Majority Report

1.1 On 1 March 2006 the Senate referred to this committee the provisions of the OHS & SRC Bill Legislation Amendment Bill 2005 (Occupational Health and Safety, Rehabilitation and Compensation). The committee received nine submissions to this inquiry. A list of these is to be found at Appendix 1. At its public hearing in Melbourne on 21 April, the committee heard from six of the organisations which had made submissions. The witnesses are recorded in Appendix 2.

Background to the bill

1.2 The OHS and SRC Bill 2005 was introduced in the House of Representatives by the Minister for Workplace Relations, the Hon Kevin Andrews MP, on 7 December 2005. As the Minister stated, the bill implements in part recommendations of the Productivity Commission in its Report No.27, *National Workers' Compensation and Occupational Health and Safety Frameworks* which was released in March 2004. The Productivity Commission recommended extending coverage under the *Occupational Health and Safety (Commonwealth Employment) Act 1991* to eligible corporations licensed to be self-insured under the *Safety, Rehabilitation and Compensation Act 1988*.[1]

1.3 The bill before the committee opens the way for an extension of this regime to employees other than those employed by a Commonwealth authority or Government Business Enterprise. There are considerable benefits to employers, especially in administrative savings for firms operating in a number of states. There are significant benefits to both employers and employees to being covered by a single set of workers' compensation and OHS laws as currently applies in the case of Commonwealth employees.

1.4 The main beneficiaries of this amendment will be, in the first instance, former Commonwealth bodies, recently privatised or due to be privatised. Under amendments contained in this bill they will be eligible for coverage under the SRC Act. Other beneficiaries will be corporations who self insure under the Commonwealth's workers compensation scheme.

1.5 The Productivity Commission suggested in its report (No. 27, *National Workers' Compensation and Occupational Health and Safety Frameworks*) that coverage under a Commonwealth OHS regime should be introduced progressively, and initially confined to firms in competition with Commonwealth organisations, followed by firms of sufficient size and stability which would be eligible to self-insure.[2] The Government did not accept this recommendation. However, the

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1 Report, p.104

2 op.cit., p.103

Government did accept the Commission's recommendation that the Australian Government amend the Occupational Health and Safety (Commonwealth Employment) Act 1991, to enable those employers who are licensed to self insure under the Australian Government's workers' compensation scheme to elect to be covered by the Australian Government's occupational health and safety legislation. This legislation would be extended to cover those insuring any future alternative national premium – paying insurance scheme.

1.6 As the Minister for Employment and Workplace Relations has observed when speaking about the difficulties faced by multi-state employers:

> They find it almost impossible to develop a national approach to occupational health and safety and the increased cost of complying with multiple jurisdictions does not lead to improved health and safety outcomes for their employees.[3]

1.7 In summary, the committee majority sees this legislation as consistent with the recommendations of an impartial body which has thoroughly investigated the problem of limiting the human and financial costs of work-related injury. It notes the Commonwealth's approach to injury prevention and management is through continuous improvement nation-wide, and with these improvements being able to be recorded and assessed on the basis of uniformity of standards. While the committee notes that this legislation will have gradual effect because state and territory systems will remain in operation, the long-term benefits will be considerable. Not least of these will be to serve as a catalyst for further reform in state jurisdictions.

1.8 The committee majority now turns its attention to specific matters of argument and concern raised during its consideration of the bill.

The need for national uniformity

1.9 In this section the committee majority expresses some general views on the need for Commonwealth legislative initiatives in areas of policy previously regarded as 'off-limits' to the Commonwealth. In doing so, however, it notes that the amendments contained in this bill cannot be regarded as leading to a 'takeover' of state functions by the Commonwealth. The bill does not interfere with the operation of state and territory legislation. To the extent that Commonwealth laws apply, they will cover only corporations, and only those which successfully apply for a licence to operate under the Commonwealth workers' compensation scheme.

1.10 Comment is sometimes made about the 'centralising tendencies' of the Government in regard to broad areas of business and industrial relations regulation. It is claimed that some of this legislation is contrary to the spirit of the Constitution, the consequence being a weakening of the federal 'balance'. There would be more substance to this argument if the states gave priority to harmonising their laws and

3 Hon Kevin Andrews MP, *Hansard* (Reps), 7 December 2005, p.6

regulations to ensure that state boundaries were not impediments to the efficient conduct of business across the country. Such an approach is, in theory, well within the scope of joint state initiative, with or without Commonwealth encouragement. In truth, there is no prevailing culture of state collaboration independent of Commonwealth initiative or direction. The committee majority acknowledges that the decision of Optus to use Comcare and take its $1.5 million premium out of the Victorian system did prompt some renewed energy on the part of HWCA to find a federal solution. It remains true that there is no political imperative to drive such collaboration, nor any other influences at work encouraging initiatives for reform at state level.

1.11 The committee majority has already noted the judgement of the Productivity Commission on the incapacity of the states to implement uniform and consistent regulation of occupational health and safety. It may be the case that states have conceded their inability to act in this policy area. No submissions on this bill were received from state governments.

The costs and disadvantages of current arrangements

1.12 The National Council of Self Insurers agued forcefully before the committee that an effective national OHS strategy would only achieve its objectives with speedier progress toward national consistency in regulations. This was not simply a case of saving administrative costs, but to achieve better safety outcomes. The Council gave the committee an instance of where this was jeopardised by different regulations:

> If you look at the security-sensitive ammonium nitrate regulations which have come in state by state, PACIA, the Plastics and Chemical Industries Association, are really concerned about the different degree of regulations across the states. We have a situation where the ammonium nitrate can be classified differently, the amount you can store is different from state to state, the transport of it is such that you can transport a certain amount in Victoria but you cannot take it into South Australia et cetera. Some national guidelines there, some national regulations, would streamline it and make it a lot safer. That is what it is about. The confusion is really dangerous.[4]

1.13 The National Council of Self Insurers predicted that the effect of the legislation would be that companies operating across state borders would seek to (subject to satisfying relevant criteria) move into the Commonwealth jurisdiction, and that this movement would drive a speedier move toward national consistency. This would make it easier for small contractors to comply with regulations because they would be governed by far fewer of them.[5]

1.14 Another consequence of the lack of uniformity across jurisdictions, according to the Productivity Commission, is its effects on the operation of Commonwealth welfare programs. The design of state schemes results in Commonwealth benefits

4 Mr Peter Harris, *Committee Hansard,* 21 April 2006, p.7

5 ibid.

becoming *de facto* workers' compensation payments. Ignorance or confusion about eligibility of coverage – the result of differences among states in the definition of employee – can mean that an injured worker can become the responsibility of Medicare or a welfare agency. The varying statutory benefits across jurisdictions have different effects on Commonwealth programs. For instance, in Victoria, payments for some statutory benefits cease after two years, whereas in Queensland they may operate for five years.[6]

Compliance with OHS regulations

1.15 At its Melbourne hearings on 21 April, the committee heard a great deal from the ACTU and its affiliated unions about the issue of compliance by companies with OHS regulations, and claims from unions that the Commonwealth lacked the human resources necessary to enforce its law. Much was made of the fact that Comcare had not yet recommended the prosecution of any employer with breaches of the OHS Act, and that it refused to act upon recommendations from state inspectors working on its behalf that it launch prosecutions.

1.16 In response to these claims, Comcare advised the committee that until legislative changes were made in September 2004 it was unable to initiate civil or criminal prosecutions. Six or seven prosecutions were currently under active consideration, all of them against businesses which were unable to be prosecuted previously.

1.17 Under current arrangements, Comcare has access to the services of approximately 200 state inspectors. Comcare advised the committee that its current recruitment of investigators would see levels rise to the point where it would have the same ratio of inspectors and investigators to employees as do comparable jurisdictions.[7] As to the allegation that Comcare had failed to use the services of state and territory inspectors, Comcare advised that it had not always found the quality of their reports of investigations satisfactory. The committee majority understands that state inspectors adopt a different approach to their work, as required under state regulations. As Comcare explained to the committee:

> Part of the problem that we experience relates to the fact that we approach investigations quite differently. You even see it with the terminology. The states refer to 'inspectors' and we refer to 'investigations' and 'investigation reports'. A lot of the inspectors that do work for us from the states are used to walking into a workplace, spotting hazards—things like cabling, as was mentioned before—writing a notice and leaving, whereas, when we require an investigation report to be done, it is quite a comprehensive forensic examination in response to an incident: what went wrong; who was responsible; what are the elements of the legislation; what

6 Report, p.108

7 Mr Martin Dolan, *Committee Hansard*, op.cit., p.34

> are the elements of an offence; what should have been done; what was reasonably practicable; was it done; and, if not, why not?[8]

1.18 Comcare has found that state inspectors do not always have the background and experience in providing reports to employers that are appropriate for the case. They often lack knowledge of the legislation, in circumstances where Comcare finds it difficult to keep them up to date. There is also difficulty in dealing with state officials who need the writing skills to articulate and prove elements of offences rather than just asserting that and writing notices.[9]

1.19 The committee majority notes the progress made by Comcare to increase the strength of its investigatory arm. It understands the problem of collaborating effectively with state bodies whose employees have their particular administrative culture which is grounded in the requirements of state regulations. This is no reflection on state OHS bodies. However, the Commonwealth has the more immediate task of dealing with large corporate enterprises, committed in all cases to effective OHS management, and having the resources to implement them. Under the amendments proposed in this bill, the SRC Commission must satisfy itself that an applicant for a self-insurance licence can meet the OHS standards set by the Commission. This is a process involving rigorous audits of the safety operations of the licence applicant. The Comcare approach to compliance will necessarily be different from that exercised by state authorities.[10]

Effect of national self-insurance on state OHS schemes

1.20 Submissions to the committee from unions have claimed that the financial pool in state systems will be reduced in the case of firms opting to self insure. This would increase the premiums for remaining businesses in the state schemes and increase pressure on workers' entitlements.[11] This assertion was also made by the ACTU at the committee's hearing.

1.21 The Productivity Commission also addressed this claim in its report. Several state and territory governments considered that there would be adverse effects on their schemes if employers were permitted to self-insure under Comcare. The argument was that allowing firms to exit from state schemes would result in a smaller premium pool and increase the costs for the remaining employers by reducing the chance to exploit economies of scale. The Productivity Commission found that this argument was based on the false premise that the larger states would have the lowest administrative costs.

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8 ibid., p.37

9 ibid.

10 ibid., p.39

11 Australian Manufacturing Workers' Union, *Submission 8*, point 15.

This is not so. The largest scheme, in New South Wales, has higher administrative costs than the scheme in Western Australia.[12]

1.22 Actuarial research available to the Productivity Commission concluded that the estimated reduction in premium revenue ranged from 2.7 per cent, if one in five employers exited, to 13.5 per cent, if all eligible employers exited. As large premium paying employers in current schemes tend to be charged experience-rated premiums, and would not in principle be cross-subsidising other employers, their exit would have a 'relatively neutral' effect on the schemes.[13] The committee majority acknowledges the caveats and reservations that are made by actuaries in regard to these conclusions, based as they are on sometimes incomplete information obtained from the states. Nonetheless, it points to the apparent unwillingness of union critics to address the specifics of these estimates in any evidence tendered to the committee.

1.23 The National Council of Self Insurers, in a supplementary submission to the committee, saw no reason to fear that a move by employers to the Commonwealth system would threaten the viability of state compensation schemes. In the absence of gross cross subsidies within the current premium pool, any such changes of insurers would be cost neutral.[14]

1.24 The committee majority considers that the concerns raised by unions in regard to compliance and prosecutions are grossly overstated, and are based on a misunderstanding of the significance of the legislation. To begin with, it is unlikely that the new provisions will be relevant to most employers currently insured under state and territory systems. Some large multi state corporations like Optus may see advantages in insuring under Comcare, but others, like Qantas and the Commonwealth Bank, have stayed under state systems, as has the Sydney Airports Corporation. Indeed, the Commonwealth Bank moved from the Commonwealth jurisdiction to the state jurisdiction when privatised in the early 1990s. No construction company has yet made an application to self-insure with Comcare. Considering the rigorous OHS licensing standards imposed by Comcare, it is unlikely that risk-prone companies would see any advantage in insuring under a legal regime in which premiums are generally higher and compensation packages more generous. The majority of corporations employ within one state and are likely to see no advantage of moving to Comcare unless the growth of their firm's interstate operations causes them to reconsider.

Conclusion

1.25 In considering the evidence to this inquiry, the committee majority concludes that the Government's increased involvement in the national regulation of

12 Report, p.125

13 ibid., p.127

14 National Council of Self Insurers, *Submission* 5a, 28 April 2006

occupational health and safety is an important policy development, and that it will produce better OHS outcomes over time. The consequence of its bringing corporations within the ambit of Comcare, and providing competition for state OHS and compensation regimes, will be to introduce more rigorous application of OHS principles and practices and over time to reduce the incidence of workplace accidents and illnesses. Government party senators believe that an over-emphasis on workers compensation benefits, which has been a characteristic of state-level debate on OHS, has distracted both employers, and employees and their representatives, from more fundamental issues of work safety. The result has been an unhelpful dispute over costs at the expense of agreement over safety.

Recommendation

The committee majority recommends that the Senate pass this bill.

Senator Judith Troeth
Chair