurers and premium-paying corporate employers.²³

The chief beneficiaries under the Productivity Commission's proposals for a new national workers compensation framework were large corporations with operations in more than one State or Territory. This was in keeping with the Commission's neo-liberal outlook.²⁴ Not surprisingly, these proposals attracted widespread criticism from the State and Territory governments as well as the trade union movement. The unions were concerned that workers' entitlements to compensation could change solely on the basis of an employer obtaining self-insurance status under the Comcare scheme, while State and Territory governments were apprehensive that any significant exodus by corporate employers to Comcare could have serious financial consequences for their schemes.

19 Heads of Workers' Compensation Authorities (HWCA), *Promoting Excellence: National Consistency in Australian Workers' Compensation: Final Report to Labour Ministers' Council* (1997) 6

<<http://www.royalcombeci.gov.au/snapshot/images/065/0753/0378/0054.pdf>> at 14 January 2009.

20 Ibid 3.

21 Richard Grellman, *Inquiry into Workers' Compensation System in NSW: Final Report* (1997) 107.

22 Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No 27 (2004) v.

23 Ibid 150.

24 Kevin Purse, Robert Guthrie and Frances Meredith, 'Faulty Frameworks: The Productivity Commission and Workers' Compensation' (2004) 17 *Australian Journal of Labour Law* 306.

Notwithstanding these concerns, the Howard government supported the Commission's recommendation to open up the Comcare scheme to facilitate national self-insurance for eligible employers and moved quickly to give effect to this decision.²⁵ The first employer to be granted national self-insurance status in the wake of the Commission's report was Optus Administration Pty Ltd. A number of other corporate employers followed suit and by November 2007 there were 25 national self-insurers including the National Australia Bank, K&S Freighters, Linfox Australia, TNT, the John Holland Group and Chubb Security Services. The government's position was bolstered further by its success in securing an unexpected majority in the Senate as a result of the 2004 federal election. This enabled it to enact amending legislation that extended the coverage of federal occupational health and safety to include national self-insurers and their workers. Although these amendments did not become fully operational until March 2007, they had the effect of providing national self-insurers with a single, regulatory occupational health and safety framework that complemented the unitary regulatory framework they had already achieved with respect to workers compensation.

III. WORKERS COMPENSATION AND COOPERATIVE FEDERALISM

This was the state of play inherited by the Rudd Labor government on coming into office after the federal election in November 2007. In the lead-up to the election, Kevin Rudd flagged reform of the federation as a key goal of an incoming Labor government. As he articulated it at a gathering of the Business Council of Australia:

Australia needs a more streamlined Federal system of government to end the blame game between the States and the Commonwealth. To end cost shifting. To end duplication of effort. To end overlap of regulation.²⁶

This, not surprisingly, struck a responsive chord with business, particularly in relation to regulatory overlap, which has been the source of recurrent complaints by corporate Australia in recent years and has included complaints encompassing both workers compensation and occupational health and safety regulation.²⁷

More recently, Deputy Prime Minister Julia Gillard confirmed that the government's goal was one of 'creating a seamless national economy unhampered by unnecessary State duplication, overlaps and differences'.²⁸ This commitment constitutes recognition of the fact that, while the States and Territories have historically been viewed as the appropriate basis for regulation, there have been mounting pressures, particularly from the business community, to shift the focus of attention to a national level.²⁹

For his part, Prime Minister Rudd had previously emphasised the importance of cooperative federalism as the preferred means of restructuring governmental relations in Australia, and maintained that Labor's approach stood in marked contrast with that of the Howard government, which he described as 'coercive federalism'.³⁰ He went on to argue

25 Comcare may issue self-insurance licences to Commonwealth authority employers to allow them to operate under the *Safety Rehabilitation and Compensation Act 1988* (Cth). If an employer is not a Commonwealth authority, the employer may make an application to the Federal Minister for Employment and Workplace Relations to satisfy section 100 of this Act: that the employer is a corporation 'carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority'. Comcare must also consider a range of other criteria primarily concerning financial and prudential issues.

26 Kevin Rudd, 'Building Long Term Prosperity' (Speech delivered to the Business Council of Australia, Melbourne, 1 February 2007) <<http://www.bca.com.au/DisplayFile.aspx?FileID=81>> at 14 January 2009.

27 Business Council of Australia, *Reshaping Australia's Federation: A New Contract for Federal-State Relations* (2006) <<http://www.bca.com.au/Content/100802.aspx>> at 14 January 2009; Business Council of Australia, *Towards a Seamless Economy: Modernising the Regulation of Australian Business* (2008) <<http://www.bca.com.au/Content/101371.aspx>> at 14 January 2009.

28 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 September 2008, 1 (Deputy Prime Minister Julia Gillard).

29 Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (2006)

<http://www.regulationtaskforce.gov.au/_data/assets/pdf_file/0007/69721/regulationtaskforce.pdf> at 14 January 2009.

30 Kevin Rudd, above n 26.

that as responsibility for many government programs were shared between State and federal authorities, a cooperative federalism model provided the most appropriate method for negotiating ‘the best policy and program outcomes to avoid duplication and overlap and to maximise administrative efficiency’.³¹ He also noted that the success of cooperative federalism depended on ‘political good-will between both the Commonwealth and the States and Territories on the one hand and governments of different political persuasions on the other’.³² In doing so, he alluded to the success of the Hawke and Keating governments during the 1990s in pursuing their microeconomic reform agenda with the mostly Liberal State and Territory governments, no doubt, in part at least, to counter potential objections that a reliance on ‘political good-will’ provides too fragile a platform for sustained reform.

Whether this is the case or not remains to be seen. Notwithstanding this, the legislative scope of the current, and any future, federal government has been boosted in recent years by two pivotal High Court decisions that have dramatically extended the constitutional reach of the Commonwealth. This was most conspicuously so with the Court’s November 2006 decision in *New South Wales v Commonwealth*³³ (‘the *Work Choices* case’) which adopted an unprecedented expansive interpretation of the corporations power that upheld the validity of the Howard Coalition government’s contentious industrial relations legislation. Much less publicised has been the Court’s ruling in *Attorney-General (Vic) v Andrews*,³⁴ handed down in March 2007, that provided an interpretation of the State insurance power of the Australian States in section 51(xiv) of the Constitution, a decision which has legitimised the power of the Commonwealth to facilitate the migration of eligible corporate employers from State and Territory workers compensation schemes to the federal government’s Comcare scheme.³⁵

The political consequence of these High Court decisions is that the Rudd Labor government has a much more constitutionally robust platform than previous Labor governments from which to pursue a cooperative federalism agenda. For this, ironically, it has the Howard Coalition government to thank. Long regarded as the unquestioned guardian of State’s rights, the Coalition, under Howard’s stewardship, underwent an astonishing transmutation to form the most centralising federal government in Australia’s history and, as a direct result, has provided Labor with a greatly enhanced bargaining position to assist it in its dealings with the States and Territories as it unrolls its cooperative federalism agenda.

There are at least four major issues that face the Rudd Labor government on the workers compensation front. In the short term, the national self-insurance issue and its future is the most pressing of these issues. It can be characterised as both a legacy issue from the Howard era as well as one of considerable importance to the cooperative federalism agenda.

Almost immediately on coming to government in November 2007, Deputy Prime Minister Gillard placed a moratorium on further applications for national self-insurance.³⁶ This was followed up with her announcement in January 2008 of a departmental review that invited public submissions on the issue.³⁷

31 Kevin Rudd, ‘The Case for Cooperative Federalism’ (Speech delivered at the Don Dunstan Foundation - Queensland Chapter, Brisbane, 15 July 2005) <http://www.dunstan.org.au/docs/k_rudd_qld_2005_speech.doc> at 14 January 2009.

32 Ibid.

33 (2006) 231 ALR 1.

34 (2007) 233 ALR 389.

35 Robert Guthrie, Kevin Purse and Frances Meredith, ‘Workers’ Compensation Fall-out: The High Court Decision’ (2007) 18 *Insurance Law Journal* 128.

36 Julia Gillard, Minister for Employment and Workplace Relations, ‘Government Announces Moratorium on New Companies Joining Comcare’ (Press Release, 11 December 2007) <<http://mediacentre.dewr.gov.au/mediacentre/AllReleases/2007/December/GovernmentannouncesmoratoriumonnewcompaniesjoiningComcare.htm>> at 14 January 2009.

37 Julia Gillard, Minister for Employment and Workplace Relations, ‘Minister Announces Terms of Reference for Comcare Review’ (Press Release, 23 January 2008)

A major dilemma for the Rudd Labor government is that the previous government's push for a system of national self-insurance was very much an ad hoc response to the demands of corporate Australia. This is highlighted by the fact that only those corporate employers able to establish that they were 'carrying on business in competition with a Commonwealth authority or with another corporation that was previously a Commonwealth authority', as required by section 100 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth), are eligible to become national self-insurers under Comcare. While the scope of this competition test is sufficiently broad to cover a wide range of employers in a range of different industries, it is quite evident that there would be many corporate employers who, in all other respects, would be equally suitable candidates for national self-insurance.³⁸

A further significant problem with the Howard Coalition government's approach was its unilateralist nature. Any decision to transfer from State and Territory schemes to Comcare remained the exclusive prerogative of employers, rather than being an issue that required joint determination by employers and their workers. As there are significant differences in scheme design and, more particularly, worker entitlements, between Comcare and the State and Territory schemes, there is obviously an issue of equity which is of direct concern to workers and their representatives. Although Comcare has arguably the best weekly payments to workers of all the Australian schemes, the maximum payment available for permanent impairment lags behind those of New South Wales, Victoria, Queensland, South Australia and Tasmania.³⁹ Not dissimilarly, lump sum payments for work-related fatalities under Comcare are lower than those available in the States,⁴⁰ and of all the jurisdictions that enable injured workers to seek common law damages, the maximum amount provided under Comcare is by far the lowest.⁴¹ The consequence of these inter-jurisdictional differences is that the impact upon workers of any shift to Comcare depends upon the jurisdiction from which they have transferred as well as the severity of their injury. While some workers have benefited from a change, in the event of injury, others have been adversely affected. Compounding this lottery effect is the more fundamental issue alluded to earlier, namely the fact that workers have had no choice in the matter.⁴²

A related problem was that any migration of an employer to Comcare also entailed a change in jurisdictional coverage as far as protection under occupational health and safety legislation was concerned. This has become an issue due to a perceived lack of commitment by Comcare to enforcement activity.⁴³ While enforcement activity is by no means the only consideration involved as far as compliance with occupational health and safety legislation is concerned, it is an integral component. As has been noted elsewhere:

There is persuasive support for the view that the extent of compliance with occupational health and safety obligations is strongly influenced by a reasonable expectation of the likelihood of being inspected, prosecuted, convicted and having a meaningful penalty imposed. The presence of occupational health and safety inspectors is important.⁴⁴

<<http://mediacentre.dewr.gov.au/mediacentre/AllReleases/2008/January/MinisterAnnouncesTermsOfReferenceForComcareReview.htm>> at 14 January 2009.

38 Robert Guthrie, Kevin Purse and Frances Meredith, 'Workers' Compensation and Self-insurance in Australia — National Priority or Trojan Horse?' (2006) 17 *Insurance Law Journal* 256, 258.

39 Australian Safety and Compensation Council above n 12, 5-6.

40 Ibid 7.

41 Ibid 88-89.

42 An issue which was highlighted by Callinan J in *Attorney-General (Vic) v Andrews* (2007) 233 ALR 389, noted in Robert Guthrie, Kevin Purse and Frances Meredith, 'Workers' Compensation Fall-out: The High Court Decision', above n 35, 134.

43 In particular, the Australian Council of Trade Unions (ACTU) has highlighted this potential. See *ACTU Submission to Senate Employment, Workplace Relations and Education Legislation Committee Inquiry into the Provisions of the OHS and SRC Legislation Amendment Bill 2005* (2006)

<http://www.aph.gov.au/Senate/committee/eet_ctte/completed_inquiries/2004-07/ohs_and_src/submissions/sub004.pdf> at 14 January 2009.

44 Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 6, 83.

In Australia, as in the United Kingdom, the primary enforcement tools available to inspectors for dealing with suspected breaches of occupational health and safety legislation are improvement and prohibition notices. These tools do not appear to have been extensively used in the federal system. Over the course of the five-year period to June 2006, Comcare issued only 67 improvement notices and 47 prohibition notices.⁴⁵ Nor were there any convictions for breaches of the legislation, even though there were more than 80 000 reported injuries during this period.⁴⁶

After taking into account the relatively low, but increasing, number of workers covered by the scheme, it is readily apparent that Comcare's enforcement activity lags behind that of other jurisdictions, and by a large margin. In 2006, New South Wales had a workforce approximately 10 times larger than that covered by Comcare. After adjusting for this difference in workforce size, enforcement activity, as measured by the number of improvement notices issued, was more than 100 times greater in New South Wales than was the case with Comcare.⁴⁷ A similar pattern was evident in South Australia which, with a workforce slightly more than 2.5 times larger than Comcare's, also issued 100 times more improvement notices than Comcare.⁴⁸ Of all the Australian jurisdictions, Comcare has been the most conspicuous in its lack of enforcement activity. Comcare's reluctance to use the enforcement tools available to it is hardly likely to inspire confidence in workers and, not surprisingly, has been the subject of trenchant criticism by the trade union movement.⁴⁹

From the perspective of the State and Territory governments, a growth in national self-insurance raises expectations of adverse financial impacts on State schemes in the event of a mass exodus to Comcare by corporate employers. To the extent that any such movement is drawn from the ranks of existing self-insurers, the financial consequences for State and Territory schemes should be minimal. The reason for this is quite straightforward. Self-insured employers are directly responsible for the administration of injury claims lodged by their own workers and the associated costs involved, and they do not contribute to the premium pools of the respective State schemes. Accordingly, their departure should not have any adverse effect. This is provided, of course, that they continue to bear the financial responsibility for any outstanding liabilities associated with existing claims at the time of departure from State schemes.

In the case of premium-paying corporate employers, the situation is different and would depend on the numbers involved and their risk profile. If the numbers were substantial and the employers involved were predominantly those with strong occupational health and safety track records, the legacy of such a mass migration would raise the spectre of higher premium rates for the remaining employers. Under these circumstances, it would be the smaller schemes that would be placed in the greatest jeopardy, a prospect which the Productivity Commission somewhat euphemistically acknowledged could result in them becoming 'unviable on a stand-alone basis'.⁵⁰

For its part, the Rudd Labor government was well aware of the concerns raised by unions, the States and the Territories, as evidenced by the terms of reference it established for the Comcare review.⁵¹ Resolving these issues, however, will be by no means easy. The

45 Workplace Relations Ministers' Council, *Comparative Performance Monitoring Report* (9th ed, 2007) <http://www.workplace.gov.au/NR/rdonlyres/82390175-D7DD-4A1C-B133-1F01B60FB6BB/0/CPM_9thEdition_.pdf> at 14 January 2009.

46 Australian Safety and Compensation Council, above n 12, 16; HWCA, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand, October 2005* (2005) 6 <<http://www.hwca.org.au/documents/comparison2005.pdf>> at 14 January 2009.

47 Workplace Relations Ministers' Council, above n 45.

48 Ibid.

49 ACTU, *Comcare Review Submission of Australian Council of Trade Unions* (2008) 15-19 <<http://www.actu.asn.au/Images/Dynamic/attachments/5892/Comcare%20Review%20ACTU%20Submission%202008.pdf>> at 14 January 2009.

50 Productivity Commission, above n 22, 135.

51 Department of Education, Employment and Workplace Relations, *Review of Self-Insurance Arrangements under the Comcare Scheme: Background Information Paper* (2008) 10

options available include reversing the Howard government's decision to allow national self-insurance under Comcare, encouraging further applications for national self-insurance with or without provisions to guarantee effective involvement by workers in decisions concerning national self-insurance, as well as including an overhaul of Comcare's role as an occupational health and safety regulator. A further option would be to establish a new scheme to provide national self-insurance coverage for corporate employers currently covered by Comcare and prospective applicants that meet any new entry requirements. One important advantage of this option is that it could provide an unprecedented opportunity for the establishment of a new scheme that incorporates the best design features of existing schemes, as well as a range of new policies to improve the return-to-work prospects for injured workers.

The report arising from the departmental review was forwarded to the Deputy Prime Minister at the end of July 2008.⁵² However, the Rudd Labor government has yet to declare its preferred position in relation to the way forward. Whether or not this is a reflection of the complexities involved in working through the principal issues is not clear. What is clear is that the future of national self-insurance arrangements and the respective rights of the key participants is at a crucial turning point.

The second challenge facing the Rudd Labor government concerns its commitment to dealing with inter-jurisdictional inconsistencies in Australian workers compensation arrangements, an issue that fits firmly within Labor's cooperative federalism framework. It is apparent though that this issue is not a first-order priority issue for the Labor government, as opposed to its proposed industrial relations and occupational health and safety changes which may be considered as centrepieces of its reform agenda.

The second-order priority status of workers compensation arrangements can perhaps best be illustrated by a comparison with the occupational health and safety reform program set in train by the government. In pursuit of this agenda, the Prime Minister, State Premiers and Territory Chief Ministers signed off, in July 2008, on an historic agreement to develop a model OHS Act and regulations for adoption by all Australian jurisdictions by December 2011.⁵³ The agreement also provided for the establishment of a replacement body for the Australian Safety and Compensation Council that would have oversight of the development of the model legislation.⁵⁴

By contrast, the Rudd Labor government's workers compensation agenda is confined to a process of 'harmonisation', a bureaucratic euphemism that suggests a pursuit of uniformity but which invariably settles for something much less. In practice, the harmonisation project is likely to build on a 2006 agreement reached by the State and Territory Labor governments that endorsed 'a 10-point action plan' designed to reduce complexity and compliance costs for employers,⁵⁵ subsequently advocated by Labor in the lead-up to the 2007 federal election.⁵⁶ This included measures aimed at standardising arrangements for payroll declarations and premium payments, developing streamlined claims and premium forms, more efficient procedures for claims lodgement and the establishment of a one-stop shop to assist employers operating in more than one jurisdiction.⁵⁷

As can be appreciated, measures of this nature constitute no more than a modest improvement program at best. The reasons for this appear to be twofold. First, the government may be of the view that its industrial relations and occupational health and

<<http://www.nationalohsreview.gov.au/NR/rdonlyres/11EAD28E-7B1B-4E43-91A1-0607A6769C6F/0/Comcarereviewbackgroundinformationpaper.pdf>> at 14 January 2009.

52 Ibid.

53 *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (3 July 2008) Council of Australian Governments [5.2.5], [5.3.3] <http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/OHS_IGA.rtf> at 14 January 2009.

54 Ibid [3.2.2].

55 Council for the Australian Federation, 'Communiqué' (13 October 2006) <<http://www.caf.gov.au/Documents/CAF%20Communiqué%2013%20Oct%202006.pdf>> at 14 January 2009.

56 Julia Gillard, *Election Fact Sheet: Workplace Health and Safety* (2007) 9.

57 Ibid.

safety proposals, which are sufficiently controversial in their own right, are as much as it can reasonably deal with in a first term of government. Second, workers compensation is comprised of often very complex, not to mention highly contentious, policy issues that are not going to be easily resolved. This could also be said of its industrial relations proposals. The key difference, however, is that industrial relations was one of Labor's central campaign issues during the federal election and one for which it can unequivocally claim an overwhelming mandate. In the event it wins a second term of government, the priority accorded to workers compensation may change. However, in the interim, such change appears most unlikely.

The third challenge the Rudd Labor government faces concerns the entitlements of workers under the Comcare legislation, and can best be viewed as another legacy issue from the Howard era. In 2006, the Coalition introduced legislation affecting workers' eligibility for compensation under the Comcare scheme. The proposed changes included measures to tighten the definition of injury, a more restrictive definition of disease and the abolition of claims for journey injuries incurred on the way to and from work as well as those that occur during work recesses.⁵⁸

The rationale put forward by the Coalition for these restrictions was predicated mainly on a supposed need to 'bolster the viability of the scheme'.⁵⁹ This claim was rather disingenuous since, although premiums had increased on average from 1.0 per cent of payroll in 2001-02 to 1.2 per cent by 2005-06, Comcare still had the lowest average premium rate in Australia as well as the nation's second-highest funding ratio.⁶⁰ As pointed out by Labor, these figures were hardly indicative of a scheme in 'financial jeopardy',⁶¹ an assessment which reinforced the view that the overriding objective of the legislation was 'to reduce existing employee entitlements'.⁶² However, as the Coalition had the numbers, the restrictions concerning workers' eligibility were included in the legislation subsequently passed by the Parliament.⁶³

This was not the end of the matter. During the election campaign, Labor again reiterated its criticism of the Howard government for 'the erosion of protections and entitlements under the Commonwealth workers compensation scheme'.⁶⁴ In doing so, it created the impression that it would take steps to restore 'appropriate protections' for workers covered by Comcare in the event it was elected.⁶⁵ To date, however, this has not happened. Whether this is because it has more pressing legislative priorities at present, but will attend to this issue in due course, is unclear. Nonetheless, a failure to act on this issue is likely to result in strains being placed on its relationship with the trade union movement.

A fourth challenge facing the Rudd Labor government on workers compensation policy concerns cost shifting by the State and Territory schemes. This is an important but neglected issue that has a direct bearing on Labor's cooperative federalism agenda.

Historically, workers compensation arrangements have served as a conduit for the transfer of costs for work-related injury and disease from State-based employer-funded schemes to injured workers and the taxpayer-funded social security system. There are numerous mechanisms by which this cost-shifting process occurs. These include limitations on the categories of workers covered,⁶⁶ restrictive eligibility criteria,⁶⁷ and the

58 Senate Standing Committee on Employment, Workplace Relations and Education, Parliament of Australia, *Safety, Rehabilitation and Compensation and Other Legislation Amendment Bill 2006 [Provisions]* (2007) 3-7.

59 Ibid 5.

60 Australian Safety and Compensation Council, above n 12, 28.

61 Senate Standing Committee on Employment, Workplace Relations and Education, above n 58, 13.

62 Ibid 29.

63 See, eg, *Safety, Rehabilitation and Compensation and Other Legislation Amendment Act 2007* (Cth) sch 1, ss 11-14.

64 Julia Gillard, above n 56, 2.

65 Ibid 2.

66 For example, by excluding contractors.

67 For example, the exclusion of some stress-related claims in certain circumstances.

use of step-down provisions.⁶⁸ The most important mechanism, however, involves the use of artificial limits on the total amount of income maintenance payable to injured workers.

Traditionally, this has been achieved either by imposing dollar limits or prescribed time periods as the cut-off points. In more recent decades, there has been a switch in some jurisdictions, such as Victoria, to the use of work capacity reviews as the preferred means of discontinuing income maintenance payments.⁶⁹ Work capacity reviews involve categorising long-term claimants as either totally or partially incapacitated for work, with the result that payments for the latter category of workers can be terminated on the grounds that they may have some residual capacity for employment even though their prospects of obtaining employment may be negligible due to the seriousness of their disabilities. As this category of workers make up the bulk of a scheme's liabilities, it provides the most fertile ground for cost shifting.

In its 1994 report, the Industry Commission highlighted cost shifting as a serious issue that needed to be dealt with.⁷⁰ While acknowledging that the precise extent involved had not been determined, it maintained that 'there is likely to be a large net shifting of costs on to the social security system.'⁷¹ The shifting of workers compensation costs also attracted widespread criticism from the Howard Coalition government's National Commission of Audit, which argued that the situation was exacerbated when State and Territory governments created 'low benefit, underfunded workers compensation schemes in an attempt to influence the location decisions of business.'⁷² More recently, the Productivity Commission again drew attention to this issue and, as with the previous inquiries, pointed out that cost shifting can be aggravated by inadequate entitlement structures for injured workers.⁷³

In terms of dealing with the cost-shifting issue, there are two particularly important considerations that need to be addressed. The first is the need for detailed research to determine the extent of cost shifting by the State and Territory schemes. This task has become all the more urgent in view of recent changes to the South Australian scheme aimed at terminating income maintenance payments to seriously injured workers through Victorian-style work capacity review provisions in order to artificially reduce premium rates for the State's employers.⁷⁴ The second is a requirement to put in place measures to roll back or eliminate cost shifting. The best way of achieving this, as the Industry Commission emphasised, is by providing 'workers with a comprehensive and adequate compensation package' — an approach that may also have the advantage of strengthening the commitment of employers to improved occupational health and safety management practices.⁷⁵

Although it does not appear to be on the Rudd government's workers compensation agenda at present, there can be little doubt that the pernicious effects of cost shifting need to be tackled. For far too long, the State and Territory schemes have been at liberty to use the federal social security system as a dumping ground for injured workers they no longer have any interest in. This has often imposed hardship on injured workers and their families and an unnecessary burden on the taxpaying public. Addressing the cost-shifting problems that characterise Australia's workers compensation landscape cannot be expected to be accomplished easily or quickly. However, reform in this area is long overdue and would constitute a major achievement for a government prepared to take on the task.

68 Provisions which reduce weekly payments of compensation at given stages, usually 13, 26 and 52 weeks after the first payment, regardless of whether a worker is fit to return to work.

69 Australian Safety and Compensation Council, above n 12, 58.

70 Industry Commission, above n 18, xlvi.

71 Ibid xlvi.

72 National Commission of Audit, *Report to the Commonwealth Government* (1996) 79.

73 Productivity Commission, above n 22, 289.

74 Bracton Consulting Services Pty Ltd and PricewaterhouseCoopers, *Review of the South Australian Workers' Compensation System: Report* (2007) 200.

75 Industry Commission, above n 18, 172.

IV. CONCLUDING COMMENTS

The Rudd government's ascent to office corresponds with a seismic shift in the constitutional reach of Australia's federal system of government. Already it has moved to take advantage of this through its cooperative federalism strategy and, at this stage, has earmarked industrial relations and occupational health and safety as two of its priority agenda items.

On the workers compensation front, it has also inherited a number of issues that will need to be addressed. Of these, the most immediately significant is the national self-insurance issue. The manner in which Labor resolves this issue has the potential to profoundly influence the future of workers compensation arrangements in this country, as well as its relationship with corporate Australia and its traditional support base in the trade union movement. Although not as big an issue, the question of workers' entitlements under Comcare and, more particularly, whether the reduction in entitlements that occurred under the Howard government will be allowed to stand, will also have consequences for its relationship with the unions.

The harmonisation issue to reduce inter-jurisdictional inconsistencies is likely to remain a low-key affair for the foreseeable future, while the impact of cost shifting by the State and Territory compensation schemes has yet to be included on the policy reform agenda.

Whether this will change once, or if, the industrial relations and occupational health and safety changes being sought have been bedded down remains to be seen. With the cost-shifting issue there is certainly considerable scope now for the preparatory work, concerning the extent of the problem, to be undertaken. Any meaningful reform in this area would, however, be most unlikely to occur during Labor's current term of office. In the event the government achieved a second term, a rollback of cost shifting would constitute a major reform and a critical litmus test of its cooperative federalism framework.