



New Leadership.



Workplace health and safety

Julia Gillard MP

Deputy Federal Labor Leader

Shadow Minister for Employment and Industrial Relations

ELECTION 2007

Overview

In the past decade Australia's workplace policy debate has been dominated by industrial relations. The Howard Government's obsession with changing our industrial relations laws – culminating in the introduction of its extreme WorkChoices legislation – has diminished the opportunity to improve workplace productivity, or harmonise and improve workplace health and safety policy.

WorkChoices has undermined the cooperation and teamwork required in the workplace to build a better workplace safety culture.

All workers have the right to a safe and healthy workplace. Every family has the right to expect their loved ones will return home safely at the end of the working day.

Similarly, employers have the right to expect that workers will cooperate fully with providing a safe and healthy working environment and that occupational health and safety (OHS) issues will not be abused for unrelated industrial purposes.

In 2003-04, 332 people died in Australia as a result of work-related injuries. This equates to a rate of 3.5 per 100,000 employed people.¹

Recent data suggests that some workplace incidents are not falling over time. In the construction sector, for example, 7.4 per cent of workers had suffered a workplace related injury in 2000. In 2005-06 this had increased to 8.6 per cent of the workforce.²

This concerning increase means workplace health and safety policy cannot continue to take a back seat to other workplace policy issues. However, the current Minister for Employment and Workplace Relations has never attended a Ministerial Council with his State counterparts to discuss keeping workers safe and helping reduce red tape for businesses.

For business, the Howard Government's failure to act has resulted in greater fragmentation of OHS and workers compensation laws, adding to the mountainous red tape burden that multi-state businesses already face.

Labor believes that industrial relations laws should foster values that are inherent to building workplaces which are safe, cooperative and non-adversarial.

Labor also believes that having OHS standards and laws and the compensation systems that underpin them fragmented into nine jurisdictions, with no national leadership, is bad for business. It is also bad for workers who face varying coverage and rules at work in different states and industries.

This must change if the Australian economy is to become more competitive and productive and if businesses and workers are to work together to deliver a cooperative and consistent approach to workplace health and safety.

The Howard Government has failed to protect working Australians by:

- introducing workplace laws which undermine co-operative workplace culture;
- failing to take any action to address the increasing rate of workplace accidents and injury; and
- expanding the coverage of the Commonwealth workers' scheme while eroding the benefits available through the scheme – for example, by removing access to journey claims.

The Howard Government has failed to protect Australian businesses by:

- ignoring the plight of multi-state businesses that are seeking a better way to manage the health and safety of their workers and the compensation schemes which apply; and
- failing to work cooperatively with the states to progress a national approach to workplace health and safety and compensation schemes.

Australia can and must do better if it is to keep workers safe and deliver on a more productive workplace. A Rudd Labor Government will:

- put an end to the blame game and drive reforms to deliver a nationally consistent workplace health and safety policy and streamlined delivery of workers compensation for multi-state employers;
- ensure that the Commonwealth scheme provides appropriate protections for the workforce it was designed to cover; and
- replace the existing Australian Safety and Compensation Council with an independent and authoritative institution to drive an inclusive approach to improving health and safety standards and delivering the reform agenda.

Comcare

The Howard Government's failure to address workplace health and safety reform has led to the erosion of protections and entitlements under the Commonwealth workers compensation scheme, while expanding the number of workers covered by the scheme.

Expansion of the Commonwealth scheme was made possible under the 1992 changes to the Safety, Rehabilitation and Compensation Act (SRC Act). These changes were made to ensure competitive neutrality in markets where a Government Business Enterprise (GBE) operated.

Under the original amendments, employers operating in a market in competition with a GBE were able to apply for a licence to self insure for workers compensation under the federal Comcare regime. Approval was subject to the discretion of the relevant Minister, and resulted in the company's occupational health and safety obligations being governed by Commonwealth OHS law.

However, it was not until 2004 that the first Comcare licence was granted to Optus, in its capacity as a direct competitor of GBE Telstra. This decision was challenged and a majority of the High Court found that the licensing provisions were a legitimate use of the corporations powers in section 51(20) of the Constitution. This settled any question that granting these licences interfered with the Constitution's prohibition on the Commonwealth legislating on 'state insurance' matters.

Soon after the High Court's decision, the Minister approved applications from companies such as Linfox, John Holland and National Australia Bank to migrate to the Comcare scheme. There are now 17 self insurers under the Comcare scheme, adding over 100,000 workers to the scheme.

A number of issues have emerged from the increasing number of companies given approval to operate under Comcare.

Coverage under Comcare

Comcare was originally established to provide coverage for workers in the Commonwealth and ACT public service. Injuries in these typically white collar workplaces differ markedly from the nature of the injury profile of the industries now covered by the expanded Comcare scheme, such as heavy transport and construction.

A comparison of the injury profile between the public sector and other industries in state workers compensation systems shows the variation between industry sectors.

In Victoria, Construction and Transport and Storage account for 17 per cent of claims made in 2005-06, while Public Administration accounted for 2 per cent of claims in that year. In Queensland, the percentage of these claims stood at 15 and 6.6 per cent respectively.

The types of injuries also vary greatly between schemes, as does the cost of the average claim, with benefits skewed toward minor injuries under Comcare, rather than serious or catastrophic injuries. For example, in the Queensland system, contusions account for 9 per cent of claims, while in Victoria they account for over 8 per cent of claims. However this injury type does not feature in Comcare profiles.

Similarly, average claim rates also vary significantly. Under Comcare a worker suffering an impairment of 81 per cent or above would receive a no fault lump sum benefit of approximately \$180,000, while in Victoria the same worker would receive \$373,420.

Resources under Comcare

A comparison of the relevant Comcare and the Victorian WorkCover Authority (VWA) data for 2005-06 reveals the extent of the gaps between the operations of state based schemes and an expanded Comcare.

TABLE 1: OPERATIONAL GAPS BETWEEN COMCARE AND VWA (2005-06)

	Comcare	VWA
Workers covered	275,800	2,130,760
Workers covered under self-insurance arrangements	115,230^	200,000
Number of inspectors/investigators (2005-06)	22	236
Workplace visits (2005-06)	203	41,163
Prohibition notices	10	1876
Improvement notices	12	11,168
Prosecutions	0	70

^Estimate only

In addition to the gaps in operational capacity, the interaction of state systems and the Comcare system is unclear for workers working on sites which would normally be governed by state laws and which are now covered by Comcare.

The High Court's original Optus ruling did not address the inexact nature of section 4 of the SRC Act, which removes eligible employers from the coverage of state or territory laws to the extent that these laws apply to "employment relationships". This has led to confusion about coverage for third parties, such as contractors or other workers who operate at a workplace under the control of a Comcare-licensed employer but are covered under the state system. This situation has placed the coverage and rights of these workers in jeopardy.

Before 2005, Federal – state cooperation on the operation of OHS inspectorates and other operational matters was built into the system through a Memorandum of Understanding which allowed state based inspectors to be called upon by Comcare to undertake its investigative role. However, this MOU has now lapsed and the Howard Government has refused to engage with the states in its re-negotiation.

Labor's commitment

Labor will, as a matter of priority, re-negotiate a MOU with the states to ensure that Comcare and state based authorities are working cooperatively to protect all workers regardless of where they work and irrespective of their coverage under state and Commonwealth OHS jurisdictions.

Labor will also examine the outcomes of the Comcare review commissioned under former Minister for Workplace Relations, Kevin Andrews, and now languishing with the current Minister, Joe Hockey, to assist in the formulation of a policy on future of migration by companies in to the Comcare scheme. In the interim, Labor will impose a moratorium on companies seeking a licence to self insure under Comcare.

Commonwealth OHS Legislation

While the expansion of Comcare coverage is creating challenges for the operation of the scheme, the legislation underpinning the scheme has also been changed, eroding the coverage and entitlements of workers covered by Comcare.

In 2006, amendments to the OHS (Commonwealth Employment) Act changed the powers of Comcare, the role of unions and the role of Health and Safety Representatives in workplace health and safety. The annual reporting requirements of Commonwealth employers on OHS matters were also changed.

Changes to the SRC Act

More recently the Howard Government has amended the SRC Act with the effect of reducing worker protections and entitlements.

These changes removed coverage of journey claims and altered key legislative definitions. These included narrowing the legislative definition of disease, so that a worker's employment must now make a 'significant', rather than 'material', contribution to the worker's disease for it to be compensable. Similarly, the legislative definition of 'injury' was narrowed to exclude injuries arising from what the Howard Government has loosely defined as "reasonable administrative action taken in a reasonable manner" and expands the exclusionary provisions for stress claims to include performance appraisals and counselling that relates to performance.

The most significant of these changes involves the exclusion of journey to work claims. Comcare now limits compensation for workers on authorised recesses, including, for example, lunch breaks, to claims only where the injury occurs at the workplace or while the worker is temporarily absent but undertaking an 'employer-sanctioned' activity.

This change creates a jurisdictional nightmare for workers whose claims will not be covered at all, or will be shifted to state-based schemes such as third party transport accident schemes.

This is not an insignificant change to the coverage of the scheme. According to the ABS, more than a quarter (27 per cent) of deaths were attributed to commuting workers.

Cost cutting

By its own admission, these changes have not been made in the name of protecting workers, enhancing OHS standards or improving the efficiency of the scheme but in the name of cost cutting. The Bill's Explanatory Memorandum stated that savings of \$20 million per year would be reaped from these changes. The Explanatory Memorandum also stated that:

"the Government is seeking to significantly amend the legislation to reflect its desire to decrease the number of injuries covered by the Scheme."

However, it is not clear that cost cutting will achieve a long term improvement in the scheme's viability unless broader issues are addressed. Evidence presented to a Senate Committee considering the amendments found that Comcare's funding ratio, as measured by assets to claim liabilities, was deteriorating over time compared to its state counterparts, which were improving over the same period.³

As more companies seek to self insure under Comcare (particularly those in blue collar industries), and with no policy direction from the Howard Government, there may be increased pressure to further restrict Comcare benefits to guarantee the future viability of the scheme. This would add to the already large degree of uncertainty facing workers covered by Comcare. The impact of large businesses shifting to Comcare may also be felt by small businesses in the state schemes if their premiums are forced up by the shift.

Consistent with the evidence presented before the Senate committee considering the Bill, Labor believes that a longer term view is required to address structural issues associated with the scheme's performance, particularly relative to other compensation schemes, and its recent expansion.

An examination of Comcare relative to other schemes demonstrates that issues of coverage, safety and jurisdiction in the Comcare scheme remain unaddressed. Comcare is symptomatic of the long succession of failures of the Howard Government in OHS. Bigger issues surrounding national coverage and coverage for catastrophic injury remain unaddressed by the Howard Government. Allowing companies to migrate into the Comcare scheme is a blunt and ineffective policy tool to address the slow progress in creating a uniform OHS and more streamlined workers compensation system to protect workers, improve productivity and reduce red tape for multi-state employers.

Labor's commitment

Labor will ensure fair representation on Occupational Health and Safety issues in Commonwealth workplaces and will re-examine the review commissioned by the Minister last year but which is yet to be made public. Part of this process will seek updated input from a reformed national body with particular regard to injury profiling across jurisdictions and industries. It will also examine the financial status of the scheme, and examine the impact that Comcare migration may have on its financial viability and ability to ensure workers get appropriate compensation and OHS coverage.

Reducing red tape through cooperative Federalism

Despite broad areas of consistency there remain separate OHS laws in every state and territory in Australia, as well as two statutes at the Commonwealth level, and state-based industry specific safety laws, such as those covering the coal mining industry in Queensland.

While state and territory OHS laws are broadly consistent, and based on the primary outcome of achieving health and safety in the workplace, there remain some fundamental differences between these laws.

This means that multi-state businesses and those businesses that interact with cross border companies must navigate their way through numerous standards, laws and administrative processes to comply with laws and, in the event of an incident or injury, make a claim through the relevant scheme.

Against this background, a 2004 Productivity Commission report presented compelling arguments for the harmonisation of Australia's OHS laws.

In this report, the Productivity Commission found that while national uniformity was a desirable policy outcome it should not be achieved at the expense of workplace safety levels. The Commission found that a national framework should set the foundation for improved outcomes through enhanced coordination, encouragement of best-practice standards and methods and efficient means for measures to be adopted nationwide.

At the time of the Productivity Commission's inquiry, employers, and particularly the approximately 39,000 multi-state businesses that operate across Australian jurisdictions, expressed their strong support for the adoption of consistent legislation regulating OHS and workers compensation.

Harmonisation is also important for workers in an increasingly mobile labour force, and ensures that equal standards and protections for all workers apply across the nation.

For the economy at large, national consistency has the potential to deliver reduced costs. It is estimated that work-related injury and disease cost the economy in excess of \$34 billion per year, with injuries accounting for 84 per cent of the total economic cost, while the majority of all costs are borne by the individual and the community.⁴

The Howard Government has hindered opportunities to implement nationally consistent OHS standards and compensation schemes, resulting in multi-state businesses seeking other ways to address the compliance and regulatory burdens associated with their cross border employment operations.

Migration to Comcare has become one way businesses have sought to deal with the problems created by the Federal Government's policy vacuum, but outcomes under this option are bad for business and bad for workers.

Labor has already made a commitment to ending the blame game between Federal and State Governments. Labor has also committed to taking a leadership role for a coordinated national strategy to radically reduce the regulatory burden on Australian businesses.

Part of this process, outlined earlier this year, includes Federal Labor working in partnership with the states and territories to harmonise key laws and regulations within five years of coming to office, including OHS regulation.

Harmonisation of OHS regulation will not result in a Commonwealth takeover of state responsibilities or rights, but instead will achieve common standards across jurisdictions to harmonise definitions, procedures and reporting requirements. These are areas in which clear and measurable productivity gains can be made. Some progress has already been made by the states themselves, but the process requires national leadership, broadening to include all states and territories, driven to a clear timetable.

Labor's commitment

Integral to this objective is making the Federal and State Governments accountable. Federal Labor has already flagged that the Productivity Commission, through the COAG Reform Council, will be responsible for estimating the costs and benefits of harmonisation in areas such as OHS.

Labor acknowledges the work of the states to harmonise the administrative elements of their OHS regulations and workers compensation schemes, and in particular the first phase of harmonisation released in August 2006 by NSW and Victoria and later endorsed by the other states at the inaugural Council of the Australian Federation in October 2006.

Labor will work with all states to ensure that this first phase of harmonisation, as described in Table 2, is fully implemented within the first term of a Rudd Labor Government. With the leadership of a Rudd Labor Government, many more elements can be harmonised to reduce the compliance burden on multi-state business.

Labor's plan to further harmonise OHS regulations and workers compensation schemes will be guided by the following principles:

- an inclusive approach to the harmonisation process, where the concerns and suggestions of the states, unions and employer groups are properly considered;
- consideration of the implication for compliance efforts required to ensure any increased consistency extends to enforcement of standards;
- consideration of the resource implications for all levels of government in administering any increase in harmonised laws; and
- the observance of COAG's current directive that there is no reduction in safety standards or current levels of support for injured workers.

Federal Labor's plan to harmonise OHS regulations and workers compensation schemes will uphold existing safety standards, while streamlining the different state systems and reducing complexity for employers and employees.

Specifically, Labor's plan will seek to:

- adopt more common laws, with consistent legal definitions for key processes in the calculation of premium and workers compensation payments;
- cut red tape by more closely aligning premium processes and procedures; and
- improve service and assistance to help employers manage their claims and help injured workers return to work.

TABLE 2: FIRST PHASE OF HARMONISATION

Development of uniform WorkCover claim and premium forms with common and more efficient lodgement processes.
Development of common administrative processes for premium payments and payroll declaration including payment plan options.
Establishment of 'one-stop shops' within each WorkCover Insurance Agent to service multi-state employers. Account managers will provide a single point of entry for common claims and premium estimation reports, and resolving queries.
New 'mutual recognition' rules to enable return to work co-ordinators to work across states when supporting injured workers.
New mutual recognition arrangements for construction induction cards issued in states and adoption of the national training agenda for OHS induction training for the construction industry.
Mutual recognition of plant and machinery and a uniform system of accreditation of verifiers of pieces of plant and machinery.
Alignment of regulatory approaches in the domestic construction industry in collaboration with employers and unions.
Sharing of advertising campaigns focused on improving safety at work.
Use of common guidance material for employers to help improve workplace safety and compliance with workers' compensation.
In line with the work of the Heads of Workers Compensation Authorities, implementation of a common 'gateway' analysis for employers applying for self-insurance. The development of uniform financial indicators and a common audit tool to assess safety performance.

An inclusive and reform-focused agency

One of the main constraints identified by business, workers and other OHS stakeholders is the lack of an independent process and forum in which OHS and workers' compensation policy can be debated, reviewed, researched, formulated and directed. Labor believes that this key driver of reform is missing from the current policy and institutional settings.

The current body tasked with this process, the Australian Safety and Compensation Council (ASCC), was the Howard Government's response to the Productivity Commission's recommendations in 2004. However the ASCC structure featured none of the report's suggested changes to the national body.

Labor acknowledges the Productivity Commission's findings that the then National OHS Commission (NOHSC) had not lived up to its objectives and that it needed to be reviewed, given a specific mandate to work towards a national framework and take an inclusive approach to this process. The Commission also recommended that a timeline to achieve outcomes be prescribed in legislation.

When NOHSC's replacement, the ASCC, was announced by the Minister in 2004, he did so at the Workplace Relations Ministers' Council and the announcement was received with some suspicion by both employers and workers.

Rather than having a dynamic policy role, the ASCC functions were reduced to "coordinating", "monitoring", "promoting" and "recommending". In addition, the Minister argued that the ASCC would become a forum for national discussion "while respecting states' jurisdictions over workplace safety and workers compensation".

There is broad agreement across stakeholders that the ASCC is a creature of the Executive, and has no power to make or enforce laws or regulations, while all its documents are provided to the Federal Government only on a "guidance" and "advisory" basis.

Labor believes there is a role for a national body whose role is rebalanced to ensure that it is independent and empowered to direct policy development, process and evidence-based outcomes in a timely manner.

The national body should be the inclusive voice for OHS and workers compensation policy research, development and reform – with input, through submissions and hearings, from all stakeholders including employers, workers, unions, practitioners, the legal profession, actuaries and academics. To this end, the national body should have a strong data collection and analysis function, so that policy is based on the evidence of workplace risk, injury and costs across jurisdictions. This will assist in developing a pathway to a nationally consistent system.

Labor's commitment

Labor will replace the ASCC with a new national body which will:

- be independent and non adversarial;
- feature inclusive representation from all Federal and State and Territory Governments, as well as employer and employee groups;
- allow inclusive input to policy development and research into issues;

- develop expertise across OHS laws and workers compensation schemes;
- be responsible for data collection mechanisms through which risk, injury and cost profiles can be readily accessed across jurisdictions and industries;
- drive policy development which will deliver consistency across OHS legislation and across workers compensation schemes; and
- have powers through its ability to refer matters to the Workplace Relations Ministerial Council and enforcement of common implementation dates for reforms.

Conclusion

The values that underpin our workplaces flow through to the way we keep them safe, productive, profitable and injury free.

It is unfortunate that such a fundamental aspect of our working lives has been ignored by the Howard Government, which has instead been focused on an extreme industrial relations agenda.

Under the Howard Government, legislative change has occurred in the absence of a process of inclusive discussion between government, employers and workers, or cooperation between Federal and State Governments. The outcome is an unparalleled level of fragmentation, complexity and uncertainty for business and workers.

The longer this issue is ignored, the greater the complexity and gaps in our OHS will become, and the greater the risk to workers' safety and their coverage under relevant compensation schemes.

Federal Labor believes that this policy inaction is bad for business and bad for workers.

Consistent with Federal Labor's industrial relations policy, *Forward with Fairness*, Labor will strive to get the balance between employers and workers right.

Federal Labor's workplace policy has a strong commitment to:

- extending a Rudd Labor Government's model of cooperative federalism to developing nationally consistent OHS laws;
- taking the best elements of competitive federalism while streamlining the intersection between multi-state employers and workers compensation schemes;
- an independent and empowered national body to lead the reform and implementation of nationally consistent OHS standards and streamlined access to compensation schemes;
- protecting the rights and entitlements of workers so that health and safety are not secondary elements of workplace policy; and
- reducing the red tape and uncertainty for businesses operating across state borders.

Endnotes

1. Australian Safety and Compensation Council, *Estimating the number of work-related traumatic injury fatalities in Australia 2003–04*, 2006, <<http://www.ascc.gov.au/>>
2. ABS, *Work Related Injuries 2000*, Cat. no. 6324, 2005-06
3. Australian Lawyers Alliance, *Submission to the Senate Inquiry into the Safety Rehabilitation and Compensation and other Legislation Amendment Bill 2006*, February 2007
4. National Occupational Health and Safety Commission, *Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community*, Canberra, May 2004