



SUBMISSION TO THE INQUIRY INTO THE NSW OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

Introduction

A purpose of this inquiry, as announced in the call for submissions, is to consider the impact of the proposals arising from the Report on the Review of the Occupational Health and Safety Act 2000 (the Report), having regard to best practice solutions that will remove unnecessary regulatory burdens on business, without compromising safety.

As this submission will demonstrate, none of the proposals arising from the Report contemplates reducing the regulatory burden for employers of NSW safety legislation/regulation. The proposals make it clear that in the view of the NSW government, no level of regulation can be regarded as too burdensome for business where safety is involved. The proposals do not have a best practice focus; rather they are intended to further consolidate a regulatory system which is already onerous and unworkable.

In contrast, the Regulation Taskforce¹ in its report states:

Just as regulation naturally develops in response to society's needs, its excesses are largely driven by societal and political pressures. Key among these, in our view, has been a growing and unsustainable aversion to risk, demanding a rethink about the role of regulation in modern society. Political leadership will be crucial to achieving a better understanding within the Australian community of the importance of a more balanced approach to regulation and to making the changes within government that are essential to a lasting improvement.

The NSW government has yet again demonstrated that its approach to regulating safety is driven by political pressure and an ideological approach which places a priority on enforcement and a willingness to use OHS regulation for industrial relations and political agendas, rather than a genuine commitment to seeking reasonable, balanced and practical legislation. The review was framed in such a way that the current legislative regime was protected and enhanced; there was no consideration of alternative, more genuinely cooperative and balanced approaches to improving safety.

This submission will outline how the report's proposals — whilst ostensibly taking account of duty holder concerns — are in fact designed to cement the absolute duty of care and further entrench the role of WorkCover as regulator with the prosecutorial luxury of looking — after the event — for all possible ways that an accident could have been avoided.

¹ Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business*, Report to the Prime Minister and the Treasurer, Canberra, January. Introduction.

We are concerned at the regulatory burden imposed by NSW OHS law whose requirements go well beyond standards elsewhere and place businesses operating in NSW at a competitive disadvantage. In no other jurisdiction or country is the legislation as onerous, particularly as exemplified by the *Occupational Health and Safety Legislation Amendment (Workplace Deaths) Act*.

Unbalanced and unmanageable legislation has a significant effect on business expectations and the willingness to take risks. The risk and uncertainties that come from inappropriate legislation, as demonstrated by NSW safety legislation are a clear illustration of the effects of restrictions on and distortions in business decision-making here. Faced with a standard of compliance which is impossible to deliver in practice and where every OHS incident and accident constitutes a statutory default, business is discouraged from investment and creating or retaining jobs. It is not a matter of coincidence that the NSW economy is currently one of the worst performing of all the States. The NSW State Gross Product has been well below that of the national average over the past four years and is technically in recession as over the last two quarters it has failed to grow. In a special economic report issued in January 2006, the ANZ goes so far as to call NSW 'the state of disappointment'.² The view that the State is underperforming is reinforced by the 14 November 2006 CommSec report "*Just how bad is the NSW Economy*":

For the second straight year NSW has recorded the slowest economic growth in the nation. The NSW economy grew by only

² ANZ Special Economic Report January 2006 p2

1.4 per cent in 2005/2006 after eking out growth of only 0.8 per cent in the previous year.³

It is also very noticeable that in the last few years, NSW's share of national jobs and business investment markets has fallen. The NSW unemployment situation could well have been worse but for the fact that the State has been 'losing' population to Queensland and other States. In 2005, over 300 000 people were estimated to have migrated to Queensland and net population growth within this State has fallen from highs of 80 000 per annum in the period 1998-2001 to between 40 000 and 60 000 per annum in the last two years.⁴ Over a number of years this has meant that NSW has 'lost' thousands of jobs to other States. Given the risk faced by business operating within the NSW OHS regime, this is hardly surprising.

Yet the report's proposals will again move NSW in the opposite direction to the regulatory approach taken in other jurisdictions and countries — see for example the UK HSE Safety Simplification Plan 2006 — and do nothing to enhance the competitive position of NSW business. It is yet another indication to industry that the NSW government, far from being "*Open for Business*" is intent on regulating business out of existence.

³ Craig James, *CommSec Economic Insights*, 14 November 2006, p. 2.

⁴ Report by Tina Perinotto in *Australian Financial Review*, 19 May 2005, p 55.

CHAPTER 5 - OHS ACT OBJECTS

The Report concludes with the patently absurd proposition that there are no fundamental concerns with the OHS Act objects, that they remain valid and need only to be clarified. WorkCover attributed this to the “modernising” of the Act in 2000, which in its words “largely reflected the findings of the 1997 Panel of Review”

Any reading of the submissions to the Review will make it plain that there is no overall consensus in support of the Act, including its objectives and general duties; nor that the task ahead is simply one of “clarification” and the provision of further information and guidance. The views put by those who have to implement the Act and Regulations and are subject to prosecution — industry groups and employers, as well as community service providers and local councils — make it clear that the Act cannot be complied with. It transcends what is reasonable and achievable and is having an adverse impact on improvement in OHS management. This is the dominant recurrent message among employers who understand the law and how it is interpreted. The Act is not regarded as reasonable or practical, instead those who are responsible for meeting its requirements see this legislation as unbalanced and punitive.

The remedy certainly does not lie in “clarification”, particularly if this clarification involves misstatement of the law designed to mask the true nature of the obligations imposed by the legislation. Nor is the solution a more “consistent” approach to interpretation in the workplace, by WorkCover and the NSW Industrial Relations Commission or Court (Commission). WorkCover and the Commission

have been entirely consistent in their prosecution of this legislation. The problem is that for duty holders (other than employees), the legislation is unworkable. The Report's limited recommendations in relation to the Objects and the philosophical model underpinning our occupational health and safety law is inappropriate. What is needed is fundamental reform.

The Objects require a significant rewrite so as to provide to WorkCover, the Commission and all duty holders and stakeholders a new, modern, forward-looking philosophy based on research and advice and reasonable, balanced and practical standards that are affordable and achievable in the real world, in real workplaces. Such an approach needs to supersede the strong prosecutorial bias that exists under the current legislation and in the current WorkCover ideology.

With that goal in mind, we submitted to the 2005 Review of the OHS Act 2000 the following new Objects to replace the existing Objects. With these changes in the policy and philosophy of the legislation, WorkCover must develop all the services, expertise and culture that lie behind their effective delivery. The rationale for each Object proposed is detailed in our Review submission in response to Question 2, at pages 17-23.

Proposed New Objects – OHS Act

- (a) To identify through WorkCover funded research and in collaboration with industry, the major categories of accidents

and illnesses and their causes by industry, occupation, function and other useful subdivisions.

- (b) To develop, through WorkCover funded research and by agreement with industry, effective and affordable solutions to the major categories of accidents, injuries and causes identified in (a), at various levels of sophistication to meet the variety of business needs and capacities.
- (c) To develop WorkCover as a sophisticated, expert resource available to industry for the identification of hazards and risks, the development of solutions and the provision of advice and information in easy to understand language and format.
- (d) To separate all enforcement and prosecution functions relating to occupational health and safety from the research and advice functions, with the former being handled by the DPP and the latter by WorkCover.
- (e) To recreate WorkCover as a strongly customer-focused and service oriented organisation designed to provide maximum assistance to the key duty holders and recognised for the quality, objectivity and scientific legitimacy of its research.
- (f) To establish a council of the key stakeholders to oversee and review the regulation development, data gathering, research, assistance, policy development and customer service functions of WorkCover.

- (g) Through the identification and development, via WorkCover funded research and by agreement with industry, of the major categories of accidents and illnesses, their causes and effective and affordable solutions geared to the variety of business needs and capacities – to progressively improve the safety standards of NSW workplaces and thereby protect people at their place of work against risks of illness or injury arising out of the activity of persons at work.
- (h) To promote a safe and healthy work environment for people at work that protects them from injury or illness.
- (i) To encourage the development of useful and efficient forms of consultation and genuine co-operation about major issues of occupational health and safety that are completely separated from industrial relations issues and conflicts in the workplace, geared to the size and/or sophistication of the employer, and designed to assist the employer to develop efficient, practical, affordable, non-bureaucratic means of complying with the Act.
- (j) To provide for WorkCover to assist industry in the development of reasonable, balanced, practical, affordable industry-approved safety management systems to meet the needs of businesses of various sizes, levels of sophistication and industry to improve their safety standards.

- (k) To develop and promote a Safer Communities program and through it an understanding of the things that should be done in people's everyday lives to promote and improve health and safety.

- (l) To provide a framework of legislation and regulations, codes of practice and guidance material that allows duty holders to know the specific reasonable, balanced, practical, finite and affordable current health and safety standards required of them and the limits to their responsibilities.

- (m) To ensure that, in the development of legislation, regulation, codes of practice, guidance material and all other kinds of advice and documentation for employers and other duty holders, WorkCover ensures that the content is clear and specific, easy to understand, non-bureaucratic, focused on the essential requirements, practical, efficient and finite.

CHAPTER 6 - THE GENERAL DUTY FRAMEWORK

6.1 General Duty Development and Framework

The Report concluded that there was strong support for the OHS Act's general duty framework as well as recognition that this model has been adopted by all Australian jurisdictions and so provides the best basis for national uniformity of workplace health and safety legislation. In the view of its authors, no alternative legislative models "received significant public support".

Again, all that was considered in need of change was the clarification of specific 'general duties' and their practical relationship to the risk management provisions in the *Occupational Health and Safety Regulation 2001* (the OHS Regulation).

Not only is the OHS Act (with Regulations) inconsistent with Robens' principles, but it is also the harshest legislative scheme regulating occupational health and safety anywhere in the developed world. It is not a model which "has been adopted by all Australian jurisdictions", nor does it provide the "best basis for national uniformity of health and safety legislation". The NSW legislation has become notorious because of the extent to which it undermines fundamental legal principles and sets unachievable standards. It is literally impossible to fully comply with the duties imposed. As interpreted by the Commission, the

legislated standards effectively require employers to have perfectly safe workplaces – zero risk.⁵

The NSW government claimed it had made a major concession to employer concerns by proposing in its draft OHS Bill 2006, a switch to the 'reasonably practicable' concept for the general duty provisions. According to the Report, moving this concept from the defences and inserting it into the main duty — will 'clarify' that employers (as well as designers, manufacturers, suppliers, controllers of work premises etc) must do what is reasonably practicable to fulfil their duties and obligations.

While this might put the prosecutor to the trouble of formally proving a breach of the duty to that standard, defendants have almost never been successful in running a Section 28 type defence in the context of present Section 8 type duty. That is because the occurrence of an incident, injury or fatality is virtually always taken by WorkCover and the Commission to equate with a breach of the general statutory duty and a failure to do what was reasonably practical. Section 28 type defences and the factual evidence on which they are based are dealt with unreasonably by WorkCover and the Commission and the Commission and WorkCover go to extraordinary lengths to argue against any reasonable, balanced and practical notions of work methods and procedures so as to negate the defence. The concepts of 'reasonably practicable', 'foreseeable' and 'control' have been significantly distorted in the NSW jurisdiction, to the point where they no longer reflect any common law notion what is reasonable, practical

⁵ In *WorkCover v TRW* [2001] NSWIRComm 52, Boland J cites at [13] "...the duty to provide a risk-free work environment...".

or achievable. Much of the unacceptable outcomes in NSW is a reflection of the inexperience of the Commission in the Criminal law.

When one looks at the factors to be considered in determining whether the actions were 'reasonably practicable', it is clear that the amendments leave many means by which a prosecution will be successful – especially against those small businesses and organisations without the resources to engage OHS specialists to spot every conceivable risk in a workplace. Even large businesses are routinely prosecuted for imperfections in their very professional "best practice" systems.

The factors include:

- what the employer *ought reasonably to have known* about the hazards giving rise to the particular risks
- the likelihood of the risk eventuating
- the likely degree of harm
- what the employer *ought reasonably to have known* about ways of eliminating or reducing the risk
- the available means for eliminating the risk
- the cost of eliminating the risk.

Nowhere does it say that one should look at the cost of eliminating the risk in terms of what is 'reasonably practicable' for the business in question. When you take into account that the IRC has invariably held that the occurrence of an injury means an employer has failed to do *something* – and then identified what they 'ought reasonably to have

known' with the benefit of hindsight – it is clear that the amendments in fact fail to amend anything.

It is important to emphasise that we are not simply dealing with the technical interpretation of the term "reasonably practicable". In many cases, the rejection of an employer's section 28(a) type defence turns on the factual findings by the Commission, too many of which are simply impractical, often very harsh and against the defendant's interests. This will be continued with the incorporation of the term within the general duties provisions.

With the history of prosecutions and the attitude of the Commission and WorkCover to the "reasonably practicable" defence, it is clear that new general duties modelled on an obligation to do what is "reasonably practicable" will not function adequately in New South Wales. The assessment by the Commission of factual circumstances in the context of that duty would, albeit inappropriately, remain unreasonably harsh. Besides, the now conventional method of stating general duties is clearly problematic for most small and medium-sized businesses and even larger businesses constrained by mature markets and, usually, marginal budgets.

For these reasons, we proposed in our Review submission that the philosophy and content of our OHS Act be rethought and rewritten, and WorkCover be recreated as a modern, professional, expert, advisory, customer-focused, and research-oriented organisation reflective of the key values derived from Robens, the UK Health and Safety Executive and other useful elements of intelligent international practice. An important component of this new paradigm is our proposal

for the introduction of Reasonable Safety Management Systems, outlined in our Review submission at pages 41 to 43. The Report rejects any such change, and as a consequence does not add to “best practice solutions” nor go any way to reducing the regulatory burden of OHS legislation in NSW.

6.2 Controllers of Work Premises

The Report asserts that much of the comment received about the obligations for controllers of premises related to the need for further clarification and guidance on the discharge of controller obligations. However, the Report advises that:

“there appeared to be a general lack of clarity about who is covered by the controller obligations and how those obligations ought to be discharged, particularly when the responsibilities are shared or when work is undertaken in non-workplace premises, such as health care workers visiting a client at their home or work undertaken in public places”. (p 34).

The response to the breadth and depth of duty holder concerns has been to conflate these concerns to focus on legislative amendment to reflect the provisions of the current regulatory exemption relating to the common property of strata titled residential premises. This is a welcome proposition, but hardly a comprehensive consideration of the regulatory impact of the overlapping obligations of duty holders. It is of little assistance to duty holders to be reminded that the legislation relies on the “principle of persons retaining responsibility for shared OHS matters and discharging those responsibilities in a co-ordinated

manner".⁶ We do not agree that the concept of 'reasonably practicable' will provide clarity that responsibilities are limited by the level of control that the duty holder is able to exercise (for example the control that the employer is able to exercise over work undertaken in domestic premises or other locations away from the employer's premises). "Control" has not been defined in the legislation and as case law in NSW demonstrates, is presently interpreted to mean "control to any extent" and has too often been used to impose duties on persons who are *not* actually in control. It has effectively functioned to enable easy prosecution of multiple parties by OHS inspectors, except, it seems (as in the Gretley case) where there is a politically troubling failure by a government agency or significant trade union ownership of a relevant supplier.

As advocated in our Review submission, overlapping and multiple duties should be minimized and duty holders should be able to establish (a) when they are said to have control and (b) when they do not have control and (c) the extent of their duties when they are deemed to have control.

Instead of attaching duties to an appropriate duty holder, the NSW government has entrenched the overlapping duties of multiple parties, each of whom is simultaneously liable and may be prosecuted accordingly. This is, essentially, a legal convenience for prosecution and not an appropriate policy or principle which assists duty holders to effectively manage safety.

⁶ Report page 36

There is a pressing need to delimit responsibility within a realistic capacity to risk manage. The cost to the community of multiple and duplicated layers of responsibility is massive, inefficient and irrational. Fundamental change is essential.

The impracticality of imposing on householders the duty to guarantee everything is perfectly safe whenever anyone is working in their home has been recognised by a statutory exemption. What has not been recognised though, is that it is completely impractical for an employer to send a competent employee (eg an electrician) to fix the lights or install a new power point in someone's house and to have to assume an artificial responsibility for ensuring the premises are perfectly safe before the electrician goes there – when even the householder is not legally liable. That cannot be regarded as an appropriate or reasonable regulatory requirement.

6.3 Duties of People at Work

The proposed legislative amendments emanating from the Report are an inadequate response to employer arguments that there is no meaningful duty imposed on employees.

In a backhanded acknowledgement, WorkCover's fact sheet⁷ admits only that employees already have a duty to take reasonable care for the safety of *all people* at their place of work – and that this already *implies* they are to take care of themselves.

⁷ http://www.workcover.nsw.gov.au/NR/rdonlyres/594A2D03-44DC-40F0-89D9-63F8F517EF74/0/employee_rights_responsibilities_fact_sheet_ohs_act_review_2006_4843.pdf

But importantly, the amendments will 'provide new protections' for employees by making it clear they:

- need only take 'reasonable' care for the safety of themselves and others at work
- will be able to seek reinstatement if they have been unlawfully dismissed for being involved in an 'OHS issue'.

Apart from the lack of any real evidence that the dismissal of employees for involvement in OHS issues has ever really been a problem in NSW, the report and its proposed legislative outcomes demonstrate a determined effort to shield employees from responsibility. This is because:

- the actions of employees need only be 'reasonable',
- it is not intended to provide to employers the defence that an employee contravened instructions or training, or that they did something that no reasonable person could have foreseen
- employers will still be open to prosecution for failing to stop employees from harming themselves and others.

So the government has responded to those who are calling for clearer responsibilities for employees by saying that an *implied* duty already exists, and by giving them greater protection – without in any way allowing employers to point to an employee's failure as a defence. This protection will only serve to further absolve employees of responsibility – and encourage the view that health and safety at work has nothing to do with them.

It was not argued in our Review submission, nor here, that the remedy lies in subjecting employees to the impossible standards that are already imposed on employers. The duty of care should be applied in a balanced and equitable manner, which recognises that employers and employees cannot predict or control every event in the workplace. The legislation should be changed to spell out that each individual has responsibilities for workplace safety and the limits to those responsibilities should be made clear. A large part of the problem in this area of the law is the overlapping and simultaneous obligations of numerous duty holders, whose obligations are not limited in any way.

Further, having regard to this Inquiry's purpose to consider the impacts the proposals arising from the Report will have on removing unnecessary regulatory burdens on business, no regard has been paid to the enormous inefficiencies produced by a regulatory system which does not allow any reliance on the work of competent employees. In contrast, the legislation demands unrealistic levels of supervision and risk assessment and WorkCover goes to extraordinary lengths to prosecute and convict the employer in any situations where the actions of an employee might have been a significant cause of an accident.

The Commission has been strenuous in its prohibition of any reliance by employers on competent staff or expert opinion.⁸ There is a litany of cases in which employers and others have been prosecuted for not providing workers with expert skills, detailed supervision or adequate training, or for allegedly inappropriately relying on an expert's ability

⁸ For example: Inspector Barry Childs v Kirk Group Holdings Pty Ltd [2005] NSWIRComm 1. [Inspector Mason v Telecommunications Infrastructure Pty Ltd \[2005\] NSWIRComm 282 \(11 August 2005\)](#); Inspector Chaston v G & P Coupland Cranes Pty Ltd [2005] NSWIRComm 347.

to risk assess or the expert's judgement in undertaking a specialised or skilled task. Yet in any real sense the employers in those cases had no effective capacity to control the employees' work.

This is impractical and unreasonable and in contrast with the approach taken elsewhere, putting NSW at a competitive disadvantage. For example, according to the Alberta, Canada, Occupational Health and Safety Code a competent worker is someone who is adequately qualified, suitably trained, and has sufficient experience to safely perform his or her work. A competent worker is not considered to require direct supervision. Reliance on a competent worker provides a defence for the employer in the event of a safety violation.

Duty holders in NSW should also be able to rely on some mechanism, like a certification system, with reasonable and practical standards, to provide one reliable guide as to the competency of the expert or specialist. The duty in the Act should be to provide a competent person to carry out the work or, to the extent that the person has not yet reached that standard of skill and knowledge, to provide appropriate supervision and/or work of a relevantly less demanding kind and/or a system of work designed to overcome the relative lack of skill and/or knowledge (*see comments on certification below*). As Robens makes clear, effective safety is a two-way street, with shared obligations for dealing with *and* avoiding hazards and risks.

Directors and managers

The Report acknowledges that there has been much criticism of the current provision (s.26) where 'a person concerned in the management of a corporation' is taken to have contravened the same provision of the Act or regulation as has been or allegedly been breached by the corporation that employs them – unless they can prove one of the defences in section 26.

The drafting of this provision deliberately exposed a huge number of persons to prosecution and the drafting of the defences, as interpreted by the Commission and applied to the various factual circumstances, made them virtually useless for defendants.

The proposed legislative amendments borrow from the *Corporations Act*, so that all 'officers' of a corporation will be held liable for OHS matters under their control. Directors and secretaries of a corporation, persons who make, or *participate in the making of*, decisions that affect the whole, or a substantial part, of the business of the corporation, persons who have the capacity to affect significantly the corporation's financial standing and persons in accordance with whose instructions or wishes the directors of a corporation are accustomed to act, would all be exposed under this proposal.

It is debatable whether this provision narrows the range of persons actually exposed to prosecution. WorkCover's view that the current provision extends down to Supervisor level would generally not be sustainable under the new proposal. It is already well established that directors and other non-participating officers who have no real

involvement in the day to day running of the workplace are liable for breaches of current NSW safety legislation. Prosecutions under the corporations laws reveal that liability may extend to other companies that have an interest in the business.

There has been no attempt to limit the overlapping and simultaneous obligations of all duty holders or disentangle this unmanageable regulatory burden. The response to this crucial issue was to relegate the matter to a non-legislative strategy of developing guidance for shared or multiple duty holders and include advice on dealing with potential conflicts with other legislation⁹. This is not a practical, real-world solution. It will merely add masses of additional documentation describing how to deal with bad law/regulations.

Duty to consult

We refer the inquiry to the detailed comments we made in our Review submission concerning the unreasonable regulatory burden imposed by the current consultative provisions and the need for reform in this area. Instead the proposal is to extend the rights of unions to enter workplaces, and contemplates further regulation through the forthcoming review of the OHS Regulation 2001. On top of these unproductive additions to the burdens employers are to be subjected to, the draft Bill also proposed conferring on Inspectors the power to effectively determine contested consultation arrangements. This role is absolutely inconsistent with the aggressively litigious culture of the Inspectorate and the background of many Inspectors. The Inspectorate is not qualified for this role and the role itself is

⁹ Report p 27

inconsistent with the clear evidence that the organic growth of co-operation and consultation produces significantly better results than pages of statute law and regulations that seek to dictate bureaucratic models for these to be achieved. The Government's proposals are about more bureaucracy, more intervention, more support for a conflict model.

It is apparent that the NSW government and WorkCover regard OHS legislation as an appropriate vehicle to counter the perceived effects of the federal Workchoices legislation and declining union relevance. The proposed expansion of union rights of entry and representation, and the establishment of the dispute settling function of the DPI and Workcover are clear manifestations of this intention.

The power given to employee representatives to enter workplaces *without notice* whenever they consider that an OHS breach has been ***or may have been*** committed has again been declared free of any justification and, despite the clear submissions from employer groups.

Unions will be able to enter a workplace to discuss issues generally with workers – as long as they can show that OHS matters were on the agenda. These opportunities will simply be used by unions to interfere at the individual enterprise level, seek to recruit members and market their services. In this they will be assisted by the Commission which is to be given a new and enhanced role in the right of entry area. Although WorkCover inspectors have been made available to date to 'assist' an authorised representative where they feel the employer may wish to obstruct or hinder their entry or the exercise of their functions, now the matter may be referred to the

Commission in the form of a dispute. The Commission has been empowered to make orders as it sees fit – and it will seek to expand this new facet of its jurisdiction.

It is difficult to envisage how this use of OHS legislation for industrial relations and other agendas will contribute to a genuinely cooperative approach to improving safety. If we are to move forward in a way that encourages 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 and the government's political agenda.

It is absolutely unacceptable for unions to have a right to launch prosecutions. Decisions to prosecute and the carriage of prosecutions should be in the hands of the Director of Public Prosecutions with a brief to act objectively and professionally according to all the usual principles of the jurisdictions in which prosecutions are pursued. In the vast majority of cases breaches of provisions of the OHS Act are not appropriate for designation as criminal offences and a politically charged organisation like WorkCover is not an appropriate body to handle prosecutions. Likewise, the Commission in its Court guise is quite unsuited to act as a Criminal Court. If justice must be seen to be done, how can the personnel of a tribunal one day arbitrate employment rights in the midst of competing claims and the next day sit as a Criminal Court to adjudicate on alleged breaches of laws in the same workplaces by one side of the arbitral parties. The whole notion of criminality in OHS needs to be the subject of a thorough review.

Safe Design

We refer to our initial submission and agree with the Report's conclusion that introducing a new class of duty holder would significantly extend the scope of the Act.

The Role of Codes of Practice

The Report's response to the propositions made in submissions is inadequate. It relies wholly on the supposition that insertion of "reasonably practicable" within general duties will remove the shortcomings of the current regulatory regime. It also asserts that codes are not made "in a vacuum". We would agree that WorkCover goes through a consultative process in the formulation of codes but it is ultimately WorkCover's decision on content, with highly variable results. Two recent examples of Codes which are considered to be unworkable are the Code of Practice for Rural Workers Accommodation, and the National Code of Practice for Manual Tasks — as yet undeclared, however WorkCover NSW has substantially contributed to the development of this Standard and Code without any apparent consultation with industry.

To reiterate: codes must be agreed to by industry. They must be reasonable, balanced, practical, achievable and affordable and their terms should be based on scientific evidence, including statistical evidence. To cut down on the volume of red tape, they should be restricted to areas of high risk or known solutions that will control the

risk effectively. They should provide the baseline for compliance. Their content should contain sufficient, but not stultifying, prescription as to acceptable ways in which duties can be met, so that compliance with the code actually amounts to compliance with the Act, and makes clear what compliance looks like. Failure to comply with a code should not of itself constitute an automatic statutory breach because flexibility is essential for alternative approaches, provided that an equivalent or better standard is achieved.

While elements of our Review Submission proposals about new general duties, founded on Reasonable Safety Management Systems (RSMS), are similar to industry codes of practice, our proposition differs in that the RSMS would actually be agreed to by industry and not merely be the subject of consultation with industry. Moreover, these systems would be designed in a variety of forms so as to reflect the differing resource levels of business based on things like the size and/or sophistication of the employer, the circumstances of the industry and other matters that would suggest the need for treating a particular grouping differently so as to actually help them adopt and implement a particular RSMS model. If an industry signs off on its own RSMS, the industry will become the promoter of the standard rather than the source of constant concern about statutory duties that are known to be impossible of compliance

CHAPTER 7 THE ROLE OF THE REGULATOR

One of the main criticisms in our Review submission was the abrogation of any responsibility for safety by WorkCover, consistent with the unions' advocacy that WorkCover's role is to enforcement of the Act, not give advice to employers. Gone are the days when a business could confidently contact WorkCover and seek advice from its inspectors on the best ways to minimise risks and protect the health of employees. Gone are the Inspectors who had significant practical industry experience and whose job it was to help employers. With the absolute duties imposed by the OHS Act, WorkCover knew it would be pointless – and even contrary to its interests – to give any advice at all because it is not possible to create the perfect safety, zero risk environment required by the Act and regulations. So WorkCover has evolved to a prosecuting and revenue collecting agency, notwithstanding the current rhetoric about charting new courses.

With the proposed amendments, the government claimed to have answered the critics. WorkCover, it is asserted, will now have:

- an 'advisory role' to employers and others on 'particular workplace health and safety issues'
- the ability to issue Guidelines, giving it greater 'flexibility' while still 'rigorously enforcing' the regulations.

It is generally understood that 'guidelines' are broad statements of principle by an organisation, rather than points of advice. Also, note that:

- the particular 'issues' on which it can give advice have not been specified, nor is there any duty on its inspectors to do so
- WorkCover inspectors will be given the task of giving advice on 'how to remedy *the breach*'. This means it need not advise on how to minimise or eliminate risk, but simply to tell employers *after a breach has occurred* what they have done wrong. Again, it has reserved for itself the benefit of hindsight. And the lengths WorkCover goes to with spurious evidence in prosecutions to undermine defendant evidence about what was reasonably practicable, convinces us that advice from the current inspectorate is unlikely to be reasonable, balanced, practical, achievable and affordable. Unfortunately, WorkCover is so dominated by an adversarial, prosecution culture that it is always looking at how to convict; at how to convince the court the employer was in the wrong. That is why there are more prosecutions and fines in NSW than all other States combined. This is what infects WorkCover's approach to drafting regulations, codes and advice.

Most importantly, however, any 'advice' given by WorkCover to employers will not be admissible as evidence in a prosecution. Businesses will not be able to argue that they are not guilty or that their fines (or terms of imprisonment) should be reduced on the grounds that they followed guidelines set out by WorkCover.

So what has changed? Very little, because WorkCover inspectors are still protected from giving specific advice that will expose *their* organisation to any risk, and because employers know their advice

can't ultimately be relied on. This will reinforce WorkCover's disinterested attitude to workplace health and safety. Also, it will continue to retain for itself the prosecutorial luxury of looking — after the event — for all possible ways that an accident could have been avoided.

The Report's response to the role of WorkCover could be described as "tinkering at the edges". The proposed legislative amendments are intended to consolidate existing functions, not move in the direction of much needed genuine reform. In our Review submission, we outlined new objects which would change the underlying philosophy of the Act and make WorkCover become a fundamentally different organisation. WorkCover must become a sophisticated, expert resource to help individual employers and industries identify hazards and risks and develop solutions.

Hence, our new Object (a).

- (a) To identify through WorkCover funded research and in collaboration with industry, the major categories of accidents and illnesses and their causes by industry, occupation, function and other useful subdivisions.

It is important also that WorkCover develop the expertise to devise effective, practical and affordable solutions. Hence, our proposed new Object (b):

- (b) To develop, through WorkCover funded research and by agreement with industry, effective and affordable solutions to

the major categories of accidents, injuries and causes identified in (a), at various levels of sophistication to meet the variety of business needs and capacities.

This must now change and duty holders must be assisted in identifying hazards and risks and developing solutions. Hence, our recommended Object (c).

- (c) To develop WorkCover as a sophisticated, expert resource available to industry for the identification of hazards and risks, the development of solutions and the provision of advice and information in easy to understand language and format.

In this new guise, WorkCover needs to be recreated with a strongly customer-focused and service oriented approach. This will be a quantum shift for WorkCover. Hence our recommended new Object (e).

- (e) To recreate WorkCover as a strongly customer-focused and service oriented organisation designed to provide maximum assistance to the key duty holders and recognised for the quality, objectivity and scientific legitimacy of its research.

None of this can happen if WorkCover continues as the prosecutor. That function should be passed to an independent agency, divorced from the politics and tensions of industrial relations, disputation and unions. Hence, new Object (d).

- (d) To separate all enforcement and prosecution functions relating to occupational health and safety from the research and advice

functions, with the former being handled by the DPP and the latter by WorkCover.

Instead of creating automatic guilt on the part of employers – because they are not capable of delivering zero risk workplaces – there needs to be a methodical approach to the identification of the categories of accidents and illnesses, and their explicit causes together with the development of appropriate solutions. The current legislation throws all of this upon the duty holder, on the presumption that harsh laws will produce better safety. The comparative statistical evidence does not support this view.¹⁰

It will be obvious to anyone who has seriously considered the matter that employers are concerned about the safety of their employees and keen to learn about and implement the practical means by which they can make their workplaces safe. However, they are frustrated by the drafting of the legislation, which sets impossible standards, and by the approach of WorkCover and the IRC, through prosecutions and convictions, which confirms what hundreds of thousands of businesses have concluded: that OHS law is not about the practical pursuit of measures designed to improve safety. Recommended Object (f) is about an important element of a new beginning, genuinely concerned with the methodical pursuit of improved safety in the realistic manner described in our proposed new Objects:

¹⁰ Injury, illness and fatality rates have been dropping consistently for over three decades (not only post-1983) and in all States, not just NSW. In fact, for the period in which the OHS Act 2000 has been in effect, the rate of improvement in NSW has been less than in other States. The latest available figures (2001-2005) of the Workplace Relations Ministers' Council (WRMC) report on Comparative Performance Monitoring (CPM) shows NSW has consistently had higher incidence and frequency rates for compensated injuries than most other jurisdictions and remains above the Australian average (CPM Eighth Report, Nov 2006).

- (f) To establish a council of the key stakeholders to oversee and review the regulation development, data gathering, research, assistance, policy development and customer service functions of WorkCover.

Recommended new Object (g) reflects the proposed shift in philosophy from the current legalistic, prosecutorial bias to a methodical strategy where WorkCover actually collaborates with industry to provide practical solutions to identified problems:

- (g) Through the identification and development, via WorkCover funded research and by agreement with industry, of the major categories of accidents and illnesses, their causes and effective and affordable solutions geared to the variety of business needs and capacities – to progressively improve the safety standards of NSW workplaces and thereby protect people at their place of work against risks of illness or injury arising out of the activity of persons at work.

CHAPTER 8 – THE ENFORCEMENT FRAMEWORK

8.1 The Enforcement Framework

8.2 Enforceable Undertakings

It is proposed that WorkCover will be able to enter into enforceable undertakings with an employer who is facing prosecution for a breach of the OHS Act. Again, this is with the intention of allowing flexibility and minimising the costs, efforts and delays associated with OHS prosecutions. The undertakings would serve as a compliance tool in lieu of prosecution.

A voluntary undertaking would be filed with the Industrial Court and would:

- act as a binding commitment between WorkCover and the employer
- commit the employer to taking preventative action to correct or prevent a breach of the OHS Act
- act as a stay of prosecution on the alleged breach.

For enforceable undertakings to be workable, there are two critical changes that have to occur. The duties and standards required under the Act must be reasonable, balanced, practical, achievable and affordable and WorkCover must be recreated along the customer service model advocated in our Review submission. Unless these things happen, WorkCover will act as, if not more, punitively than it

does under the present regime which would undermine the whole foundation of enforceable undertakings.

8.3 Informing a Deceased Worker's Next of Kin about the Recovery of Fines

As tragic as these situations will always be, before any proposed amendments are made, the legislation needs to be recast so as to make it reasonable, balanced, practical, achievable and affordable. This is so there can be satisfaction that any prosecution of an employer under the Act will be based on appropriate and proper principles, proper treatment of defendants, proper court process in hearings before a more appropriate court, proper reasoning in judgments and proper rights of appeal. None of these things is currently in an acceptable state of affairs. All of them require significant rethinking and rewriting.

8.4 Resolution of OHS Disputes

The recommendations of the Report and the proposed legislative amendments have adopted another recommendation strongly endorsed by the union movement. The chairperson of an OHS committee or an OHS representative will be empowered to issue a 'safety recommendation notice' (SRN) where they believe on reasonable grounds that an employer is breaching, repeating or continuing a breach of the OHS Act. Training on how and when to do this will be provided by WorkCover.

One of the significant dangers of this provision concerns the claims by unions regarding so called "stress" allegedly caused by work and so called "bullying" at work. Behind both of these issues are union strategies for greater influence in the workplace and the unions have worked hard to tie these issues to occupational health and safety.

Spurious work stress claims are notorious in workers compensation cases. Their numbers are rising and their average cost and duration are the highest of all the categories of claims despite the very debatable evidence as to definition, causation and remedy. Such claims are well known to employers amongst employees whose performance is poor or who are having relationship problems outside or inside the workplace or a whole host of other circumstances that create a desire to vacate the workplace for the short or long term.

From the mid 1990's the ACTU tried to build a case for reduced working hours on the argument that Australia is a long work hours culture, that work causes stress and stress causes disease. This in turn was derivative of the 1993 European Union Working Time Directive, a fairly blunt and unscientific device for reducing work hours in the E.U.

The ACTU campaign failed but the argument is still being pressed with a new emphasis on the alleged ill-effects of changes in work intensity, together with new elements about "workplace bullying", an amorphous term, so far spanning everything from actual assault to deliberate silence, but also incorporating the pressure applied by "bosses" to employees to get things done, bad manners, horrid workmates, etc.

The unacceptable danger of the SRN tool is its availability to cloak the pursuit of trade union industrial goals in a manner that could easily cripple business in NSW via a mechanism designed to avoid the statutory embargo in the federal “Work Choices” package. There is nothing in the language of the Report nor in the draft Bill (now withdrawn) that would prevent such tricks being played on individual businesses and ultimately the State economy.

The New South Wales economy is already noticeably weak, beyond the explanation of lower mining revenues. For about a decade we have been arguing the employer case about negative, unbalanced, punitive OHS laws. In that time, employers across the State have increasingly watched the case reports in which their industry and local colleagues have been aggressively prosecuted and fined large sums. In too many of these cases employers in other countries, even other Australian States, would have been treated differently. In many of them they would not have been prosecuted at all because their standards are more sensible, more balanced, practical, achievable and affordable. In many of them — like the UK on many issues — the regulator actually sees its role as examining problems and developing solutions it can provide to industry. Adding this new SRN tool that boosts the bureaucracy and could result in employers being confronted by a new issue every week (spurious or otherwise) will be viewed as another reason to move interstate or freeze or reduce employment here.

The SRN tool carries with it unacceptable dangers and it creates another mechanism on top of the already flawed consultation model introduced in 2000. These are piecemeal proposals that have a lot to

do with union desires rather than the genuine, far-reaching overhaul of the whole OHS apparatus, as argued in our Review submission.

In our discussions with the State Government in the lead up to its Budgets over many years, we have argued that the cost of Government to business — the effect on competitiveness — is in the main the aggregation of taxes and legislative burdens. Of course infrastructure adequacy is also crucial. Even in the absence of tax increases, however, these costs can rise dramatically if relevant legislation is poorly designed. That is precisely the case with our OHS laws. They have raised the cost of doing business and increased the insoluble risks to a level where risk aversion has to rise. Add to that the adverse effects of drought and rising interest rates and we have the current dangerous cocktail.

This is no time for making worse what is already the harshest OHS regime in the developed world.

8.5 Sharing of Enforcement Information with other Jurisdictions

Significantly, the proposed amendments emanating from the Report's recommendation, include the ability for WorkCover to call on inspectors from other jurisdictions to assist in its policing of OHS.

The effect of this is unclear, but it indicates that WorkCover's enforcement and watchdog role may take on a potentially national, or at least east coast, significance.

The first priority must be to fix the structure, philosophy and provisions of our existing legislation before adding a new element of complexity to the administration and prosecution of OHS in New South Wales. Given the interstate differences in OHS and other relevant legislation, it is difficult to see how such an arrangement could operate effectively. We are opposed to the idea of mutual recognition of inspectorates whilst NSW's legislation remains so unbalanced, impractical and punitive. It seems clear it would be likely to slow down concerted attempts in New South Wales to reorient the approach to occupational health and safety away from the current prosecutorial bias and towards the constructive and cooperative model we have argued for in our Review submission. Instead, mutual recognition is more likely to operate to lure other jurisdictions to follow the negative NSW model and philosophy.

8.6 The Courts

The Report completely ignores the fundamental issues raised in submissions. Instead its proposals focus on additional alternative enforcement measures which may be introduced, not the flaws which need to be addressed. Duty holders are not reassured to be told, in essence, that the system is viable as it was conceived by a panel of experts, and that the Commission was chosen because it is said to have particular expertise in workplace matters. Given the significance of the Commission in the uniquely oppressive OHS Act and its centrality in the operation of an unfair and unbalanced regulatory system, our Review submission is reproduced here:

The OHS legislation is criminal legislation, yet it resides with the Commission – a body without expertise in the criminal law. 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 in the interpretation of the OHS Act. As indicated elsewhere in this submission, this has led to unacceptably harsh treatment of defendants.

In yet another indication of the extent to which the OHS Act compromises employer rights, 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. However, in the 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.

Given the serious nature of the proceedings and the heavy penalties that can be imposed under the OHS Act, particularly since the inclusion of Part 2A, the OHS jurisdiction should be transferred to the Supreme Court of NSW, with the full restoration of all the protections and rights afforded defendants before that Court together with the traditional defendant rights of appeal. It is not enough that only individuals who are convicted and sentenced to a jail term 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, as should employers themselves.

8.8 Rights of Appeal

Australian Federation of Employers and Industries (AFEI) has long argued that the OHS Act denies employers fundamental rights of appeal that are available to even the most serious criminal offenders. To compound the injustice, WorkCover has a right of appeal where an employer is acquitted of a charge of breaching the Act.

The Report and the WorkCover fact sheet about the proposed amendments considers this not to be a problem at all, downplaying its significance because it is 'rarely used'. This is largely because employers are rarely acquitted. But it also admits there is a 'perception' (not the reality) of a 'double jeopardy' situation in the minds of 'some employers'. Fortunately, this imbalance will be partly corrected by taking away WorkCover's right of appeal against an acquittal of an offence under the OHS Act.

But, again downplaying the huge grass roots reaction of employers against injustices in the OHS Act, WorkCover acknowledges only that 'concerns' about the stripping of employer rights of appeal in OHS matters has been expressed by the Full Bench of the Industrial Court. This legal outrage will now be corrected, and appeal rights have been restored – but only with leave of the Full Bench or certification from a judicial member.

8.9 Prosecution and Investigation Powers

Again, the Report's response to the fundamental issues raised by duty holders is cursorily dismissed. It is inadequate in the extreme to attempt to justify union prosecutions by reference to historical circumstances and the limp propositions that

- academics support the right of unions to prosecute and
- regardless of who initiates the prosecution, "it is ultimately up to the relevant court to determine whether the prosecution is successful or not".

In what other area of the criminal law is one of the "contestants" permitted to prosecute an adversary with whom it will, at one time or another, almost certainly have been locked in combat? And if there were any such other area of the criminal law, with penalties as severe as those in the OHS Act 2000, would a breach be cast in terms of an impossible duty to provide a perfect outcome, with the adversary deemed guilty? Would the defences be as impossible to prove as those in the current OHS Act? The fact is that the provisions and circumstances of the OHS Act are uniquely oppressive as this extract from our Review submission demonstrates:

The OHS Act imposes absolute liability for zero risk and a criminal prosecution process without adequate defences. Under the current Act, defendants face deemed guilt even before they go to court, reverse onus of proof, no right to trial by jury, no right equivalent to the ordinary criminal's right against self-incrimination, only a limited right of appeal (compared with WorkCover's unlimited right of appeal) and no right of appeal beyond the Full Bench of the Commission, except if sentenced to a

jail term under the new Workplace Deaths amendments. Under the current Act almost every principle and protection of the criminal law is denied to directors and managers of corporations. Defendants, whether incorporated or not, have virtually no chance of defending a prosecution because of the impossible general duties, the unfairness of the defences and the harshness of the approach taken by WorkCover and the Commission.

In this legislative scheme, it is unconscionable that partisan unions may bring proceedings for alleged offences. WorkCover and the unions are able to act as both “judge and jury” – deciding who to investigate, what evidence to obtain or create and whether or not to prosecute. Both are entitled to a moiety, not to mention recovery of the prosecution’s costs (as commonly occurs).

This situation is completely unacceptable in criminal prosecutions, in an absolute liability scheme, and requires new legislation that appoints a completely independent prosecutor, such as the DPP, to undertake this function. It would not be acceptable to pass the prosecution function to another agency of government – like the Department of Commerce –which, with the best will in the world, could not achieve the level of independence intended to be the hallmark of the Director of Public Prosecutions. Moreover, it is clear that the DPP has a much greater level of experience in the criminal law than WorkCover.