

**Submission
No 174**

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

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**Public Service Association
of NSW**

Submission

to the

Joint Parliamentary Select Committee

on the

NSW Workers Compensation Scheme

17 May 2012

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EXECUTIVE SUMMARY

The suggested changes in the Issues Paper in no way contribute to the equity and social justice aspects of workers compensation that must be the paramount considerations for those who unwillingly became subjects of the Scheme.

The following recommendations address the terms of reference governing the Committee's Inquiry into and report on the New South Wales Workers Compensation Scheme, in particular:

(a) the performance of the Scheme in the key objectives of promoting better health outcomes and return-to-work outcomes for injured workers,

Assistance, such as that offered to Excess Officers of priority assessment and redeployment, should be immediately extended to all injured employees, with additional funding to be provided to achieve best practice in this area.

Full income replacement, superannuation and all costs paid for the duration of the claim, weekly payments on time and accurate, with high contract penalties for private sector participants who fail these KPIs.

All claim-related appointments and claim related travelling time to be on paid work time.

WorkCover must bring back the requirement to use Occupational Physicians, as opposed to general practitioners in relation to injury management and return-to-work assessment.

Urgent reinstatement of the WorkCover Occupational Medicine Unit, cost free to workers.

Testsafe Australia, hosted by WorkCover, must be funded to cover free testing for worker, HSR and union requests.

The true costs of human life as established by Safe Work Australia must be used as a basis for calculation of the value of loss of life years, with compensation to be paid to the worker or worker's estate without needing to test dependency.

Raising of the experience-rating premium threshold has removed financial incentives to improve prevention, rehabilitation and return-to-work for 87% of employers. The Inquiry should recommend that this is reduced considerably to reintroduce incentive for the vast majority of employers.

Micro-sized employers that are not experience-rated must provide detailed written undertakings annually to WorkCover that they are using systematic proactive Work Health and Safety (WHS) management systems.

WorkCover must work closely with this class of employer to develop and maintain codes of practice to make compliance a much less complex task. Advisory work must focus strongly on establishing and maintaining best practice WHS suited to micro-size campaigns and industry location.

Senior Public Sector managers "WHS Officers" must have WHS lead and lag indicators, rehabilitation and return to work targets embedded in their performance management processes.

Restoration of the common law right to sue for damages caused by negligence would give workers equal rights to others in the community. As there is no legal assistance for common law claims only those with a serious prospect of success would initiate a claim.

(b) the financial sustainability of the Scheme and its impact on the New South Wales economy, current and future jobs in New South Wales and the State's competitiveness

A presumption that an employer must pay a short-term claim supported by an occupational physician. If it goes beyond six weeks, anyone choosing to dispute the matter would face the risk of having legal costs ordered against them.

The NSW Government should fully commit to implementing the framework that emerges from the draft National WHS Strategy 2012-2022. This would require a significant investment of funds into WorkCover to really lead the nation in reducing workplace injury and disease.

Urgent reintroduction of commutations with claims calculated from the Safe Work Australia life-value figures as their basis.

Immediate legislative action to pare back private sector agents' profits to the long-term bond rate.

Workers compensation injury management strategy must be built as a commercial and public health exercise, not as the dependent variables of an investment fund. A WorkCover Transition Programme, funded and built to seamlessly absorb the contracted-out functions as contracts expire, should be scoped as a matter of urgency by the Authority.

Prior to changes there should be an urgent actuarial investigation into the long-term financial effect on the Scheme of:

- achieving the draft 2012-2022 National WHS Strategy prevention targets in NSW,
- the insourcing of claims management,
- introduction of non-insured six week excess period of full remuneration,
- Re-introduction of commutations and common law claims.

The PSA is opposed to the idea of extending the application of the *Civil Liability Act 2002* (NSW) ("the Act") to work-injury damages for some Public Sector claims. The Act was not intended to apply to employees and this will mean that Public Sector employees will face a significant reduction in their rights with respect to Workers' Compensation.

(c) the functions and operations of the WorkCover Authority.

Confirmation of the Regulator's core function to conduct broad-scale, proactive and systematic workplace safety audits to more vigorously ensure the compliance of Persons Conducting a Business or Undertaking (PCBU) with their legal obligations.

Increase of WorkCover's funding generally to Victorian levels to achieve broad-scale proactive systematic workplace safety audits, which are national best practice. Also to prepare prosecutorial briefs for those most negligent to ensure specific and general deterrence in the Scheme.

Specialised insurers in NSW need to be audited for conformity in developing and maintaining an OHS Loss Management Program (OHSLMP). OHSLMP is the management of the continuous reduction of workers' compensation risks specific to insured employers of

specialised insurers by establishing, implementing and maintaining loss control standards as well as assisting insured employers in meeting their WHS, Injury Management and Return-to-Work (RTW) obligations.

This audit activity should be extended to general Scheme agents and the NSW Government's self-insurance scheme.

The end of the détente. Claims are down - this is good, but there is still an activist prosecuting WorkCover to be reinvigorated with risk exposure to feature as an expanding field of prosecution alongside a reinvigoration of disease, serious injury and fatality prosecutions. Failure to consult/elect HSR Category 3 prosecutions must also push the limits of the penalties available.

An independent assessment of the effects on the Scheme and the WorkCover Authority of the post 2005 executive level shift to advice and persuasion over prosecution to secure compliance.

WorkCover to advocate to Safe Work Australia and the Heads of Work Safety / Compensation Authorities that negligence must be reintroduced as the test for Category 1 prosecutions. Category 1 prosecutions will otherwise be very rare.

Inspectoral opinion must again be respected by WorkCover as an employer. Inspectors must be confident in the field that their professional judgement will be backed up by management.

Immediate research to identify any additional inspectoral powers and training required to tackle the scourge of insecure work, illegal work, sham contracting and toxic supply-chains on ohs.

Regulator and inspector work-methods need to change to include examination of order books to identify current and future worksites where the total number of workers can be ascertained. This may require enhanced powers and training for WorkCover personnel.

Reform of the 20-day rule for inspectors, fast turn around on hazards as the essence of inspection, but one-size-fits-all rules that stifle more complex inspectoral and research work must be reformed urgently.

All inspectors' licenses to be used in workplace inspections with inspectors' default work being in the field.

1. Introduction & Overview

The Public Service Association of NSW represents employees of the Crown in the State of NSW, General Staff in Universities and TAFE, employees of Statutory Boards, Parliament, and of State Owned Corporations.

The PSA endorses the Unions New South Wales Submission to this inquiry and briefly wishes to draw to the attention of the Inquiry the following issues.

2. Injury Management

Many areas in the NSW Public Service do not have enough trained or experienced Injury Management staff to effectively facilitate alternative or suitable duties when an injured staff member needs to begin a return to the workplace with restricted duties.

There are many frustrated injured workers in the NSW Public Service ready and willing to work on suitable duties.

Limitations on suitable duties can be due to restrictions on staffing numbers or to circumstances where all staff are needed at full capacity.

Also there are limitations on suitable duties in areas such as Corrective Services, in prisons and Juvenile Justice, where they use Health and Safety policy to refuse to accommodate anyone on the premises who is not able to pass a totally-fit-for-duties assessment.

Difficulties arise finding alternative duties in rural areas and also getting timely access to medical providers and services. These problems contribute to the extension of time for rehabilitation and return to the workplace.

When returning to full time duties, injured employees are expected to then make medical appointments outside working hours or in their own time.

Many injured workers in the NSW Public Service are happy to return to work on suitable duties, but are unable to return to their substantive position, for physical or psychological reasons.

Assistance, such as that offered to Excess Officers of priority assessment and redeployment should be extended to these injured employees.

Many members of the Association have expressed their surprise at the difficulties encountered when suffering a workplace injury and navigating the Workers Compensation path.

Workers are often unable to match pre-injury wages as they are restricted to their base salary without penalties, shift allowances and, while returning to full-time hours/duties, cannot utilise flex-time as others in the workplace can.

If an injury is serious enough to extend beyond the 26 weeks, the employee's income replacement drops to the statutory level of \$432.50 pw,

The injured worker then has to use their own leave, whether sick leave, recreational leave or long service leave (if they have it), to match their pre-injury wage up to a capped limit.

3. PSA WorkCover Authority Survey

With the strictures of time allowed for submissions to this Inquiry, the PSA was only able to survey one agency for their experience of workers' compensation issues in their agency. Responses from this survey of the WorkCover Authority are as follows:

- The clear opinion of respondents (67%) was that the post-2005 shift to advice over prosecution was not improving compliance amongst employers generally.
- 82% of respondents preferred to use better premium enforcement to improve Scheme viability over either increasing premiums or reducing workers benefits.
- In terms of internal workers compensation experience:
 - 60% of respondents said that their employer did not provide sufficient support and information to them.
 - 57% said their injury was not well managed.
 - Good liaison with medical providers by WorkCover was low at 37%.
 - Clear explanation of claimable expenses was down at 10%.
 - Over half of respondents said that their career had suffered as result of their injury.
 - Only 41% said that WorkCover had taken steps to address the cause of injury.

4. Survey Comments

In addition to these data, the respondents made comments on the Scheme and the current position at WorkCover. Their comments alone should draw the Inquiry's attention to the broader systemic issues with the Scheme and issues pertaining directly to the Regulator as a PCBU.

WorkCover is a Regulator and should only provide general advice. Otherwise, there is a conflict of interest. There are numerous OHS information (general publications, codes of practice and national standards and WorkCover information centre) available to employers.

I did not lodge a compensation claim when I was bullied at WorkCover. I did not know how to lodge a claim and I was so fearful of retaliation that it was the last thing I would have considered doing. WorkCover staff are not protected by the WHS legislation and injury management for staff is done poorly for many people. Same problem - who do we complain to? Nobody regulates the Regulator's workforce.

WorkCover is not undertaking any evaluation of the impact of the advisory functions at all. The current 'fashion' or flavour is for customer service and I agree WorkCover could do more to provide plain English and useful advice BUT we also need to maintain our strong enforcement function. We are the regulator after all.

Employers tend to do the very minimal work which endangers the lives of workers. There were circumstances that workers make allegations of employer's falsifying documents to show WorkCover.

No contact was made within first 7 days of reporting the injury and making the claim.

At the moment there is very limited communication from CASD Executive about decisions

<i>being made or policies etc.</i>
<i>Mine was a No Lost Time injury however there was very little support provided and it was necessary for me to chase up the insurance company</i>
<i>Waited over 3 months for rehab assistance and much longer for ergonomic assistance.</i>
<i>Rehabilitation program is not adequately provided. In most circumstance, workers going to lawyers to get answers.</i>
<i>Although I did not have a claim, others I have worked with and/or supervised in the past have had injuries that were very poorly managed.</i>
<i>Had to wait 2 weeks before X-rays and CAT scan approved. No treatment until about week.</i>
<i>WorkCover must bring back the requirement to use of Occupational Physicians as opposed to general practitioners in relation to injury management and return-to-work assessment. WorkCover had an Occupational Medicine Unit before but shut it down.</i>
<i>Again, in general, employers do not provide adequate information. In the past, there was a requirement for employers to publicly display workers compensation arrangements. This must be enforced.</i>
<i>Bullying is still happening. Not enough is done.</i>
<i>Employers only do the minimal work; safety requirement is the last thing on their mind and will choose the cheapest way. Employers should be proactive. WorkCover must promote health & safety by ensuring workplaces have acceptable systems of work. WorkCover must influence employers to be proactive by having safe work practices.</i>
<i>No workplace assessment occurred resulting in additional back strain.</i>
<i>I was retrenched when I was on light duties and had to go to court to reach a settlement.</i>
<i>Employers cannot adequately manage return-to-work as rehab coordinators (in general) are not competent to perform this task. Most employers do not have dedicated rehab coordinators. The task is allocated to supervisors as an additional task only and not their primary role.</i>

5. WorkCover Case Studies

The survey of WorkCover staff also elicited a number of personal experiences of compensation claims. These cases illustrate the particular problems of injury prevention and claims management within the Regulator's own workforce.

A theme that emerged from the survey is that there is no "umpire" to complain to when staff are exposed to safety risks and when the claims process goes wrong.

The Inquiry may seek to consider options for addressing the conflict of interest held by WorkCover in its roles as a PCBU and as the WHS and WC Regulator in NSW.

Case 1:

I work in a very high pressure area of WorkCover where there have been numerous OHS problems.

A few years ago I was drowning in ridiculous workloads, like most of my colleagues. It was pointless going to management because the acting Director would just say things like: "these are perfectly manageable workloads that are comparable to private sector stress levels".

I began to have health problems because of stress at work. My doctor said that I should lodge a workers' compensation claim.

After lodging the workers compensation medical certificate, I was contacted by the Return to Work Officer in WorkCover. He said that he was not going to accept my claim. He did not explain why my claim would not be accepted. The Return to Work Officer also attempted to discredit my doctor's diagnosis and advice.

Not surprisingly, this lack of support upset me even more and I went off on sick leave. I received treatment at hospital for my work-related symptoms.

I did not understand the process of making a claim. To this day I still do not understand why the WorkCover RTW staff are authorised to summarily dismiss a claim from an injured worker.

I was injured at WorkCover because of poor OHS work practices and bad management. Then I suffered again when my claim was not processed without explanation. On return to work from sick leave I was targeted by management.

This is not fair and I had nobody to complain to because I work at WorkCover.

Case 2:

I resigned from my job with WorkCover, sold my house on the Central Coast and moved interstate after being subjected to bullying, intimidation and impossibly high workloads.

When I attempted to lodge a workers' compensation claim for work-related stress I was given no assistance by the organisation. The Return to Work Officer was only interested in dissuading me from lodging a claim.

Management was also hostile. They created the unsafe work conditions that led to my emotional and psychological injury in the first place. I gave up and didn't proceed with the claim. I decided that it was impossible to work for an organisation where management cultivated a work environment of bullying and unsafe work practices.

Case 3:

I left my job at WorkCover after receiving compensation for health symptoms arising from being bullied. There was no attempt by the employer to deal with the OHS problems in my area before or after my claim.

The costs of my claim were entirely avoidable if the employer had acted responsibly and done what the OHS Act required.

I was not given a safe place of work and felt I had no alternative but to leave my job.

Case 4:

My claim for psychological injury was accepted and I have received compensation for nine months. The Director who helped create the bullying environment has left but there remains a toxic culture.

Myself and others reported the bullying to senior management in WorkCover years ago but nothing changed. So I feel that the claims costs are because management didn't do the right thing.

6. The True Costs

Thanks to consistent research coming out of first the National Occupational Health & Safety Commission, then the Australian Safety and Compensation Commission and now Safe Work Australia, it is **arguable** that employers only pay at most a quarter of the costs of the physical and mental carnage **emanating** from the employment relationship. If you account for workers' compensation insurance premiums differently, the contribution drops to 5%.

Safe Work Australia research has estimated the average value of a human life at around \$6 million. No dead worker's family receives anywhere near this 'user pays' price.

7. Financial Incentives for Negligent Employers

Employers' should pay a fairer share of the damage they cause. After the raising of the experience-rating premium threshold from 3k to 10k, only 13% of medium to large employers are left with any financial incentive to improve WHS. This fact alone should interest orthodox economics. If we are serious about driving down the loss of 4.8% of GDP, overwhelmingly due to employer negligence, then this Inquiry should agree that this threshold must be lowered. Further, no employer should be able to walk away from any of the costs to the life of the affected worker(s).

Government businesses are in a similar situation. Their budget at the workplace level is not affected by costs of premiums and claims. Managers at workplace level in Government have the ability, but not the financial incentive, to prevent injuries and contain claims costs by early return-to-work. It is unusual for safety and workers' compensation performance of managers to be measured and included in performance evaluations and recruitment.

Consideration might also be given to having employers fully meet the costs of all short-term claims involving less than six weeks off work. This would help reduce premiums and provide incentive to employers and employees alike.

In addition, restoration of the common law right to sue for damages caused by negligence would give workers equal rights. As there is no legal assistance for common law claims, only those with a serious prospect of success would initiate a claim.

The Scheme itself could look at ways of substantially reducing involvement in claims-handling and disputation over minor matters. The presumption could be that an employer must pay a short term claim, and if it goes beyond six weeks anyone disputing the matter would face the risk of having legal costs ordered against them.

A Scheme like this would reduce costs, and shift remaining costs to those at fault. Good managers of safety would not be carrying poor managers.

8. A Ten Year Framework for Prevention

A good framework for the realisation of such a plan would be for the NSW Government to fully commit to implementing the framework that emerges from the draft *National WHS Strategy 2012-2022*. This would require a significant investment of funds into NSW WorkCover to enable it to lead the nation in ensuring less people are injured at work.

With three-quarters of the costs of negligent employers falling on the workers affected and a clear policy of no increase in premiums, this investment in prevention alone is a key public policy priority.

9. Existing Resources for Prevention

The Inquiry should distinguish the major difference between proactive and reactive strategy in the management of occupational health and safety (ohs). The development, implementation and continuous monitoring of an OHS Management System (OHSMS) are paramount in achieving a proactive strategy to ensure workplace safety. Injury management and return-to-work (RTW) programs are reactive strategies. It goes without saying that if there's no injury or illness, these reactive strategies are not going to be used. Having an effective OHSMS produces safe work practices that will prevent incidents and risk-exposure from occurring in the first place.

It is widely recognised in the ohs professional arena that promoting a more systematic and effective way of managing ohs and ensuring compliance to relevant legislative requirements is required. Information materials are readily available to assist employers (small or large) to establish an OHSMS, such as:

National Self-Insurer OHS Audit Tool – August 2009 (NAT) Approved by Heads of Workers Compensation Authorities and prepared by WorkCover NSW on behalf of the National Self-Insurers OHS Audit Tool Working Party, in support of the national harmonisation agenda

AS/NZS 4801 - Occupational Health & Safety Management Systems – Specification with guidance for use

AS/NZS 4804 - Occupational Health & Safety Management Systems – General guidelines on principles, systems and supporting techniques

OHSAS 18000 - International Occupational Health and Safety Management System specification

On a national level, self-insurers are required to have an OHSMS. The financial gain by self-insurers where they genuinely maintain their OHSMS is proof of the value of ensuring workplace safety and appropriate injury management and RTW programs. This system only works with rigorous auditing of their OHSMS. Regulators across Australia must ensure that self-insurers do have an OHSMS that meets the requirements of the NAT, by conducting periodic audits. The Inquiry needs to recommend that self-insurance licences be lost after serious injury, risk-exposure or fatality.

It must be the Regulator's core function to facilitate proactive safety auditing by Inspectors to prevent, control, minimise and manage WHS risks and dramatically reduce the chances of injury or illness and keep workers safe in their workplaces.

Specialised insurers in NSW need to be audited for conformity in developing and maintaining an OHS Loss Management Program (OHSLMP). OHSLMP is the management of the

continuous reduction of workers' compensation risks specific to insured employers of specialised insurers by establishing, implementing and maintaining loss-control standards as well as assisting insured employers in meeting their OHS, Injury Management and RTW obligations. This audit activity should be extended to general Scheme agents and the NSW Government's self-insurance Scheme managed by NSW Self-Insurance Corporation (SICorp).

10. Insourcing Claims Management

After current contracts expire, the Government should resume this function. Workers Compensation management must be seen again principally as a public health exercise not an investment fund. That said, the excellent investment results of NSW WorkCover since the re-creation of the central investment fund show that the Public Sector outperforms the private sector in this regard and in many others.

Public sector claims management, with the minimal involvement of profit-seeking commercial Scheme agents, will better serve the public health goal of supporting productive lives which the draft National WHS Strategy seeks to achieve.

11. Enforcement Falls from a Height

The Inquiry's attention should be drawn to the enforcement activities of WorkCover. The overall performance of the Workers Compensation Scheme cannot be looked at in isolation from the injury prevention effort. The level of Work Health and Safety (WHS) activity has a direct bearing on costs of the Scheme.

It would be fair to say that historically NSW has been the most active of the Australian OHS regulators in the courts. Regrettably, an advisory approach was announced by WorkCover in 2005 and enforcement activity has declined significantly since then.

According to published WorkCover data, from 1991/2 to 2005/6 the number of prosecutions was between 300 and 500 per year, but since then prosecutions have languished at around 110.

Infringement notices over the same period ranged from 900 to 1600, but in 2010/11 were down to 587.

Prohibition notices ranged from 1100 to 1400, and in 2010/11 were down to 832.

The light-touch instruments of compliance, not enforcement, are the Confirmation of Advice Records (CARs). These are running at about 2500 per year.

Premium enforcement has halved over the period from \$51 million to \$26 million.

Wage audits have dropped from a peak of 20,000 in 2005/06 to 6500 in 08/09. Due to **'commercial in confidence'** the number of audits are not reported in WorkCover publications.

Total enforcement fines in 2010/11 have fallen to a ten year low.

It is estimated that about a quarter to a third of Inspectors no longer conduct workplace inspections. These Inspectors are involved primarily with policy, management, advisory or technical specialist roles.

12. NSW OHS & Workers Compensation data from Productivity Commission Report

The Productivity Commission prepared the report *Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety* at the request of the Council of Australian Governments.¹ It was released in March 2010 and includes extensive information on OHS arrangements and performance in Australian jurisdictions. The numbering and titles of the figures and tables below are kept from the original Productivity Commission Report.

13. OHS Agency Resources

An overview of resources within each jurisdiction to manage OHS is provided by the following data.

Table 1 shows the range of enforcement tools used in NSW and throughout the rest of Australia. Of the suite of enforcement tools used throughout Australia, NSW has not employed adverse publicity and enforceable undertakings. These options have been widely used in other states and territories and should now be used in NSW under the new Work Health and Safety legislation. The Productivity Commission's analysis marks out the gaps in current WorkCover operations.

Productivity Commission Report Tables

Table 1 Availability of enforcement tools
2008–09

	Cwth	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Mining		
										NSW	Qld	WA
Educate/advise	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Verbal warning		✓	✓	✓	✓	✓	✓		✓	✓	✓	✓
Written directive	✓	✓	✓				✓	✓		✓	✓	✓
Improvement notice	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓
Prohibition notice	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		✓
Licence suspension	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Licence cancellation	✓ ^a	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Adverse publicity	✓		✓		✓		✓	✓	✓			
Infringement/penalty notice		✓	✓	✓	✓		✓	✓	✓			
Prosecution	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Enforceable undertaking	✓		✓	✓		✓	✓	✓	✓			✓
Other	✓ ^b		✓ ^c	✓ ^d								

^a Comcare has the ability to revoke licences based on a graduated tier system. This system allows for employers to be ranked and apply a self-assessment based approach where Comcare provides oversight and monitoring. ^b Injunctions, remedial orders. ^c Voluntary compliance, non-disturbance notices, letters of caution, letters of warning. ^d Seizures, electrical safety protection notices.

Table 5,3 shows the resourcing levels of the OHS Agencies throughout Australia. The levels of resourcing shown for NSW have no doubt declined slightly since publication of the Productivity Commission Report. However, they indicate that NSW has had:

¹ Productivity Commission report available at http://www.pc.gov.au/data/assets/pdf_file/0007/96163/ohs-report.pdf

- the second worst ratio of worksites to staff of all OHS agencies in the country.
- expenditure on OHS per worksite that is below the national median.

Table 5.3 starkly shows that comparing expenditure per worksite, Victoria is nearly double that of New South Wales. Clearly, the resourcing of WorkCover needs serious examination.

It is also noteworthy from Table 5.4 that WorkCover's funding model sees no direct funding from consolidated revenue, unlike Victoria, Queensland, South Australia, Western Australia and the Northern Territory, where central funding is in the range of 68% to 100%. So there is ample scope for a direct injection of funds into the Authority.

Table 5.5 shows just how stretched NSW WorkCover Inspectors are, with nearly three times as many worksites per inspector as in Victoria. On average, Safety Inspectors in NSW have more workplaces to visit than in any other state or territory. Quite simply, this means there is less chance of an Inspector making a workplace visit in NSW.

It is therefore recommended that the whole funding model of WorkCover itself be brought up to Victorian levels.

Table 5.3 Resourcing indicators — core OHS regulators

2008-09

		<i>Cwllth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
OHS staff (FTE)	no.	126.7	691	411	482.6	232	149.1	35	44	25
OHS expenditure	\$'000	14 620	100 639	65 166	55 460	28 965 ^a	18 085	6 427	4 979	3 640
Worksites regulated	'000	4 ^b	664	220	390 ^c	144	205	nr	nr	nr
OHS expenditure per FTE staff	\$'000	115	146	159	115	125	121	184	113	146
Worksites to OHS staff	no.	32	961	535	808	621	1 375	na	na	na
OHS expenditure per worksite	\$	3 655	152	296	142	201	88	na	na	na

na not applicable. nr non response. ^a Budget includes funds transferred from WorkCoverSA. ^b Figure refers to registered locations, not individual worksites. ^c Figure refers to number of regulated businesses and thus may underestimate the number of worksites regulated.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

Table 5.4 OHS income components — core OHS regulators

2008-09

	<i>Cwllth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i> ^a	<i>SA</i>	<i>WA</i>	<i>Tas</i> ^b	<i>NT</i>	<i>ACT</i>
Total income (\$'000)	16 932	100 639	65 166	56 186	28 965	18 085	6 427	4 655	nr
Source (%)									
Central funding	2	0	88 ^c	100	68	75	100	100	nr
Fees generated	98	100	12	0	32	25	0	0	nr
Fee income components as a percentage of total fee income (%)									
Licensing	33	11	84	na	33	90	83	na	4
Permits	0	1	0		0	4	3		0
Inspections	0	1	0		0	0	0		19
Audits	0	0	0		0	0	0		0
Appeals	0	0	0		0	0	0		0
Other	67 ^d	87 ^e	16 ^f		67 ^g	6 ^h	14 ⁱ		77 ^j

na not applicable. nr non response. ^a OHS related fees collected are classified as administrative revenue and are not retained by WHSQ. ^b All expenditure for OHS activity is funded from appropriation. Revenue collected in fees is paid back directly into Consolidated Revenue and is not available to meet OHS costs. ^c Income allocated from workers' compensation premiums. ^d Other regulatory contributions, interest, training, conference and other fee income. ^e Other income primarily relates to contributions from the Workers' Compensation Scheme and Self and Specialised Insurers, as well as investments, commercial activities and other minor revenue sources, which are used to fund WorkCover operations. ^f Revenue collected from fines and penalties. ^g Employer registration fees. ^h Registration of plant application, design review application, plant registration assessment, publications of instrument books, miscellaneous revenue, FoI fees, staff contribution to GVS, staff contributions to government housing. ⁱ Design and Survey Approval Fees. ^j Revenue received by the OHS Commissioner: for training and seminar fees, grants from other ACT Govt agencies, and sponsorship.

Table 5.5 Inspectorate resources — core OHS regulators

2008-09

		<i>Cwth</i>	<i>NSW</i>	<i>Vic</i>	<i>Qld</i>	<i>SA</i>	<i>WA</i>	<i>Tas</i>	<i>NT</i>	<i>ACT</i>
FTE OHS inspectors	no.	41.0	289.1	202.5	234.6	89.0	103.0	47.0	12.0	17.0
Worksites per OHS inspector	no.	98	2 296	1 086	1 662	1 618	1 986	na	na	na
FTE inspector positions filled as at 30 June 2009	%	100	92	95	83	78	87	87	75	100
Turnover of OHS inspectors	%	14	3	6	9.3	8	6.3	9	15	9
Starting salary of a full time OHS inspector	\$	57 985	74 011	71 295	57 000	56 245	53 291	52 276	54 196	59 800
Average salary of a full time OHS inspector	\$	76 397	82 099	75 573	69 700	66 168	77 627	67 670	63 043	71 423
Experience of OHS inspectors										
less than 3 years	%	7	16	0	19	6	29	21	50	29
3 to 10 years	%	41	38	59	47	27	22	40	42	59
More than 10 years	%	51	46	41	34	67	49	38	8	12
Average professional development per OHS inspector (annually)	hrs	nr	34	26	21	30	100	nr	230	20

na not applicable. nr non response.

Source: Productivity Commission survey of OHS regulators (2009 unpublished).

14. The Future of Enforcement

The new *NSW WHS Act 2011* will most likely be enforced through Category 3 prosecutions of a strict liability nature. The equivalent Category 1 offence of reckless endangerment in the *NSW OHS ACT 2000 s.32A* remained unused 2006-2011. The effects of the new National Compliance and Enforcement policy also tend towards the light touch educative approach. With fines of up to \$500,000 available, Category 3 prosecutions will be an attractive low-effort enforcement option given that workplace negligent manslaughter is usually worth about \$100,000 at current fining rates with no gaol time possible.

15. Issues with Inspectors' Directed Work Methods

As PSA members working as Inspectors have submitted, the current *modus operandi* of workplace inspection for workplace premiums is to establish the existence of a valid insurance policy and no more.

WorkCover could benefit from time devoted to collection of avoided payment of premiums. There has been too much emphasis on examination of wage-books by WorkCover's specialist compliance unit.

There is a cash and sham-contracting economy, acknowledged in the Henry Tax Review, that desk-top auditing of wage-books does not detect. WorkCover's compliance activities need to involve field officers in the identification of the numbers of paid workers hired by PCBUs and putting them in the correct premium category.

Work methods need to change to include examination of order books to identify current and future work sites where the total number of workers can be ascertained. This may require enhanced powers and training by WorkCover personnel.

At present most time is devoted to checking whether a business has a policy. WorkCover already knows that non-insurance is an insignificant problem. WorkCover has reinforced its longstanding paper policy that inspectors should also check the correctness of the industry classification and the total wage bill. This policy statement will not on its own encourage inspectors to investigate this, when they are under tight time-frames to dispose of files that generally originate as a complaint or notification of an incident.

This might normally take up to ten days by the time the business has its 5 working days (effectively 7 working days when legally a day begins and ends at midnight) after a request for a certificate of currency. The inspector could be far more effective if the certificate of currency was required to have attached to it a statement of the total declared wages.

Currently the inspector would have to follow up receipt of the certificate of currency by enquiries to the insurer. The Inspector might also face a delay because the insurer may need the business to produce wage records prior to issuing the certificate of currency.

There will always be more complex cases that require more time to investigate. These include where a business operates in multiple work-sites. Inspectors will be unlikely to spend this time unless the matter is dealt with as a new file with its own time allocation. Inspectors investigating complex cases may also need specialist research and forensic support. It may also assist if individual Inspectors are given recognition for the amount of hitherto unpaid premium that is collected.

The 20 day inspector turnaround on complaints also fosters a focus on WHS Hazards, and not more complex premium-calculation issues. Although a recent internal memo has called for proper auditing, without reform of the 20-day rule more complex premium work will be more difficult to achieve than it should be.

The regrettably small sums involved in both premium and WHS prosecutions still belie the broader specific and general deterrence value of rigorous enforcement of Workers Health and Safety law.

16. Journey Claims

One of the alleged major concerns in the cost of journey-claims is refuted by the fact that this cost the Scheme less than one per cent and has yet to feature as an item in the last decade's WorkCover Annual Reports. If it were such a major cost it would show up in the accounts. It does not. This is an ideological move away from decent public health coverage for a tiny minority of catastrophically injured workers, for a saving that is insignificant.

The financial issues allegedly assailing the Scheme are broader than these of course, according to the actuaries. The previous six premium cuts to remain 'competitive', contradicts the evidence that these costs are any thing other than a minor business consideration in workplace location, as the Unions NSW Submission to this Inquiry argues.

17. Call for Future Inquiries

Clearly there needs to be an inquiry into and then legislation on Scheme costs, with a view to pruning agent profits to no more than the long term bond rate as part of a longer-term transition back to the public sector.

The Scheme traps the permanently impaired without decent return to work outcomes on low statutory rate payments below the State Minimum Wage. Mortgages gone, relationships massively strained, reactive depression with a life of no hope of working again. Along with the acknowledgement that secondary psychological injuries commonly occur after physical work injuries. In addition there are the intergenerational psychological effects for children and relatives of the dead and injured.

Long term and permanently injured workers must have their losses remedied to the fullest extent in best practice rehabilitation and proper structured retraining to jobs of equivalent benefit levels or full income replacement until retirement. No one's major life savings, through a mortgage or superannuation, should be endangered by a negligent employer.

Injured workers must not be made to pay for the effects of the ongoing financial crisis. They have suffered enough and there is no reason from a public health perspective that their derisory 'benefits' (never back to full pay after 26 weeks) should be cut.

The cost of scheme premiums must properly fund best practice, high quality remedies for the damage done by work. Until business pay the full costs for the lives they damage and end, workers' lives will continue to be cheap externalities.

Examination of the experiences of injured, diseased and dead workers should drive future inquiries into the operation of workers compensation schemes. From an examination of the Inquiry's Parliamentary E-Brief, these issues rank lowly in public policy priority list as drivers of recent Scheme reviews.

18. Commutations & WorkCover

The Scheme currently allows virtually no commutations. No commutations mean the long-term injured are locked in to the Scheme with no way out.

This often has a devastating psychological effect because the long-term injured find their lives subsumed by the Claims Managers' requirements.

In the past twelve months two long-term injured workers to the PSA's knowledge have instructed our solicitors that they could not take any more micromanagement of their lives by their Claims Managers and instructed our solicitors to write stating they didn't wish to receive any more payments as long as they were left alone.

In addition, the effect of an ever growing "tail" on the Scheme must have an adverse financial impact.

The PSA understands all the actuaries who have examined the Scheme over the years have recommended the re-introduction of commutations, except those advising the Government in 2001 and now.

The PSA understands that fifty per cent (50%) of the "deficit" claimed by the Government is due to the effects of the GFC and that one billion dollars of it is due to APRA increasing

the risk component from eight per cent (8%) to twelve per cent (12%). We suspect the balance can safely be accounted for by the inability of the system to finalise claims.

The present benefits system is the system introduced in 2001. Maximum weekly payments have been increased by indexation and impairment benefits were increased for injuries after 31 December 2006 by ten percent (10%). Essentially therefore the benefits haven't changed, the work injury damages threshold hasn't changed, WorkCover doctors use WorkCover's method to assess impairment and yet a "deficit", said to be \$4,083 billion at 31 December 2011, has arisen.

Analysis of WorkCover's annual reports show there were half the number of injuries compared to 1996 and Scheme agents now get paid three times as much for claims as they did in 2001.

Clearly, it is not the benefits side of the equation that has a problem and in that regard the PSA refers the Committee to the Submission of Unions NSW.

19. Civil Liability

We are opposed to the idea of extending the application of the *Civil Liability Act 2002* (NSW) ("*the Act*") to work injury damages. This is an act relating to common law claims and individual responsibility is not appropriate in employment situations where employees are bound by the directions of their employer.

One of the original aims of the *Civil Liability Act 2002* (NSW) was to supposedly promote individual responsibility to avoid injury. However, the notion of individual responsibility does not sit easily within an employment context. At its heart the workplace is characterised by master-servant relationships, wherein the employer has control over the premises, the nature of the work to be performed, how the work is to be performed, when the work is to be performed, etc. In short, the *Civil Liability Act 2002* (NSW) was not designed for the employment context.

The Act was not intended to apply to employees and this will mean that Public Sector employees will face a significant reduction in their rights with respect to Workers Compensation. In particular, we are concerned about the following;

Section 5G of the Act restricts the ability of injured persons to make claims where an activity involved an "*obvious risk*". Section 5H states that a person does not owe a duty to warn of an obvious risk. Together with section 5S of the Act, this can mean that compensation can be reduced to nil where such a risk is accepted. Further, section 5I states that a person is not liable in negligence for harm suffered by another person as a result of the materialisation of an "*inherent risk*". Many of our members deal with inherent or obvious risks on a daily basis. If these tests are to apply, then this may be used to deny members compensation in jobs where there is a risk. Examples of these types of jobs within our membership are:

- Child protection officers
- Staff who work in correctional centres
- Legal Aid employees
- Disability services

Part 5 of the Act gives exemptions to public authorities. For example section 42 gives public authorities special consideration when determining whether they have breached a duty of care. This could result in our members being disadvantaged based on the fact that their employer is a public authority.

Appendix A - WorkCover NSW 2000 – 2011 Compliance & Enforcement Activities

Yr	Successful Prosecutions	Penalty Infringement Notices	Prohibition Notices	Improvement Notices	Confirmation of Advice Records	Wage Audits	Premiums Recovered	WC Fraud Prosecutions	S.156 Notices Premium Fraud Million	No of Inspector Authorities Issued	No of Businesses	Total Fines (\$'000)
00/01	404	n/a	n/a	n/a	n/a	2200	\$4.5 mn			267		5,400
01/02	455	1636	1332	12480	n/a	550	\$3.8 mn	15		269		9,500
02/03	443	244	n/a	n/a	n/a	6590	\$20.6 mn	11	\$956k	270		13,000
03/04	399	915	1139	17,927	n/a	13,000	\$26.5 mn	19	\$918k	274	650,890	13,300
04/05	563	1652	1421	18,213	n/a	15,635	\$51.4	42 laid	\$1.564	277	664,060	11,500
05/06	482	1212	1195	14,831	n/a	20,227	\$51.1	15	\$1.143	287	668,673	13,878
06/07	300	726	1127	13,243	1217	11,995	\$40.1	14	\$1.806	290	671,618	11,086
07/08	182	619	994	13,109	3919	5840	\$25.1	19	\$3.908	284	697,304	8,600
08/09	108	690	769	10,863	2460	6477	\$29	12	\$2.862	296	689,324	4,602
09/10	103	688	856	12,161	2486	????	\$9.2	10	\$1.723	310	679,746	5,614
10/11	109	587	832	11,318	2272	????	\$26	49	\$1.953	314	704,773	6,101

Appendix B – 1991 to 2001 Prosecutions

