



# National WHS and Workers Comp Roundup

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Closing the Loop  
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# WHS Bill & Regulations

- WHS Act passed in NSW (27/5/11), Qld (26/5/11), NT (1/12/11), ACT (29/9/11) & Federal (29/11/11) jurisdictions
- Act passed in Tas – date of effect 1/1/13
- Regulations made in NSW (14/12/11), Qld (29/11/11), NT (1/1/12), ACT (12/12/11) & Federal (7/12/11) jurisdictions
- Tas regulations in draft

# WHS Bill & Regulations

- South Australia – Bill passed the Lower House 22/11/11, still in 2<sup>nd</sup> reading in Upper House
- Victoria – Bill will not be progressed:  
*“The Government will not sign up to the current proposal for harmonised legislation for occupational health and safety. It offers little benefit for Victoria to offset the \$3.4 billion of estimated costs, the majority of which falls on small business. Victoria will continue to work towards best practice legislation”.*

Hon Kim Wells MP, Treasurer of Victoria, Budget Speech 1/5/12

# WHS Bill & Regulations

- WA – WHS Bill to be drafted in 2012, but without:
  - Right of entry (already exists in IR Act)
  - Penalties
  - HSR power to cease work
  - ‘Reverse onus of proof’ (ie control)
- Passage of Bill will be linked to passage of a *Mine Safety Act*
- No regulations drafted as yet

# Control – a burning issue in SA

- The current OHSW Act establishes control as a 1<sup>st</sup> principle test whether criminal law applies
- Because it relies on employment to activate it
- The WHS Bill demotes control to one of many considerations as to the *extent* to which the criminal law applies
- If uncorrected, this will afford the regulator the maximum wiggle room to bring prosecutions

# Control – the implications

- Point-blank refusal to consider indemnifying employers on costs if prosecutions fail
- Employers will be forced to expend \$\$\$\$ to establish that they should not have been prosecuted in the first place (à la *Kirk*)
- Could bankrupt a small/medium size business
- The WHS Bill is a retrograde step on control, but few others elsewhere have noticed

# Control – relevant case law

- *Baiada Poultry* not a valid precedent
- *Kirk* has limited relevance as it stemmed from the former NSW statutory reverse onus of proof, which was unique
- *Reilly v Devcon Australia Pty Ltd* [2008] WASCA 84 is more relevant
- 1972 report of the Robens Committee - precursor to current OHS law in the Commonwealth:  
*“As a matter of principle the legislation should not have the effect of imposing obligations on employers concerning circumstances over which they have no control.”*

# Regulatory Impact Statements

- Federal RIS (Access Economics) justified WHS laws by forecasting significant savings & safer workplaces
- Vic RIS (PwC) argued against WHS laws by forecasting a \$3.4bn cost, mainly to small business
- SA has one, WA is getting one
- Economists!

# On the subject of economists

*Q. What do economists and computers have in common?*

*A. You need to punch information into both of them.*

*Q. Why does Treasury only have 10 minutes for morning tea ?*

*A. If they had any longer, they would need to re-train all the economists.*

# WHS Codes of Practice etc

- 11 COP so far approved by Ministerial Council as model codes
- 12 more awaiting approval
- Plenty more to come
- 6 WHS 'Guides' published by SWA so far
- 18 Fact Sheets published

# WHS Codes of Practice by jurisdiction

- NSW – 17 Codes published, more to follow
- Qld, Cth, NT, ACT – 11 priority Codes published
- SA – 11 priority Codes ready to publish
- Tas – Codes to be published prior to 1/1/13
- General approach is to retain existing Codes until equivalent model Codes are approved

# WHS Implementation TAG

- Formed to address WHS implementation issues by adjusting model documentation
- Receives submissions from stakeholders & makes recommendations to SIG-OHS
- Now considering longer-term operation – TAG to continue to deal with routine matters while HWSA deals with urgent needs requiring swift action
- My view – stakeholder access to both processes needs strengthening

# The revised SIG-WC program

- Nationally consistent arrangements for death entitlements
- Nationally consistent permanent impairment assessment guide
- Nationally consistent dust diseases compensation arrangements
- National return to work data collection including self insurance worker questions
- Addressing retirement age to reflect the increasing pension eligibility age and remove barriers to older people working.

# NCSI Speech to SWA Forum March 2010

“Here is our rule of harmonisation of workers compensation. *The degree of difficulty in harmonising scheme components varies in line with the impact each component would have on schemes’ funding if it is changed.* The bigger the impact, the harder it is to change. We think this has been a disincentive to harmonisation and will probably remain so”.

# Self Insurance

- Had 2 main topic streams:
  1. Qualitative & quantitative comparison of SIs with insured schemes
  2. Consider & propose uniform licencing requirements
- Worker survey element of (1) will be carried out in conjunction with RTW worker survey
- Licencing requirements component has been deferred in the revised SIG-WC program

# Permanent Impairment

- SIG-WC has agreed to:
  - Recommend use of AMA5 with modified NSW Guidelines as national standard PI tool including:
    - Pain chapter disregarded
    - Psych chapter replaced with PIRS
    - Hearing chapter replaced with AMA4 equivalent
  - Already in use in NSW, WA, SA and ACT
  - Victoria dissented & unlikely to adopt
- Now working on infrastructure modelling

# Death Entitlements

- Problematic – recommended the maximum entitlement for *everything* including:
  - Lump sum increase to Vic level (\$527K)
  - Weekly payments for 26 weeks at 100% of PIAWE
  - ‘Dependant’ to include ‘reasonable expectation of support’
  - Paying lump sums to estates if no dependants(!)
  - Fix payments for dependant children at \$125pw indexed
  - Maximising funeral, counselling & other costs
- SIG-WC -referred back to TAG for proper costing
- TAG (except ACCI) appears to have no care for cost or scheme impact – regulators unimpressed

# Dust diseases

- Newly formed
- Report to SIG on nationally consistent approaches to asbestos & dust diseases compensation & approaches to improved research and data on toxic dusts.
- Consultant comparison and gap analysis completed
- Draft scoping paper drafted for SIG - out-of-session
- August - Scoping paper to Ministers' Council
- My view – must be a single national scheme!

# RTW

- Develop a set of evidence-based principles & guidance material on RTW
- Report to SIG on RTW measures/indicators & measurement tools using claims & other data
- Main work currently around worker survey, led by Comcare. Early draft survey instrument discussed May 2012
- May supplant Campbell instrument
- May supplant or compliment current intra-scheme surveys

# Multi-State Employers

- Early on decided to gather data via focus groups
- NCSI expressed concerns re stratification – large employers/SIs will have different concerns to small employers
- Pilot focus groups proceeded
- Reliability of outputs questionable
- Likely to lead only to more feckless alignment of regulatory paperwork

# Observations on harmonisation generally – personal opinion

- ‘Cooperative Federalism’ has failed in workers comp
- Reflects lack of Federal courage to take it on
- WHS nationally a patchwork, workers compensation plan eroding to nothing because it’s too hard
- Money & politics (in that order) still dictate outcomes
- The core problem is less about the laws than the number of regulators – single systems needed
- The statutory structure of SWA perpetuates the role of self-interested S&T regulators

# Observations on harmonisation generally – personal opinion

- Grossly inadequate stakeholder role in SWA
- Federal Govt weakness guarantees that:
  - WHS will slowly diverge from model in years to come
  - Hard issues will never be tackled in workers compensation
- Even the low-hanging fruit seems to be mostly out of reach in workers comp
- ‘Scope’ is used to avoid the tough questions
- Today’s benefit is limited to political postures
- True test is where we will be in 10 years

# NDIS & NIIS

- Both are highly commendable objectives
- But why separate concepts? Why not one scheme?
- Primary issue is funding – States already wary of NDIS involvement without more info
- Interface with compensation schemes – who funds, who pays?
- Big challenge is to interface with fault-based compensation schemes, eg SA CTP
- Already triggered a review of CTP scheme in SA

# Questions?

