SUBMISSION ON BEHALF OF THE AUSTRALIAN FEDERATION OF EMPLOYERS AND INDUSTRIES (AFEI)

SAFE WORK ACT 2009 (MODEL SAFE WORK PROVISIONS)

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Australian Federation of Employers & Industries

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Introduction

1. This submission is concerned with the overall framework and policy approach of the model legislation. It should be read in conjunction the submission of ACCI which includes our concerns with additional aspects of the *Safe Work Act* 2009 (Model Safe Work Provisions) (the model Act.)

2. The OHS Review and subsequent development of the model Act has missed the opportunity to consider and deliver real reforms and a new approach to OHS regulation. Instead we have been presented with a framework which enables jurisdictions to retain key components of their systems including the regulator and court system. Secondly the model legislation has retained a prosecutorial emphasis. It has delivered a framework which expands both duty holders and their obligations and is designed for ease of prosecution rather than to present a framework which encourages ownership and complete engagement in producing better safety outcomes.

3. An objective of OHS legislation should provide certainty for duty holders and focus on injury prevention and the practical and achievable management of foreseeable risks. Employers should be able to know that if they have appropriate industry standard management systems in place, sufficient for the nature of their operation, which are fully implemented and kept up to date, they have complied. Those who engage experts to carry out work which involves OHS risk should be entitled to rely on that expertise. The model Act does not

provide these features. It has retained the policy stance and philosophy of legislation to change behaviour through regulation and threat of prosecution (with substantially increased fines) instead of encouraging acceptance of self-responsibility, self-reliance, motivation and incentives. The framework embodies the policy stance that the routine use of prosecution is fundamental in making duty holders (as many as possible) bear responsibility for safety outcomes.

4. In subscribing to the view that current legislation is inadequate in its reach for “new and emerging occupations” and “modern forms of working” (whatever these may be), the focus has been shifted from work and the workplace to capture duty holders at all points of the supply chain. This is more likely to add to uncertainty and confusion in safety management, and a focus on process and procedure (eg which parties must be informed/ consulted with/ trained etc) rather than a clearer focus on what actually has to be done to remove hazards at work and to encourage employees to work safely.

Objects of the model Act

5. Dominant within the model Act’s Objects is the involvement of unions, workplace representation and the achievement of compliance. The multiplicity of objects and their imprecision is likely to be a fertile ground for legislative interpretation by the courts.

6. Clause 3 (1) (c) should be deleted – encouraging union involvement in assisting persons in control of a business or undertaking (pcbus) to achieve a healthier and safer working environment should not be an express object of an OHS Act.

7. The model legislation should engender a regulatory culture in which regulatory advice and experience are respected and readily available. Ideally, regulators would be an expert resource for individual employers to help them identify hazards and risks and develop solutions. Most employers are simply too small and lacking in the relevant resources to be able to meet the broad statutory requirements. Instead of recognising this practical reality, regulators have been "written out" of the model Act's objectives**.**

8. Clause 3 (1) (d) should have added to it "by the authorities" to entrench the role of OHS authorities in providing advice, information and education to duty holders to produce better OHS outcomes.

9. Clause 3 (2) should be deleted as protecting workers and other persons against harm is already covered under clause 3 (1) (a).

Limitations in model legislative approach

10. Despite the Inter Governmental Agreement that "harmonisation" means uniformity of the OHS legislative framework [1], in order to harmonise OHS laws, each state and territory will need to enact or give effect to its own laws to mirror the model Act and regulations.

11. It is frequently asserted that all jurisdictions have essentially the same "Robens" style OHS legislation with broad performance based obligations on duty holders, supplemented by regulations and codes, with prosecution according to a pyramid of enforcement mechanisms. However, there are significant differences within the legislative regimes and, importantly, in the regulatory and judicial approaches. This wide divergence in both the approach and detail of each jurisdiction's legislation, and importantly, how this legislation is interpreted by the courts will limit the uniform application of model legislation.

12. One crucial difference is apparent in the July 2008 COAG commitment to appease NSW to continue the earlier position of the jurisdictions[2] that there will be " no diminution" of safety standards[3].

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[1] InterGovernment Agreement 1.2 The Parties agree that OHS harmonisation means national uniformity of the OHS legislative framework (comprised of a model OHS Act, supported by model OHS regulations and model codes of practice) complemented by a nationally consistent approach to compliance policy and enforcement

[2] COAG April 2007: The States decided that harmonisation was subject to there being no reduction or compromise in standards for legitimate safety concerns in current OHS standards. At that meeting it was further noted that New South Wales could not agree that duty holders and the scope of their obligations are areas for prioritisation, "as issues relating to these are subject to consideration of the independent review being conducted by the Hon Paul Stein QC". That review was concluded in April 2007 and its report was not adopted by the NSW Government.

[3] 3 July 2008 COAG Communique http://www.coag.gov.au/meetings/030708/index.htm

13. The repeated assertion by WorkCoverNSW that the general duty – and the consequent employer liability – in the current NSW OHS Act is effectively the same as the general duty and liability applying in other States is, on all relevant tests, incorrect. If, as is asserted by WorkCoverNSW, they are broadly the same as other jurisdictions, there would have been no reason to resist moving to a national framework. However there was resistance, with the outcome that the model Act enables NSW to preserve its controversial and unreasonable standards.

14. The model Act definitions provide that:

> ***OHS law*** means:
>
> **Jurisdictional note**: Each jurisdiction will specify the OHS laws for its jurisdiction.
>
> ***authorising authority*** means:
>
> **Jurisdictional note**: Each jurisdiction will need to specify the court or tribunal or body to be the authorising authority for that jurisdiction.
>
> ***regulator*** means:
>
> **Jurisdictional note**: Each jurisdiction will specify the relevant regulator for its jurisdiction.
>
> ***Tribunal*** means:
>
> **Jurisdictional note**: Each jurisdiction will specify the relevant court or tribunal for its jurisdiction.

15. As a consequence WorkCoverNSW will retain its position as regulator/ authorising authority and NSW employers will remain subject to prosecution within the NSW Industrial Court.

16. Further there are a significant number of jurisdictional notes throughout the model Act, in particular, the relationship between the model Act and other Acts, description of penalties and additions to the list of functions of the regulator.[4]

17. As the legislation adopted by each jurisdiction will continue to be interpreted by the various state and territory courts, the outcome for defendants is likely to continue to be affected by the approach of the courts in the jurisdiction in which the prosecution is brought. Even with uniform legislation, differences in approaches by the regulators and courts will prevail, despite the quest for a national uniform compliance and enforcement policy through the Heads of Workplace Safety Authorities and Safe Work Australia.

18. Instead, it is likely that there will be an acceleration of the trend to adopt the approach of the NSW Industrial Court.

19. Whilst launching an OHS legal text in 2008, a former president of the NSW Industrial Court noted with approval that the overwhelming majority of cases cited were from the NSW Industrial Court or Industrial Relations Commission over the past decade.

[4] See the ACCI Submission on the Exposure Draft Model Act and Regulations; "Other comments"

20. He said: "*Because of the way in which the law in the book is centred so much around the NSW jurisdiction, it makes clear that the development of the law and the jurisprudence in OHS in this country has been carried out successfully by the NSW jurisdiction."*[5]

21. Employers do not agree that the development of OHS law and jurisprudence in NSW has been successful. The concepts of fairness and reasonableness which should underpin any legislation have been eroded in NSW OHS legislation by the application of absolute general duties and extraordinarily harsh judicial interpretation of factual evidence and judicial interpretation of:

- Identification of foreseeable hazards
- Implementation of reasonably practicable measures to eliminate/control hazards/risks.

22. While the primary duty in the model Act is to be qualified by "reasonably practicable", this is likely to remain problematic for NSW employers given its past interpretation by the IRC NSW. This approach is likely to be fortified by the model Act Objects at Clause 3 (2) which requires that the "highest level of protection" be given to workers and other persons.

Duties of Care – Principles

23. The general duties in the model Act are non-delegable. No duty on one duty holder restricts the scope and extent of the duty restricts another. Each duty holder bears the full responsibility and must meet the requisite standard: reasonably practicable (primary duty holder/specific

[5] OHS Alert 15 May 2008

activities), due diligence (officer) or reasonable care (worker).Even where an expert is engaged with obvious skill, knowledge and experience, the multiple, overlapping duties remain.

24. Subsection 15 (3) requires duty holders to discharge their duty to the extent that the matter *"is within the person's capacity to influence and control".* Control is not defined in the model Act (the Review Panel viewed control as relevant only in determining reasonable practicability, a view shared by WRMC). The IRC NSW has established that control means *"to any extent".*[6]

Control and the extent of the duty

25. We are opposed to the model Act's imposition of overlapping duties on multiple parties, each of whom has some element of control, is simultaneously liable and may be prosecuted accordingly. In essence this is a regulatory legal convenience and not an appropriate policy or principle for improving safety outcomes. It has been a key part of the NSW legislative scheme[7], and to varying degrees has been adopted by other jurisdictions and the national regulator.

26. The development of case law emphasises that it is difficult to articulate in a piece of legislation an appropriate principle for delineating duty, *the limit to capacity to influence and control*, hence the development of the legal convenience.

[6]Mc Millan Britton &Kell Pty Ltd v WorkCover Authority (NSW) (1999) 89 IR 464

[7] For example: Inspector Wilkie v Integral Energy Australia [2005] NSWIRComm 47; WorkCover Authority (Inspector Clark) v Raymond Jabboury (No 2) [2002] NSWIRComm 70; Inspector Page v John
Desborough t/a D & T Constructions [2003] NSWIRComm 351; Inspector Batty v Hunter Water Corporation & TCK Excavations Pty Ltd [2005] NSWIRComm 573; Kennedy-Taylor (NSW) Pty Ltd v WorkCover Authority of New South Wales (Inspector Charles) [2000] NSWIRComm 240.

27. For example, imposing on a manufacturer the duty to ensure the safety of a specialist electrician employed by an electrical engineer or contractor engaged to perform specialist work beyond the manufacturer's knowledge and competence, may make it easier to prosecute both the manufacturer and the electrical engineer/contractor, but the result is unrealistic.

28. It is our view that overlapping obligations and responsibility for safety involving multiple duty holders with no clear delineation of the extent of control should have been avoided in the model Act. NSW prosecutions demonstrate that this approach may increase the instances of successful prosecution, but they have created uncertainty, confusion, duplication and wasted resources amongst multiple duty holders. This approach appears to be based on the belief that uncertainty is conducive to better health and safety outcomes, because each duty holder will maximize its efforts to ensure a safe working environment. However the reality is that the multiple overlapping duties with no limit to control breeds confusion and frustration, and leads ultimately to a failure of effective action. It does not improve effective safety management. The cost to the community of these multiple and duplicated layers of responsibility will be massive and inefficient.

29. Clarification is necessary to accurately categorise what constitutes control (full or partial) and the limits to the duty holder's obligations (for example, contract provisions granting control to the contractor to be evidence of control). The model Act should limit responsibility to where there is realistic

capacity to risk manage.[8] Overlapping and multiple duties should be minimized and duty holders should be able to establish (i) when they have control and (ii) when they do not have control and (iii) the extent of their duties when they are have control.

30. If an expert or specialist is engaged to undertake work, there should be a right to rely on their expertise or specialist knowledge and skill and their ability to operate safely in their own field of work and in the interests of themselves and those who may be affected by their work.

31. Duty holders should also be able to rely on some mechanism, like a certification system, to provide a reliable guide to the competency of the expert or specialist, a supplier or manufacturer.

32. There is a further aspect of control which has not been raised in the Issues Paper, but which has significance for safety duties and the delineation of the extent of control. This is the extent to which a person in control of a business or undertaking, or other duty holder, is entitled to rely on the competence of an employee. The duty in the model Act should be to provide an employee to carry out the work who has the appropriate training and experience. Where an employee does not have this capacity, the level of supervision and oversight would increase commensurately.

[8] For example the operator of a factory is responsible for its safe condition and for providing a safe environment for the expert to work in; an expert contractor is responsible for matters within its expertise-safety of their own equipment, work method.

33. The NSW experience in how the worker's duty of care is dealt with in judicial interpretation is instructive in how not to formulate these duties in model legislation.

34. There is a long line of decisions which effectively say that no matter what an employee does in contravention of safe work systems, the employer will still be liable.[9] Even in the face of evidence showing strenuous efforts by employers to maintain safe work, the IRC NSW routinely pronounces them to be deficient in their efforts to avoid employees' departing from a safe system of work.

35. The IRC NSW has been strenuous in its prohibition of any reliance by employers on competent staff or expert skill in the discharge of OHS responsibilities. [10] There is a plethora of cases in which employers and others have been prosecuted for not providing workers with adequate training and /or detailed supervision to workers who have themselves expert skills, or for allegedly inappropriately relying on an expert's ability to risk assess or the expert's judgment in undertaking a specialised or skilled task.

36. While the IRC NSW may observe that compliance may be difficult, it is never the less demanded:

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[9] For example: Inspector Chaston v G & P Coupland Cranes Pty Ltd [2005] NSWIRComm 347;Inspector Woodington v Thiess Services Pty Ltd [2004] NSWIRComm 20; Inspector Simpson v Tomago Aluminium [2005] NSWIRComm 117; Inspector Evans v Graincorp Operations Ltd [2003] NSWIRComm153.

[10] For example: Inspector Barry Childs v Kirk Group Holdings Pty Ltd [2005] NSWIRComm 1.

"An inexplicable departure from safe practice in such a case might be difficult to foresee and guard against."[11]

and

"…knew of the risk posed by the power lines but (they) failed in very significant ways to adopt a safe system of work, which they were capable of doing."[12]

37. Yet in any real sense the employers in those cases had no effective capacity to control the employees' work. Notwithstanding that workers with specialist skills or expert knowledge and experience are employed or engaged, duty holders in NSW can in no way rely on the exercise by the workers of their knowledge and judgement in performing their work safely.

38. This approach allows the inappropriate removal of the common law right to rely on skilled workers or experts, and has now been incorporated into the model Act.

39. Further, the model Act has retained only a very narrow general duty for workers – the common law standard:

" While at work, a worker must:

(a) take reasonable care for his or her own health and safety

(b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons and

(c) co- operate with any reasonable instruction given by the person conducting the business or undertaking to comply with this Act"

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11 Ibid.

12 Inspector Chaston v G & P Coupland Cranes Pty Ltd [2005] NSWIRComm 347.

40. The timidity involved in the use of the word "cooperate" in NSW and other jurisdictions and now in the model Act reflects a lack of commitment to the pursuit of a reasonable step that would contribute to improved safety. The duty on employees must be clear and unambiguous. In their own interests, employees need to understand that working safely and being vigilant about the risks that will inevitably be present, despite the best of safety management systems, are essential to their own and others' health and safety. The legislation should spell out that each individual has responsibilities for workplace safety and the limits to those responsibilities should be made clear.

Primary duty of care qualification of "reasonably practicable"

41. For NSW employers the model Act has the apparent advantages of the removal of the reverse onus of proof and the qualification of the absolute duty "to ensure" with "reasonably practicable". Section 17 of the model Act defines what is reasonably practicable. However this qualification will remain problematic given its past interpretation by the IRC NSW and likely interpretation of the model Act definition, if adopted. The courts are to have regard for and give appropriate weight to *"all relevant matters"* including those identified in s 17 (a) to (e).

42. It will be an improvement for NSW employers to have the reverse onus of proof removed. However, given the experience in NSW in dealing with the current defences available to a person deemed guilty it will not be difficult for the prosecution to prove that reasonably practical measures

could have been taken. The IRC NSW has typically dealt harshly with factual evidence from defendant directors and managers.

43. Consequently the legislation remains open to interpretation by the courts, and duty holders will face continually moving goals, as in the event of a safety failure, with prosecutorial hindsight, some element of control will be found to be present, hazards will always readily be identified and reasonably practical measures will again typically be found to be available. The question of reasonable foresight has relevance here. It is difficult, if not impossible in NSW, to establish that a risk was not foreseeable or is speculative. Employers must consider even the remotest possibility, as explained by Boland J:

> *"as the cases have emphasised, the obligation on the employer is to actively seek out all risks to safety and eliminate them. It is not obvious or foreseeable risks that must be eliminated but also those that often occur in workplaces, the unforeseen or hidden risk….. whether there was even the remotest possibility*."[13]

44. Reasonable foreseeability of a risk or detriment to safety is relevant to the extent that it assists in determining whether it was reasonably practicable to avoid the risk. If the happening of an event is not reasonably foreseeable it is not practicable to make provision against it.

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[13] Inspector Green v The Crown in the Right of the State of NSW 2004

45. Numerous NSWIRC decisions contain the caution that when considering the matter of foreseeability, one should be careful not to substitute reasonable hindsight for reasonable foresight. Despite this, even when the NSWIRC has wrestled with the foreseeability of a particular situation, ultimately it has still convicted the employer. For example:

> *"… I do not consider, on the evidence, it correct to say this risk to safety was readily foreseeable. The confusion between hindsight and foreseeability is a method to which due care must also be given …I do not consider the defendant's failure, assessed in the light of it constituting a not easily foreseen risk from a uniformly available form of equipment, as high. The defendant's culpability is more towards the lower end of the scale."*[14]

> *"this might be a case where the degree of foreseeability might not be assessed as being so clearly obvious that it would be grossly negligent not to take some step to address the risk."*[15]

and

> *"This case perhaps is an example to industry that even where you have well developed systems - as I believe this defendant had - there is a need to be ever diligent and to look at the sometimes most simple machine with a critical eye to ensure that it does not pose a risk to those who may be employed upon its use*."[16]

In this case an $84,000 fine was imposed.

[14] Inspector Malone v Delta Electricity [2003] NSWIRComm 212
[15] Ibid at [30].
[16] Ibid at [33].

46. In NSW, the employer's general duty obligation to provide a risk free work environment extends beyond what is "reasonably foreseeable"[17]

47. Case law demonstrates that the 'event focus' of prosecutions, with a concentration on particular incidents or risk scenarios, undertaken with hindsight, has removed the focus from producing good safety outcomes. This has left employers (and other duty holders) with absolutely no certainty about what risk management should entail. The model Act will not assist in achieving this certainty.

Widened scope of the legislation beyond the employment relationship – extension of duty holders and their obligations

48. The primary duty holder is the "person conducting a business or undertaking" (pcbu). Business or undertaking is not defined. The legislation moves beyond the employment relationship and workplace with the intention to cast the duty holder net as far as possible. Holding companies, financiers may be performing a business or undertaking for the purpose of the legislation and have relevant duties. (We note there is an exclusion for persons financing the aquisition of stock by customers - clause 6 (3))

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[17] Defendants must always be able to show that everything has been done to avert all risk. This applies not just to risks that can be specifically identified but also to accidents of some class or other that might conceivably happen. See Legge v Coffey Engineering Pty Ltd (No 2) (2001) 110 IR 447; WorkCover Authority of New South Wales (Inspector Keelty) v The Crown in the Right of the State of New South Wales (Police Service of NSW) (No 2) (2001) 104 IR 268; Holmes v RE Spence & Co Pty Ltd (1993) 5 VIR 199; Ferguson v Nelmac Pty Limited (1999) 92 IR 188; O'Sullivan v The Crown in the Right of the State of New South Wales (Dept of Education and Training) (2003) 125 IR 361 at [140]-[141]; Inspector Malone v Delta Electricity [2003] NSWIRComm 212; WorkCover Authority of New South Wales (Inspector Ching) v Bros Bins Systems Pty Ltd [2005] NSWIRComm 226; Inspector Robinson v Macquarie University [2003] NSWIRComm 466. Inspector Jelley v Dupond Industries Pty Ltd & Ors [2007] NSWIRComm 316

[40] Inspector Anthony Farrell v Partridge Plumbing Pty Ltd [2003] NSWIRComm 354.

49. More than one person can be a person conducting a business or undertaking and each person must discharge their duty to the extent of their capacity to influence or control and consult, cooperate and coordinate their activities with those other persons. While such arrangements may be suited to particular workplaces, such as building projects, the model Act does not limit duties to the place of work but applies to any work carried out *"as part of the conduct of the business or undertaking"(clause 18 (3)).*

50. Subsections 8(2) and 9(1) of the *NSW OHS Act* 2000 require employers and the self-employed to ensure that people *in their place of work* who are not their employees are not exposed to risks to their health and safety arising from their undertaking. The elements of an offence under s8 and s9 which must be proved include the limitation that the person was at the place of work at the time. This limitation is not apparent in clause 18 of the model Act.

51. Further clause 18 (4) (f) of the model Act requires the pcbu to provide any " *information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking*".

52. Compliance with such broadly cast duties will be onerous and impractical for many pcbus.

53. The interpretation of *person* and *undertaking* raise issues which are unlikely to be resolved in a manner which makes compliance easier. According to the Panel's first report (paras 6.56 and 6.57):

> *Statutory interpretation Acts in all jurisdictions provide that unless the contrary is expressly provided, the term person includes natural persons, corporations and unincorporated associations. The duty would be owed by the operator whether the operator were an individual, company, partnership or other body.*

54. The model Act defines *"person" as "includes a body corporate, unincorporated body or association and a partnership."* However, throughout the Act the use of the pcbu term and "*person*" is often complex and confusing as the reference to an entity and an individual is not always clear.

55. We oppose the duty of care being owed to other persons put at risk from work carried out "*as part of the conduct of a business or undertaking".* This is very broad, exposes duty holders under OHS legislation to areas covered by public liability. The meaning of "*undertaking*" has been interpreted very broadly in NSW and extends to well after completion of any work. [18]

[18] For example WorkCover v Morrison [2001] NSWIRC 325. In this case a pool builder was found to be conducting an undertaking even though he had completed construction of the pool to the full extent possible given the state of other construction on the site and had left the site five months prior to date of the accident in which subcontractor, unrelated to the pool builder, bought 3 year old child to the worksite, who drowned.)

56. We are also concerned that, in the quest to “catch all’, the focus on safety ***at work*** will come adrift and effort and resources will be spent on wider reaching, but ultimately less effective attempts to identify what needs to be complied with under a changed duty holder structure.

57. It is clear that even the multiple layers of infrastructural redundancy required by NSW OHS law, and now by the model Act, cannot remove all hazards and risks. Demonstrably these have been unworkable and should not have been the basis of the model Act.

58. The solution was not to legislate a "catch all " series of duties, but to delineate and make clear the areas of responsibility and control.

59. Clause 18 (4) (g) imposes a more onerous duty as a primary duty holder must “ensure that the health of workers … are monitored. This takes duty holders beyond the realm of occupational health into public health provision. Monitoring should only be required where prescribed for work related injury or illness.

Officer and the due diligence duty

60. Under the model Act it appears corporate officers have other specific duties imposed upon them, which are qualified by ‘due diligence’. Officers will be liable if they fail to exercise due diligence. Corporate contravention is not a precursor in establishing that there is a breach of the officer’s duty. It seems that part of the price for the removal of deemed guilt is the complete removal of the corporate veil.

61. Due diligence is not defined in the model Act and will be determined by case law.

62. The approach of the NSW IRC in regard to due diligence is that the obligation is not met by general precautions but must be directed at guarding against specific and particular risk. [19]

63. The "all due diligence" test in the NSW jurisdiction is characterised at the level of practical impossibility in the view of Hemmings J, who placed it somewhere between due diligence and perfection.[20]

64. Wendy Thompson provides a more explicit view of the boundaries, or the absence of realistic boundaries, of "due diligence". She is a former manager of WorkCover NSW Prosecutions Branch, notes Hemmings J's observations above, and then describes "due diligence" in this way:

> *"The concept of due diligence would appear to require, at the very least, compliance with [every bit of] the Act and applicable regulations by the corporation and the individuals nominated under the provisions of s.26.*
>
> *The concept of due diligence also appears to have a proactive aspect. For instance, directors and persons concerned in the management of a corporation would be expected to be aware of emerging or changing legal, technological, medical and scientific information relevant to the activities carried out by the corporation, and to modify the systems utilised by the corporation accordingly.*

[19] *WorkCover Authority v Daly Smith Corporation* [2004}] NSWIRComm 349
[20] State Pollution Control Commission v Kelly Pty Ltd (1991) 5 ACSR 607.

Further, directors and persons concerned in the management of a corporation would be expected to actively promote and enforce safety within the corporation and to ensure compliance with the systems put in place by the corporation to achieve compliance …

The concept of due diligence also appears to require individual directors and/or managers to immediately and personally react when they become aware of a failure in the systems implemented by the corporation to ensure safety."[21]

65. Again, the model Act demonstrates the emphasis on taking a punitive approach, one aimed at successful prosecution rather than encouraging officers to improve their chances of compliance.

66. The definition of 'officer' will not exclude a Minister of a State or Territory or the Commonwealth. A Minister is equivalent to and officer' of any large organisation and should have the same duties, and the same exposures.

Other duty holders

Suppliers

67. Only where a supplier has legal control of an item should they hold a supplier duty. Persons or entities whose only role is to finance the acquisition of the plant, substance or structure should be excluded from the supplier duty. "Structures" are included within the supplier's duty. Real estate and stock and station agents should not owe a supplier duty under the

[21] Wendy Thompson, *Understanding NSW Occupational Health and Safety Legislation* (3rd ed, 2001).

model OHS Act. Such a duty would be entirely inappropriate as compliance would be unachievable. Is the agent to identify, assess, and rectify the potential OHS risks of each commercial (and at times, residential) property on the assumption that it will be used as a workplace?

68. Auctioneer obligations should be confined to those already in place in relation to the sale of plant.

69. The scope of the designer duties is unreasonable and problematic. Designers are rarely involved in determining the construction methods of a project and therefore it is difficult to envisage how the architect or designer could be expected to engage in consultation with the person who would ultimately be accountable for the demolition of a building. The overlapping of responsibilities becomes even more problematic given that each of the subsequent duty holders is required to produce coordination plans and safe work method statements articulating how they will conduct their undertakings in a safe manner. Designer duties should be limited to ensuring the safe design of the building for the purpose for which it is intended to be used as a workplace according to the owner or developer's brief.

70. The manufacturer duties would impose virtually identical duties on builders as those applying to designers, and fails to take into account which party has the capacity to address risks when they occur. The proposed duty is limitless.

71. As the comments above demonstrate, instead of adopting a “whole of life” catch-all approach, what is needed is a coherent core of duty holders with clearly defined and separate obligations, capable of addressing all situations rather than continuously expanding duty holder categories to address so-called ‘regulatory gaps”

72. This “whole of life” concept is highly uncertain, with multiple and overlapping duties and liabilities and no clarity about the boundaries of responsibility. While there may be duties that should appropriately be articulated in relation to designers, manufacturers and suppliers, how are these to be identified by the "person in control of a business or undertaking" mechanism? What is it that the manufacturer actually controls? Is it the manufacture of a tool, a piece of plant or a kitchen cabinet that entails an obvious safety hazard, or a safety hazard that is only demonstrable after something goes wrong in another workplace, but where those gifted with 20:20 hindsight will readily be able to say the risk was foreseeable?

73. Taken separately, but particularly in their joint operation, such provisions will make it impossible for duty holders to comply, where duty holders such as designers have little, if any, capacity to control how their design/product/system/ structure is used. What is the link to improved safety by having multiple overlapping duty holders, all with differing degrees of control, and in many instances limited practical ability to actually influence safety outcomes?

74. It should be noted that the Building Code of Australia already deals in significant detail with building design. Another layer of regulation and competition between government agencies about such matters is not needed.

Penalties

75. The harsh penalty regime contained in the model Act is unwarranted. The so-called deterrent effect advocated by supporters of such heavy penalties is outweighed by the negative effect on developing a genuine commitment to improving OHS and the discrediting of the entire system of regulation.

76. AFEI joins with ACCI in opposing the WRMC decision to increase the maximum penalty for a corporation to $3 million. This is a massive increase in penalty levels for each jurisdiction and neither the OHS Review Panel nor WRMC has provided any justification for such an increase, let alone provided any evidence of expected improved safety outcomes.

77. Whilst in no way endorsing the current penalty regime in NSW the maximum penalty for a corporation under the model Act should not exceed the current maximum penalty level across Australia of $1.65 million in NSW. Each of the proposed penalties for corporations for category 1 to 4 offences should reduced be by the same proportion as the category 1 penalty from $3 million to $1.65 million or 45%. It should be noted that as maximum penalties are increased, the level of penalties actually imposed increases proportionately.

78. Goal sentences in OHS legislation are completely inappropriate especially given the controversy surrounding the duties and definitions that pervade the model legislation.

Civil or Criminal penalties

79. Only the most flagrant breaches should be characterised as criminal offences, and should carry with it the proper burdens of proof – all elements should be proved by the prosecutor.

80. In NSW the OHS legislation is criminal legislation, yet it resides with the NSWIRC– a body without expertise in the criminal law- a situation which will not be changed by the model Act. As a result, it allows the merging of industrial relations matters with OHS prosecutions. This is an inevitable outcome where the same judges decide OHS prosecutions and industrial relations matters. This has often produced unbalanced and impractical outcomes in prosecutions and has led to unacceptably harsh treatment of defendants.

81. There is no right under the current law to appeal beyond the Full Bench of the Industrial Relations Commission In Court Session. Everywhere else in the criminal (and civil) law, the High Court is the ultimate court of appeal.

82. However, in the NSW occupational health and safety jurisdiction, not only is the employer's right to appeal severely restricted, but the prosecutor, WorkCover, has an unlimited right to appeal against an acquittal of the employer. This amounts to double jeopardy for the defendant, a concept shunned elsewhere in the legal system.

83. It is not enough that only individuals who are convicted and sentenced to a jail term in NSW are able to appeal to the Court of Criminal Appeal and potentially beyond. Individuals who are fined under the Act for whatever criminal offence should have the same rights of appeal.This is situation which the model legislation has deliberately avoided remedying.

84. As a priority, each jurisdiction should also work towards transitioning to a national civil court system for the hearing of cases for breaches of the model OHS Act. There also should be a strategy for each of Australia's OHS regulators to transition to a culture more closely aligned with Work Safe Victoria's focus of being a constructive, accountable, transparent and effective OHS regulator. Without such actions and changes, a truly uniform national OHS system will not actually be delivered, even if model legislation is in place in each jurisdiction.

85. At the very least, given the criminal nature of the proceedings and the heavy penalties that are now to be imposed under the model Act, prosecutions should be heard in the Federal Court, with the full restoration of all the protections and rights afforded defendants before that Court together with the traditional defendant rights of appeal. The States should take whatever steps are needed to insert the Federal court in the relevant State legislation.

Consultation

86. The model Act has a heavily prescriptive approach to representation and consultation. Other than prescribing a duty to consult the model Act should have allowed duty holders to decide the manner and extent to which they will go about meeting that duty. It should not have mandated the creation of Health and Safety Representatives and work groups. Instead it should have provided duty holders with the ability to retain flexibility to develop arrangements suiting their particular circumstances.

87. The model Act should not include a procedure to follow if agreement on a consultation procedure cannot be reached. Such a procedure could discourage parties from genuinely working towards a consultation procedure that will best suit the particular workplace needs. Consultation procedures are best developed and agreed by the relevant parties at the particular workplace.

88. The provisions should be confined to the use of the consultative arrangements, with any matter at issue being brought to the attention of the employer to consider and respond.

89. Other than the appropriate OHS regulator, no other third party or institution should be involved in the issue resolution process.

Work Groups and Health and Safety Representatives

90. Arrangements allowing for work groups to be determined for workers engaged in two or more businesses or undertakings should be by agreement only and must not be imposed by legislation. While there may be instances where a multi-pcbu work group would be of value there may also be instances where such a provision is used inappropriately, such as to provide roving representatives with unprecedented access to other businesses, sites and workers to which they have little or no connection. The underlying industrial relations agendas and tensions in places where roving delegates have operated make it plain that this is an industrial power issue. If we are to move forward in a way that encourages employers to adopt more collaborative approaches to health and safety at work, employers must be convinced that there are opportunities for constructive engagement and not merely another mechanism to assist trade union industrial and marketing campaigns.

91. Clause 50 (4) provides that "If a request is made for a work group to be determined for workers engaged in 2 or more businesses or undertakings, each of the persons conducting the businesses or undertakings *must* comply with this section".

92. This is not in accordance with WRMC's response to the recommendations of the National OHS Review. The Panel's recommendation at 103 (a), which was agreed to in principle by WRMC, was as follows:

"The model Act should provide that workers be grouped in work groups for the purposes of representation by one or more HSRs and that work groups may include workers engaged at more than one workplace and the workers engaged by more than one business or undertaking".

93. Clause 50 should be amended to align with the Panel's recommendation.

94. The model Act also provides that where negotiations cannot resolve discussions about work groups that the authority may be involved and that the authority's decision will be taken to be the agreement. Such action should be subject to review and therefore should be added to the list of reviewable decisions under clause 218.

95. The model Act provisions for the functions of HSRs and the pcbu obligations to HSRs. These provide HSR's with astonishing powers, vested by statute. Such powers are unwarranted. Along with these excessive statutory rights there is no corresponding responsibility. To the contrary, clause 60 provides immunity for Health and Safety Representatives, and clause 60 (3) re-iterates that there are no duties attached to role of a hhealth and Safety Representative.

96. Clause 64(d) requires that “any resources, facilities and assistance” are to be provided to an HSR “that are reasonably necessary”. Again, a fertile ground for dispute has been provided, without the need to any actual improvement in safety outcomes needed to justify these outlays.

97. Clause 62 (2) (f) provides that in performing a function the Health and Safety Representative may “whenever necessary, request the assistance of ***any*** person”. This provision is unreasonably broad, allows unlimited access of any person to the workplace and can be used as a means of by-passing the model Act’s already unbalanced OHS Entry Permit requirements. It should be deleted.

98. For the same reason, the following clauses should also be deleted:

- clause 64 (1) (e) which states that the PCBU must “allow a person assisting a health and safety representative for the work group to have access to the workplace if that is necessary to enable the assistance to be provided”
- clause 73 (2) (d) specifies that a party to an ‘issue’ includes “if the worker or workers affected by the issue are not in a work group, the worker or workers or their representative”
- clause 73 (5) provides that “A representative of a party to an issue may enter the workplace for the purpose of resolving the issue”.

99. Clause 62 (2) (a) (i) provisions for an HSR to inspect the workplace at any time should be limited to within the PCBU's usual business hours and be the same as the authorised entry provisions at Part 6.

100. Clause 64 (1) (b) (i) & (ii) allow any HSR to have access to information that the PCBU has relating to actual or potential hazards at the workplace and the health and safety of workers in the work group. There are no limits attached to the use of this information or any safeguards attached to ensure that the business or undertaking information is not misused. Again, this reflects the unbalanced and punitive nature of the model Act. Use of worker *medical (* only*)* information requires (correctly) worker consent or is unidentifiable.

101. The model Act provides that a HSR may direct that unsafe work cease. A power to direct work to cease should only be available to inspectors who are subject to general oversight by State, Territory and Commonwealth governments.

102. HSRs should not have the power to issue provisional improvement notices. It is not appropriate, even with the requirement that representatives be suitably trained to exercise such a power in the workplace. This power should be retained as the province of inspectors who should also, given their expertise and knowledge, assist in finding a solution to the safety issue.

103. There are some wider issues surrounding the issuing of Pin notices by HSRs. The substantive content of notices can be used to assist in improving safety outcomes elsewhere. The legislation should have required that there is transparency about the substantive content of notices. Despite seeking useful data from WorkCover NSW on numerous occasions over more than a decade, it has failed to produce information identifying the things for which notices have been issued and the relative significance of each kind of alleged failure by employers. Consequently, the opportunity to help employers improve their safety based on what WorkCover had learnt through the notice process has never materialised.

104. The model Act should have taken the positive step providing a legislative requirement that information on the risks which are the subject of notices etc be transmitted to duty holders, along with recommended actions to deal with the risk. It did not do this, and further, by providing HSR's (with a much lower level of training and expertise in this area than inspectors) with the right to issue Pins, further dilutes the opportunity for this information to be accumulated and used in a positive manner.

105. It is important Pins (and other enforcement notices) be issued only by inspectors to provide as much constructive advice as possible to ensure compliance as well as recommendations in relation to risk management.

Protection from discrimination – reverse onus of proof

106. Existing provisions that are present in workplace relations and anti-discrimination legislation already provide protections against discriminatory treatment and victimisation arising from occupational health and safety matters. Further, the reversal of the onus of proof, along with the option to launch criminal proceedings is another instance of the excessively punitive nature of this legislation.

Union right of entry

107. There should be no right of entry for trade union officials ("entry permit holders"). Too often, the union right of entry is used for marketing purposes – recruiting members – or to pursue industrial relations agendas. Given the political and conflictual nature of the relationship between unions and many employers, it is quite inappropriate for OHS legislation to treat one party, with no duty under the legislation, in such a partisan way.

108. Union powers on entry in the NSW OHS Act are unacceptably wide yet they have been adopted in the model Act. The term "inquire" is used instead of "investigate" yet the clear intent is to provide investigative powers. Such powers should be confined to the role of the inspector.

109. Under clause 107 (1) (d), the rights that may be exercised while at the workplace are unreasonable and unbalanced. OHS entry permit holders should not be able to "make copies of any record or document that is directly relevant to the suspected contravention" – this has the potential for abuse

and there are privacy concerns for both individuals and businesses. OHS entry permit holders should also not be granted access to a workplace's records and computers which would amount to a serious breach of both privacy and security. Unions should not have the power to conduct OHS investigations; these powers are excessive and undermine confidence in the model OHS Act. They should be properly confined to the province of the inspectors.

110. Clause 108 (2) should be deleted and that 108 (1) should be amended to require *that "An OHS entry permit holder must, immediately upon entering a workplace under this Division, give notice of entry …"*. This amendment would provide a minimal, much needed safeguard to employers for misuse of right of entry provisions.

111. There should also be a requirement to state the specific reason for entry, not just the section under the Act which the entry is authorised.

112. There should be provision for the OHS permit holder to leave the site if upon entry it is determined that the suspected contravention of the Act has not occurred.

113. Part 6 of the model OHS Act should prohibit entry of permit holders under Division 2 for frivolous, mischievous or vexatious reasons with penalties attached for such behaviour.

114. The model Act should explicitly provide pcbus with the right to accompany an OHS entry permit holder who exercises a right of entry within their workplace. Again this is an much needed check on the overall union right of entry system.

The Regulator

115. An Object of the Act at clause 3 (1) (d) is "*to promote the provision of advice, information, education and training in relation to occupation al health and safety*". Clause 143 (c) provides that a function of the regulator is to "provide advice and information on occupational health and safety to duty holders under this Act and to the community".

116. This is a welcome development as there should be a specific statutory basis for the provision of advice, information, assistance to duty holders to improve safety outcomes. It is hoped this legislative provision will now be adopted by NSW - it was not by accident that the current NSW OHS Act was drafted with no statutory basis for the provision of advice or information on the part of the regulator.

117. Clause 154 provides that "*An inspector may give advice to a person about compliance with this Act*". This clause should be strengthened to require that inspectors "must" give advice to a person about compliance with this Act.

118. Part 7 confers limitless powers on the regulator: clause 144. Further, clause 146 gives the regulator similarly limitless powers of delegation. This is exceedingly open ended and uncertain given the already expanded powers accorded to unions, HSRs and potentially other bodies which the regulator may deem to be of assistance in performing its functions.

119. Clause 163 (1) (c) provides that an inspector who enters a place may "*require a person at the place to answer any questions put by the inspector*". This effectively removes an individual's right to silence and denies individuals a generally accepted legal right in criminal proceedings.

120. Clause 163 (3) provides inspectors with the power to conduct an interview in private if the inspector considers it appropriate. This would effectively take away a person's right to legal representation.

121. Section 178 and 179 are concern privilege against self incrimination.

122. Section 210 also provides strong coercive powers to the regulator to obtain information.

123. The provisions relating to questioning and privilege are complex and unclear and unlikely to be understood by the vast majority of duty holders.

124. We support ACCI in pointing to the need for additional measures to be inserted in to this part of the model Act including specific policies and procedures from regulators as to how inspectors will exercise their powers in relation to privilege and questioning and how they will ensure that individuals will be made aware of their rights when questioned.

125. Additionally there should be a statute based process by which a compliant may be made to the regulator about the actions of an inspector. As currently drafted, there is no capacity to raise complaints about the performance of inspectors in exercising their functions and powers.

9 November 2009