



Greater harmony and consistency... but at what cost?

By Richard Faulks

In recent years, the Alliance has focused on the fight to resist changes to compensation laws around Australia. Some states and territories have adopted a balanced view, while others have stripped injured people of their rights. But in focusing on that debate, we have overlooked some worrying moves by the federal government.

The proposed industrial relations changes are a timely reminder of the need to be vigilant in defending citizens' rights from federal intervention. As yet, the extent of the changes is unclear. But many commentators are already warning of the dangers of removing the fundamental rights of more vulnerable workers. Former Judge of the Australian Industrial Relations Commission, Paul Munro, described the changes as misconceived. He said, 'For a long time we've had the benefit of such a system ... We are about to witness deliberate, essentially misconceived and misrepresented destruction of it. Key principles, processes and the institution discharging them will be almost irreversibly damaged or cast aside.'

The comments of Federal Workplace Minister, Kevin Andrews, about potential changes to workers' compensation, should also ring warning bells for those who value the rights of individuals.

In a speech earlier this year entitled 'Future Directions of Occupational Health and Safety in Australia', Mr Andrews said that the Howard government would seek 'greater

harmony and consistency' between Commonwealth workers' compensation and OH&S laws, and those of the states and territories.

Unfortunately, this march towards uniformity is likely to come at a cost to some Australian accident victims.

The first sign of this is the minister's decision to allow private employers to opt out of state and territory workers' compensation systems and opt into the federal Comcare scheme. Mr Andrews relied upon recommendations of the Productivity Commission to justify his government's decision to allow Optus and Toll to enter the Comcare scheme. He maintains that the government would 'encourage self-insurance applications from employers who meet the current competition test to self-insure under the Comcare scheme'.

One effect of granting such a licence is to remove the rights of injured workers to compensation under the state and territory schemes and, more importantly, their common law rights in jurisdictions such as the ACT and Queensland. That a common law right can be removed by a minister granting a licence to an employer to enter into a Commonwealth scheme, without any consideration of the preservation of that right, is a dangerous omission that is hardly justified by the desire for 'greater harmony and consistency'.

The Victorian Government challenged the decision to grant such licences in the Federal Court in *Victorian WorkCover Authority v Andrews* [2005] FCA 94. The Court held that the legislation and granting of the licence to

Optus were both allowable. It remains to be seen whether the High Court forms a similar view when it considers the appeal lodged by WorkCover.

In a related move, the federal government has introduced the Asbestos-Related Claims (Management of Commonwealth Liabilities) Bill 2005, which apparently seeks to transfer common law liability in all asbestos claims against Commonwealth authorities to Comcare. Commonwealth employees who would be affected by the Bill are probably subject to the *Safety, Rehabilitation and Compensation Act 1988* in any event, but any endeavour to fetter or restrict the common law rights of such asbestos victims should be scrutinised. The legislation may, of course, not assist the Commonwealth government given decisions such as that of the NSW Court of Appeal in *Commonwealth v Holland* (1991), which appears to preserve unfettered common law rights for such victims.

Nevertheless, we should all remain vigilant in the face of what seems to be a campaign by the federal government to pursue a national agenda which, at the moment, includes attempting to remove the rights of some injured workers without even a legislative process. ■

Richard Faulks is president of the Australian Lawyers Alliance and managing partner of Stacks with Snedden Hall and Gallop in Canberra. **PHONE** (02) 6201 8900
EMAIL rfaulks@stackshg.com.au