

# Productivity Commission – Benchmarking OHS Issues Paper

## WorkCover NSW comment May 2009

**Issue 1 — Has OHS regulation and/or its burden changed significantly prior to or since 30 June 2008? If so, please provide details of the changes you have observed.**

The introduction of the *Occupational Health and Safety Act 2000* (OHS Act) and *Occupational Health and Safety Regulation 2001* (OHS Regulation) in 2001 involved a significant modernisation of the previous OHS legislation. The Act was set out in plain English and re-organised to facilitate comprehension and access. The approach to occupational health and safety (OHS) management was reflective of broader Australian and international trends away from ad hoc prescriptive standards to a consolidated performance-based approach to OHS.

The introduction of the Act has brought a number of benefits to the New South Wales economy. A report by economic consultants, ACIL Tasman which is available on the WorkCover website, found that the reform of workplace safety laws in 2001 led to an annual saving of around \$5.58 billion to the State's economy. This report also found that changes made to testing and tagging requirements in 2006 reduced the regulatory burden for businesses by \$144 million per annum.

More recent changes to OHS legislation in New South Wales, all of which have involved the preparation of a regulatory impact statement, include the introduction of:

- The *Occupational Health and Safety Amendment (Dangerous Goods) Act 2003* and *Explosives Act 2003* commenced on 1 September 2005. This framework allows the regulation of dangerous goods whether or not at a place of work. The framework applies to all quantities of dangerous goods for workplaces, and to quantities over prescribed levels for non-workplaces.
- The *Occupational Health and Safety Amendment (Major Hazard Facilities) Regulation 2008* commenced on 14 July 2008. This regulation improved national consistency by adopting the National Standard for the Control of Major Hazard Facilities. The Independent Pricing and Regulatory Tribunal conducted a review of the costs of the regulation and in doing so considered how the regulatory burden of compliance could be minimised.

Some examples of recent work that have reduced the regulatory burden on New South Wales businesses include:

- A number of changes to licensing have been implemented in New South Wales and other jurisdictions to improve consistency across jurisdictions.

The administrative processes for licensing now appear consistent to users across several key areas, such as five-year renewal periods, requirements for photo licences, mutual recognition processes, and the ability for decisions to be reviewed. Jurisdictions have also taken considerable effort to standardise the look of the application forms and licences, bringing consistency to this area.

- The development and use of common guidance, such as the Serious About Safe Business Pack and the 'Homecomings' advertising campaign, has provided benefits to both industry and government, by communicating consistent messages across borders, reducing duplication and effectively using resources.
- Considerable effort has been made to harmonise areas of workers compensation, such as the development of uniform claims forms.

## **Issue 2 — Which existing studies or sources of data do you consider suitable for use in this study?**

As noted in the Issues Paper, it may be difficult to collect comparable data for common periods and caveats may need to be used. Caution should be taken in undertaking analyses and in particular in drawing conclusions from OHS and workers compensation data as there are differences in the ways jurisdictions collect and report data.

### Comparative Performance Monitoring Report

The Comparative Performance Monitoring Report is one source of jurisdictional information and data. It contains detailed explanatory notes and caveats that caution against comparisons between jurisdictions as the operation of OHS systems and workers compensation schemes can vary considerably. It is important to recognise that reported performance variations may not be a true reflection of differences in performance and may simply be an artifact of the data used.

The CPM report applies adjustment factors to most indicators to aid comparability. The CPM report also makes use of different definitions, including the National Data Set (NDS), which means that the information presented in the CPM report is not consistent with similar indicators, such as those presented in jurisdictional annual reports.

All jurisdictions provide an outline of scheme / administrative costs as part of reporting for the CPM report. The Office of the Australian Safety Compensation Council (recently replaced by the Safe Work Australia Council) reviewed the methodology by which this is measured.

The data provided includes a breakdown of scheme costs for example, weekly payments, medical costs and legal costs. Jurisdictions also provide an outline of the costs of administering the scheme. This includes the business costs for example those associated with inspection, licensing, corporate administration and information technology costs.

It is important to note the assumption that the data provided by each jurisdiction is consistent, as there will always be differences in the financial mechanisms that each jurisdiction use and in the way they interpret the definitions.

#### ABS data

The Australian Bureau of Statistics has produced two *Work-Related Injuries, Australia* reports. Whilst also providing useful information, the results of these surveys should be used with caution, as the survey did not define 'injury' when seeking input from respondents i.e. the severity/type of injury was not defined.

#### Other sources of data

Utilising existing sources of data is supported, as this would reduce the burden placed on jurisdictions in assisting the Productivity Commission's study. The following data sources may also be useful for the study:

- WorkCover publishes the Statistical Bulletin covering workers compensation claim statistics in New South Wales annually. The Statistical Bulletin provides information about the causes and effects of workers compensation claims to assist individuals and organisations in their endeavour to prevent workplace injury and disease, and to minimise the social and economic cost of claims through injury management practices.
- The WorkCover Annual Report provides information on achievements in improvements to workplace safety, injury management and return-to-work outcomes, and workers compensation provision in New South Wales.

### **Issue 3 — Is there other regulation related to OHS that should be covered in this benchmarking study? For example, should industry-specific statutes and regulations that cover OHS issues also be covered?**

It is critical that the scope of the Commission's study focuses on areas that will not interfere, duplicate or confuse stakeholders with what is occurring under the national OHS legislative review process. It is noted that the Issues Paper states that the study will not make recommendations on the content of what should be included in the model OHS Act.

Additionally, the Commission should note that in regard to mining and explosives, there are already harmonisation processes underway. A key role for the Australian Forum of Explosives Regulators is to promote the development and implementation of nationally consistent explosive legislation and safety and security standards to Ministers, heads of agencies and associated parties. The Safe Work Australia Council will now oversee the related work of the Australian Forum of Explosives Regulators. At the Council of Australian Governments meeting on 30 April 2009, the National Mine Safety Framework Implementation Report, which includes strategies for achieving a consistent OHS regime in the mining industry was agreed.

### Potential areas of focus for the study

The study could consider the following:

- Specific instruments such as codes of practice.
- It is not recommended that the study focus on specific industries. An activity-based approach is preferred for example high, medium and low risk activities.
- Regulatory administration, for example access to information; fees and charges; timeliness of responses; appeals mechanisms; mutual recognition; and enforcement.
- Regulatory outcomes by identifying several work activities and assess the time, resources and money expended to safely manage these activities.
- Indicators and data – consider comparing between jurisdictions existing mechanisms to identify and monitor compliance in high-risk industries.

### **Issue 4 — What OHS outcomes or indicators might best be used to explain differences in the effectiveness of OHS regulation between jurisdictions?**

While a comparison of injury incidence and frequency rates would be considered a good starting point, it should be recognised that it is difficult to distinguish true performance variations from differences in the structure of industries, risk profile between jurisdictions and other issues relating to data. It is also noted that the relationship between the number of workplace injuries and number of claims is uncertain. Under reporting of claims and injuries impact upon workers compensation statistics.

Leading indicators, for example the number of proactive interventions, could be used to measure the effectiveness and efficiency of targeted campaigns designed to assist industry to systematically manage risks.

WorkCover's Workers Compensation Statistical Bulletin reports on a large amount of indicators including frequency rates, incidence rates, workplace injuries, occupational disease, fatalities, time lost, gross incurred cost, gender, industry and occupation.

### Indicators used in the CPM report

Within the CPM report, OHS performance is measured by comparisons of the:

- Incidence rates of claims
- Frequency rates of claims
- Measurements of compliance and enforcement activity.

There has been some recent activity undertaken by jurisdictions in improving the measurement of compliance and enforcement activity in the CPM. The Heads of Workplace Safety Authorities (HWSA) established a working group

to develop more consistent and meaningful definitions to accurately reflect the OHS compliance and enforcement activities conducted by each jurisdiction. The working group reviewed definitions used for compliance and enforcement activities, how these definitions are interpreted and applied by jurisdictions and ways to improve these measurements to be more accurate. The results from the working group's review of the compliance and enforcement will not be seen until the next CPM is released (planned for later this year).

### **Issue 5 — Are differences between jurisdictions in average workers' compensation premiums a useful indicator of differences in regulatory outcomes?**

The difference in average workers compensation premiums between jurisdictions is a poor indicator of differences in OHS regulatory outcomes. The major variables impacting average workers compensation premium rates are the structure and performance of the scheme, investment performance and the benefits regime.

The relative importance of these factors to the level of average premiums varies between jurisdictions because of wide differences in scheme structures and benefit entitlements.

In particular:

- Privately underwritten schemes have the cost of capital built in thus having higher premium rates
- Long tail schemes pay more in benefits over a longer period, thus significantly increasing premium costs. For example, New South Wales pays ongoing medical costs while Victoria ceases in many cases 12 months after return to work.

New South Wales has the third lowest average premium rate and has announced that it will maintain the current rate for the 2009/10 policy renewal year. New South Wales also has the most extensive range of benefits of any jurisdiction.

### **Issue 10 — How do codes of practice and other guidance material assist compliance with OHS regulations? Alternatively, do these codes hinder businesses choosing the most appropriate compliance strategy for their individual situations?**

The NSW OHS legislative framework has a hierarchy with the OHS Act containing general duties, establishing overarching health and safety obligations. The supporting regulations provide a range of performance-based and prescriptive requirements to inform duty holders more specifically of what they need to do to discharge their general duties. Codes of practice give

practical and industry specific guidance on what compliance with the legislation may 'look like'.

An approved industry code of practice provides practical guidance to employers and others on achieving the standard of health, safety and welfare required by the OHS Act and OHS Regulation. Codes of practice usually address a particular hazard, work activity or health and safety duty.

An approved code of practice should be followed, unless there is an alternative course of action, which achieves the same, or a better standard of health, safety and welfare in the workplace.

### **Issue 11 — How are codes of practice promoted and enforced?**

Codes of practice are promoted strategically through professional and industry associations, unions and other stakeholders. The development and implementation of codes of practice involves significant stakeholder consultation. The promotion of codes of practice are targeted to appropriate stakeholders and published on the WorkCover website and promoted through media releases. Depending on the nature of the code of practice they may be supported by a launch, seminar or through advertising in trade magazines and publications. Stakeholders who have been involved in the development of codes of practice are able to promote the code of practice directly to their members through their websites or newsletters.

In New South Wales a code of practice is designed to be used in conjunction with the legislation but does not have the same legal status. A code of practice is designed to provide practical guidance to employers and others. There is no mandatory requirement to follow a code of practice, unless directed by an inspector in order to remedy any contravention of the legislation. A person or company cannot be prosecuted only because of a failure to comply with a code of practice. However, under the OHS Act, failing to comply with a relevant code can be used as evidence to demonstrate that there has been a breach of the legislation.

### **Issue 12 — What observations can you make about the frequency, thoroughness and efficiency of OHS inspections? Which aspects impact adversely on business?**

#### Compliance and enforcement policy

As part of the Inter-Governmental Agreement, jurisdictions agreed to develop a nationally consistent approach to compliance and enforcement. Through the Heads of Workplace Safety Authorities (HWSA), jurisdictions have recently developed a national Compliance and Enforcement Policy for OHS legislation. The purpose of the Compliance and Enforcement Policy is to assist regulators to adopt a consistent approach to enforcement that is effective (in terms of reducing the incidence of work related injury and disease) and efficient in achieving compliance while also maintaining community confidence that the

laws are being administered fairly and consistently. Consistent with the national Compliance and Enforcement Policy, WorkCover directs resources towards areas that are identified as the posing the greatest risk to health and safety. The Compliance and Enforcement Policy is available on the HWSA website: [www.hwsa.org.au](http://www.hwsa.org.au).

#### National compliance campaigns

HWSA undertakes national compliance campaigns targeted at specific industries across all jurisdictions. These campaigns are designed to improve compliance in targeted areas identified as requiring attention over specific timeframes. These campaign initiatives support the National OHS Strategy 2002 – 2012, and facilitate the development of consistent approaches to nationally recognised priorities.

#### Inspectors

WorkCover has a specialist unit to provide dedicated investigations services in relation to work related deaths, serious incidents, serious risk matters and alleged serious breaches of the legislation. This unit supports the work of the Inspectorate.

WorkCover inspectors undertake a range of activities including verifying industry compliance by visiting workplaces, performing audits and other monitoring activities. Instances of non-compliance may attract inspectors' notices to correct the underlying causes of the breaches. Serious breaches and failures to heed notices may result in prosecution.

As outlined in the national Compliance and Enforcement Policy, inspectors and other frontline officers 'adopt a flexible and responsive approach with the provision of advice, education and assistance being recognised as important elements in achieving compliance'. There are currently 313 inspectors in New South Wales.

All new inspectors undertake an intensive training program, along with periods of field experience provides recruits with the knowledge and practical skills required to enable them to competently and confidently perform as a WorkCover inspector. This intensive training program extends over 18 months. It is designed to ensure an inspector develops the foundation skills and knowledge to meet the level of competence required by the national competency standards that comprise the Diploma of Government (Workplace Inspection).

#### **Issue 13 — Is there a significant incidence of non-enforcement or partial enforcement of OHS regulations? Where does it occur? How does it affect safety outcomes?**

WorkCover's enforcement strategies are focused on areas of identified risk and are responsive to the circumstances of duty holders. As outlined in the national Compliance and Enforcement Policy, WorkCover seeks to apply resources and target compliance and enforcement actions to areas of

greatest risk to health and safety. Risk-based compliance and enforcement seeks to target the resources available to each workplace health and safety authority to areas of greatest need and where they are most likely to have the greatest impact on improved working environments.

Compliance and enforcement measures also seek to be responsive to the particular circumstances of the duty holder or workplace. Responsive regulation seeks to use the most effective and appropriate enforcement measures to achieve compliance.

WorkCover enforces clear breaches of the legislation through appropriate and proportionate means, for example notices, fines or prosecution. The provision of Confirmation of Advice Records (CARs) allows inspectors to give written advice to employers about safety issues specific to their workplaces. CARs are designed to provide employers with a greater understanding about how to manage safety issues in a more systematic way. CARs can confirm that a business is using the right approach, advise where improvements could be put in place and provide guidance as to what may be needed for future development.

**Issue 14 — Do educative or punitive approaches to regulatory enforcement lead to changes in compliance costs faced by businesses? If so, how?**

WorkCover believes that educative and punitive approaches to regulatory enforcement do not add costs to business. When a business is in contact with a regulator, there are no short-term immediate costs to a business providing they are compliant with their OHS obligations. WorkCover's primary focus is to ensure that legislative obligations are complied with.

There is a need to use both advisory and enforcement strategies to effectively undertake its regulatory role, as outlined in the national Compliance and Enforcement Policy. WorkCover uses a wide selection of compliance strategies ranging from information, advice, persuasion, co-operation, inspection, verification and compulsion through to deterrence activities.

The national Compliance and Enforcement Policy includes the following principles governing sanctioning:

- Change the behaviour of the duty holder
- Eliminate any financial incentive of non-compliance
- Be proportionate to the nature of the offence and the harm caused
- Reduce the harm caused by regulatory non-compliance, where appropriate
- Deter future non-compliance
- Be responsive and consider what is appropriate for the particular duty holder.