

PRESUMING EMPLOYER GUILT

the damaging state of work safety and compensation laws in Australia

WORK REFORM UNIT
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A culture of presumed employer guilt corrupts and distorts successful work safety and workers compensation laws.

The culture and the laws need to be changed to ensure that every individual involved in work is held responsible and liable for the things they control. Only through this process can Australia drive towards truly safe work environments.

In this context, national consistency in workers compensation and occupational health and safety laws is a priority requiring urgent attention.

New South Wales in particular has the worst OHS laws in the country and probably internationally. The NSW laws not only corrupt work safety objectives but defile all notions of justice in the workplace and the wider society. They need immediate repealing and replacement.



A FLAWED ■ FRAMEWORK

1. OVERVIEW

Most people running businesses in Australia would describe workers' compensation and occupational health and safety (OHS) laws as two of the most frustrating and confusing areas of government regulation. The laws frequently fail to provide clarity and are, for the most part, inordinately complex.

This confusion and complexity is made worse because there is a high level of inconsistency in regulatory design, approaches, systems and administration between the States. This inconsistency is not being addressed by the States.

Existing workers' compensation and OHS schemes directly and unnecessarily increase operating costs, dampen productivity and constrain business success. Further, the key national priority—targeting safe working arrangements and compensation for genuine injuries across Australia—is compromised.

What needs to be understood is that a significant percentage of these systemic problems directly flow from a fundamental design flaw, namely the conceptual underpinning of the schemes by employment concepts. If this design flaw is not addressed the systemic problems will remain.

National leadership on these two issues should be viewed as a priority.

2. A FLAWED CONCEPTUAL FRAMEWORK

Most analysis of OHS and workers' compensation problems focuses on the details of how the various schemes across Australia are administered. That is, the usual focus is on 'red tape' compliance issues associated with the schemes. This, however, is inadequate, because both regulatory areas suffer from a key flaw in the conceptual framework with which all state schemes operate. It is this which is at the heart of the compliance problems.

Both OHS and workers' compensation take as

their starting point the elements of control which are embedded in the employer-employee legal relationship. The crucial feature of this relationship is that the employer has the 'right to control' the employee. The inference contained within the legal relationship is that the employer is all powerful in the work relationship and, further, that the employee is in most respects witless and powerless. The legislative structures of OHS and workers' compensation are both predicated upon the existence of the employment relationship and it has, therefore, come to dominate the cultures and administration of the institutions that administer the laws.

This results in a number of assumptions being built into the design of regulations that are highly suspect when it comes to practical work realities.

Those assumptions are that:

- When a work injury occurs, the employer, however defined, is responsible for the injury.
- Employees have diminished capacity to control their work environment and, when an injury occurs, are assumed to be blameless.

Thus, the employer (however defined) is presumed to be at fault regardless of the actual causes of any particular injury. This distorts the effective functioning of workers' compensation arrangements as insurance schemes and OHS laws as injury-prevention mechanisms.

This is the starting point from which the policy and operational distortions that occur in workers' compensation and OHS laws can most readily be understood.

3. THE ISSUE OF 'CONTROL'

The closest public policy parallel to workers' compensation and OHS laws are the road laws. By contrasting the two areas, the inconsistencies in public policy approach become clear.

Both road laws and work safety laws have to con-

sider “who controls the situation” in order to create effective rules which (a) reduce the incidence of injury and (b) facilitate enforcement.

However, when it comes to the funding and administration of the rehabilitation of injured individuals:

- who controlled the vehicle and caused an injury is not taken as relevant under road laws but,
- who is assumed to control the work situation is central under work injury insurance laws.

3.1 ROAD LAWS

For example, road laws operate on a practical basis that drivers control vehicles and are held personally liable for their driving behaviour. But, unlike property insurance, compulsory personal injury insurance for vehicle-related accidents does not apportion blame. In fact, to apportion blame for personal road injury insurance purposes would distort the operation of this insurance.

Road laws clearly stipulate what drivers can and cannot do. It is recognized that if the laws are ambiguous or confusing, this will result in car crashes. Drivers are held responsible for their individual actions over what they personally control. Serious breaches of road laws resulting in crashes, death and/or injury can result in criminal charges being laid with possible imprisonment as punishment. Manufacturers of vehicles are required to supply vehicles to minimum regulated safe standards, given technical limitations.

With car insurance, when crashes result in personal injury, the insurance schemes operate on a no-fault basis. (This is different to non-compulsory property insurance.) All vehicles must be insured for personal injury cover. Individual premiums are not adjusted according to claims history. All injured persons are treated equally and have access to medical, compensation and rehabilitation services. Even a driver who may have caused a crash is not denied medical insurance services.

This system works well and is accepted as fair and just because the individual who controls a vehicle is easily identified. If fault is to be apportioned under the road laws, this is tied to the discovery of facts. Drivers are not held to be liable for situations beyond their practical control. But control and blame are not relevant for the purposes of rehabilitating injured persons.

3.2 WORK SAFETY

Under work safety laws, however, the apportionment

of blame dominates. Work safety laws take it as given that the employer controls the work situation and is therefore responsible and liable under both workers' compensation insurance and OHS.

But the reality of work situations is that many different individuals have combined control over work. The truth is that there are normally multiple ‘hands’ on the steering wheel of the work ‘vehicle’. Work safety laws, however, are biased toward the assumption that one ‘hand,’ the employer’s, controls work. This is a false assumption based on the presence of a legal contractual relationship called employment. The truth is that employers do have significant control, but so too do employees and many others, including unions, suppliers and government authorities.

The outcome of this false assumption about employer control is that:

- Individuals who did not have practical, effective or total ‘control’ are held to be totally liable, both from an insurance perspective and a prosecution perspective.
- Other individuals who did have control or shared control in any situation are not held liable in any respect.

Twisting the truth about ‘work control’ in such a contorted way diminishes community trust in the fairness and justice of work safety laws, causes people to spend time and energy trying to avoid the injustices of the laws, and reduces the effectiveness of public policy targeting safe work.

Further, this key conceptual point—‘employment control’—if ever it was valid, is quickly being deconstructed by the rapid rise of independent contracting which organizes work without using the employment contract. The response of work safety regulators to this development has been to further distort the law by selectively and inconsistently ‘deeming’ some non-employees to be ‘employees’. This process has layered regulatory confusion upon confusion to the point where the ‘road laws’ of OHS and workers’ compensation cannot effectively be known in advance by the community. This confusion of work safety ‘road laws’ must, of itself, work against safe work.

The extent to which this confusion and distortion occurs varies from State to State, thereby creating further confusion. Some States, however, have made positive developments to have the law reflect work realities and create clarity. Other States have actively distorted the law.

OCCUPATIONAL HEALTH AND SAFETY

Occupational Health and Safety laws vary widely between the States in terms of their core structure and definitional approach. NSW is the worst of the states; Victoria is probably the best. The other States have variations on a central theme perhaps closer to the Victorian approach than to NSW. The legislative approaches to the imprisonment of individuals for unsafe work practices vary markedly between the States.

4. CORE LEGISLATIVE STRUCTURES

The international benchmark for OHS laws are established under the Robens principles of the UK, and ILO Convention 155. These hold that individuals should be held liable and responsible under OHS for what they control within the bounds of what is practicable.

4.1 VICTORIA

Victoria established new OHS laws in 2004 which closely reflect the international principles.

- All parties are held responsible for what they practically control. This applies equally to employers, employees, independent contractors, suppliers of equipment, controllers of premises and so on.
- Prosecutions and fines apply in equal measure to all individuals, regardless of their particular legal status.

Victoria has largely resolved the problem of assuming that ‘control’ is tied to the employment relationship. Victoria has ‘looked through’ the legal status and applies practical measures based on the facts of any given situation relating to the parties who exercise work control. In other words, employees have the same measure of re-

sponsibility and liability as employers according to what they practically and actually control. The same applies to suppliers and others.

This sends powerful signals to everyone in Victorian work situations that they have personal and individual responsibilities to conform to safe work practices.

4.2 NSW

NSW has grossly distorted the international OHS principles and, in so doing, has created significant community distrust of their OHS laws. They have in fact defiled the normal principles of criminal justice.

The NSW approach is an extreme case of where the laws assume that the legal status of the employer results in the employer being assumed to be in total control of work. In doing this, the NSW laws effectively strip employees of any individual responsibility to comply with statutory OHS responsibilities.

In NSW:

- Employers, independent contractors, suppliers of equipment and so on have a statutory obligation to ensure that no injuries or deaths occur. There is no tempering of this in terms of what is practical or what they in fact control.
- This statutory requirement to “ensure” creates presumption of guilt under NSW OHS laws. “Practical control” only applies as a defence. This is a distortion of international OHS principles rather than an application of them. In particular, the statutory presumption of guilt has led to a serious lack of confidence in the justice and fairness of NSW’s laws.

- Employees do not have a specific statutory obligation to comply with OHS laws. Employee obligations are limited to “co-operating” with the employer’s obligations. This effectively transfers liability for the actions of the employee to the employer. This creates presumed guilt on the part of an employer, even if the breach of OHS laws occurred because of the negligent actions of an employee. This sends powerful signals to employees that they can ignore OHS obligations, and equally powerful signals to the community that the OHS laws defile justice. This strips the NSW laws of integrity.

Further compounding this defiance of international OHS obligations, the NSW laws:

- Conduct prosecutions in the IRC jurisdiction, as opposed to proper courts as applies in all other States.
- Deny access to trial before jury.
- Prevent full rights of appeal in prosecutions relating to injuries and fines.
- Allow unions to act as prosecutors and to receive up to half of the fines imposed and have their legal fees paid by the party prosecuted.

It is not unreasonable to describe the NSW OHS judicial process as being as close to a stacked, kangaroo court as can be witnessed in Australia.

As a consequence, these laws have bred an aggressive prosecution culture within the NSW Workcover authority. This is highlighted by the fact that NSW conducts over 60 per cent of OHS prosecutions Australia-wide, but has only one-third of the Australian workforce. Further, 65 per cent of Australian OHS convictions occur in NSW.

4.3 OTHER STATES

No other State has OHS laws as distorted as NSW. Instead, they all have a general application of international OHS principles but with variations in their legislative structures. The emphasis is on control within the bounds of practicability. None has applied presumption of guilt. But none has gone as far as Victoria in making it absolutely clear that employees, as individuals, have equal OHS responsibilities and liabilities alongside all other individuals—regardless of legal or contractual status.

5. UNIONS

All States grant unions some form of special OHS authority, including access to workplaces. NSW is the only State that gives unions prosecutorial powers.

Union special privileges for OHS purposes are generally justified on the grounds that employees need a safety voice ‘on the ground’. Unions are chosen because historically they represented a large proportion of employees in the workplace. With the collapse of union membership and the rise of independent contractors, however, special OHS privileges for unions in fact act to dis-empower employees’ OHS voices. This is dangerous for work safety objectives.

No State government has adequately discussed or addressed the issue of how to ensure effective worker OHS empowerment in the face of an ineffectual union presence or a union presence that may work against OHS. State governments’ OHS laws have requirements for OHS committees but these are predicated on the use of collectivists structures and fail to address the needs of individuals. It is a gaping hole in OHS regimes.

6. OHS AND CRIMINALITY

All jurisdictions have the normal processes of criminal liability applying alongside OHS laws. This replicates the road laws. That is, if an individual knowingly and/or with gross negligence does something that leads to the injury or death of a person in the work situation, the individual can face criminal prosecution through the normal criminal courts and with all the rights of criminal justice applying.

Over the last decade, however, there has been a strong push to embed additional criminal or quasi-criminal sanctions inside OHS laws. This is not consistent with international OHS principles. Such laws distort justice.

6.1 COMMONWEALTH CRIMINAL CODE

In 2001 the Commonwealth amended the criminal code creating something called “corporate criminality”. Effectively, the Commonwealth has put into legal force the idea that a collection of individuals (for example, a corporation) is able to commit a criminal act. The code holds that a corporate “culture” can act criminally. This is a breach of well-established principles of criminal

justice which hold that only individuals are criminally responsible for their individual actions. “Cultures” are never held to be capable of criminal actions. Further, the Commonwealth Code holds that individuals within corporations can go to jail on behalf of the corporate collective. That is, that an individual who has not been found to have acted criminally in his/her own actions can be jailed for the criminal actions of others.

6.2 VICTORIA

Shortly after the Commonwealth created the code of corporate criminality, Victoria attempted to translate the code into work safety laws. That is, it attempted to legislate that a corporation would have been declared to have acted criminally and corporate executives were to be jailed on the corporation’s behalf. This attempt at OHS corporate criminality was rejected. In 2004, however, Victoria reviewed its OHS laws. The Maxwell Report rejected corporate criminality and the idea that criminality can apply to OHS laws. The report did, however, recommend jail for flagrant breaches of OHS laws—even where an injury or death does not occur. The 2004 Act adopted the recommendation. The reasoning applied is that serious breaches of OHS laws can lead to injury and death and, as such, jail might be warranted in extreme cases. It is not immediately clear but probable that the normal processes of criminal justice would apply.

6.3 ACT

The ACT has applied a modified version of corporate criminality in its OHS laws based on the Commonwealth Criminal Code. The Commonwealth, in response, has moved to remove Commonwealth cor-

porations from the application of the ACT Act, while at the same time retaining its own code of corporate criminality. On this issue, the Commonwealth is displaying policy inconsistency and confusion without explanation.

6.4 NSW

NSW provides for imprisonment of individuals when death or serious injury occurs. For second offences under its 2000 Act, presumption of guilt applies, trial is before the IRC, trial before a jury is denied and full appeal rights are denied. Imprisonment for first offences applies under its 2005 Act, with presumption of guilt and trial before the IRC. Trial before a jury is still denied, but full appeal rights apply.

6.5 OTHER STATES

Queensland, Tasmania and the Northern Territory do not have imprisonment provisions in their OHS Acts but retain that possibility under criminal laws. The other States have not enacted OHS laws that carry a possible prison term similar to the Commonwealth, Victoria or NSW, but reviews and proposals for such laws are pending in South Australia and Tasmania.

Laws across Australia relating to the imprisonment of individuals under OHS are inconsistent and confusing at best. At worst, as in NSW, they strip Australians of their normal rights to access systems of justice. The NSW laws, in particular, represent vastly more than a ‘red tape’ problem. Rather, they cut to the heart of what it means to be a civilized society. National debate with a view to consistency and proper application of criminal principles is urgently required.

WORKERS COMPENSATION

Workers' compensation is distorted by lack of consistency and confusion of intent. The starting point for confusion is definitional inconsistency in the jurisdictional reach of the State schemes. The concept of employment intrudes into the schemes' designs, which results in the distortion of normally accepted insurance principles.

7. FLAWED INSURANCE CONCEPTS

The essence of the problem is that the person paying the premiums (ie) the employer however defined does not receive the benefit of any claim but suffers the losses resulting from a claim made by someone else. Under normal insurance the person paying the premium is the person covered and liable to receive the benefit in the event of a claim. It is in this basis that actuarial risk is assessed. However workers compensation design distorts normal actuarial risk assessment.

8. DEFINITIONS

The Heads of Workers' Compensation Authorities insist that workers' compensation benefits apply only to employees and that self-employed individuals cannot be covered by the schemes. However, if self-employed individuals structure themselves as a company, they normally become subject to the schemes by virtue of becoming an employee of their company, even though they are effectively the employer of themselves. Further, the States have all created definitions of employment for the purposes of workers' compensation that go be-

yond common law and which bring some individual self-employed persons within their schemes and leave others out. There is no consistency in the approach between the States. Both within each State and between the States there is high level confusion about the status of self-employed individuals and entities that engage self-employed individuals for the purposes of workers' compensation.

8.1 VICTORIA

Victoria has all-embracing and unintelligible "deeming" provisions which, when tested in the High Court, led the Court to declare that the provision meant whatever the bureaucrats chose them to mean. This has resulted in a situation where individual unstructured self-employed persons are refused workers' compensation registration should they apply. However, entities engaging self-employed persons may be liable to pay premiums on the person they engage, but cannot know for sure unless audited by the Workcover bureaucrats.

8.2 NSW

NSW will not register self-employed individuals but has a bureaucratic expectation that entities which engage such individuals should pay premiums on the individuals engaged. But the authority will not guarantee that it will honour claims on such individuals, even where premiums have been paid. NSW also lists a variety of occupations where self-employed persons are declared

“employees” and subject to the schemes.

NSW is currently undergoing an aggressive audit by Workcover in which businesses that have used independent contractors in good faith are being confronted with retrospective premium bills large enough to cause business closures. Some businesses have, in fact, closed as a result.

8.3 QUEENSLAND

Queensland has a broad definition of worker but then excludes some workers who pay tax under the Federal Personal Services Income Act.

8.4 SOUTH AUSTRALIA

SA does not cover self-employed individuals in their scheme but because the workers’ compensation jurisdiction is handled by the IRC, there is a bias toward creatively finding individuals to be “employees”. This has created significant and expensive litigation. People working in certain occupations are also declared to be employees for the purpose of the scheme.

8.5 WESTERN AUSTRALIA

WA applies a broad definition of worker but excludes directors of companies from the scheme. That is some types of employees (directors) are excluded but other types of independent contractors are included.

8.6 NORTHERN TERRITORY

NT applies a broad definition of worker but in some instances exclusions can apply by regulation.

8.7 TASMANIA

Tasmania takes a practical approach to the issue. If self-employed individuals have evidence of private accident/illness cover, they do not have to register or be covered by the workers’ compensation scheme. If no insurance cover is evident, an entity engaging the self-employed individual must pay workers’ compensation premiums and the person is covered. Tasmania has eliminated confusion through a simple administrative trigger that ensures that all working individuals have work insurance cover of some sort.

9. FRAUDULENT CLAIMS

Because the systems work on the assumption that the employer is to blame for injury, all State systems are wide open to claims abuse. Workcover authorities claim

that they investigate fraud. In practice, however, the systems are rorted. The systems are seen by many as a supplement to social welfare.

Endemically:

- Workers who may have suffered an injury out of work will claim the injury was work-related. The systems assume that when a claimant alleges the injury was work-related that the worker is correct. The onus to prove the injury was not work-related falls on the employer—an almost impossible task.

- Some sections of the medical profession are complicit in fraudulent claims. Most medical professionals charge more for a workers’ compensation consultation than for other consultations.

- Non-declaration to employers by employees of prior injuries is standard. If re-injury occurs, the employer is required to bear the costs. Workers’ compensation authorities claim that non-declaration of prior injury can void a claim, but this rarely, if ever, applies. Privacy, discrimination and other laws effectively prevent employers from investigating if a prospective employee has prior injuries. This stops employers from having proper control of their work risk. Yet they must bear the cost of claims.

10. CLAIMS MANAGEMENT

The employer is supposed to undertake claims management. This occurs also because of the assumption that the employer is to blame and as such should shoulder the responsibility of claims management. The systems in place, however, are hugely complex and require dedicated and specialist skills. For small businesses, in particular, claims management administration is overwhelming in its volume and complexity. The systems work badly. Employers are supposed to be assisted by workers’ compensation authorities and/or contracted insurers, but these organizations suffer from high turnover of claims-management staff, internal lack of knowledge of claims-management rules and processes, and inconsistent and often contradictory application of claims-management rules.

11. RETURN TO WORK

Employers have obligations to assist injured workers to return to work. However, the risk of aggravation of pre-injury creates high level risk for employers in effectively being able to facilitate return to work, particularly for individuals who have lingering injuries. Return-to-work

processes require highly skilled specialist medical knowledge to effect properly. The complexity for business is extreme and beyond the skills base of most employers.

12. RECOVERY OR THE 'NO' POLICY POLICIES

The use of on-hire (labour hire) is common in workplaces. In all jurisdictions, the on-hire company is required to cover the on-hired workers for workers' compensation, pay premiums and manage claims. The on-hire agencies include the cost of workers' compensation in the charge rate to their clients.

In the event of claims, however, workers' compensation authorities regularly initiate "recovery". They sue the client of the on-hire agency for the cost of a claim and 'recover' the money—usually from the client's public liability insurer. Over the last three years, workers' compensation authorities have aggressively followed this course of action.

The outcome is that:

- The authorities 'double dip', shifting the cost of workers' compensation on to public liability insurers.
- Workers' compensation schemes have become a sham, effectively involving State-legislated theft from businesses whereby worker injury insurance premiums are charged, but the cost of the benefit in the event of claims is transferred away from the scheme to another party.
- Public liability insurance companies have become reluctant to provide cover to companies that use labour hire.

It is possible that recovery is being used by State governments as part of a campaign to force businesses not to use labour hire.

However and in addition, recovery is being used against apprenticeship group training companies putting at risk the national apprenticeship system.

CONCLUSION

The chief feature of Australia's OHS and workers compensation schemes is their inconsistency. Within each state the schemes are predominantly complex and difficult to understand for both businesses and workers. Some States are better than others. Some States have made quality improvements.

However, for businesses that trade in single states the compliance issues are huge. For businesses that trade between states the compliance issues are arguably insurmountable. It is perfectly feasible to face OHS prosecution in one State and not another for identical occurrences. It is perfectly feasible for a worker to be injured in one State and be covered by a workers compensation scheme but for the same worker to suffer an identical injury in another state and not be covered.

This situation works against the national objective of safe work environments and effective worker injury management schemes. ■

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