NATIONAL REVIEW INTO MODEL OCCUPATIONAL HEALTH AND SAFETY LAWS

SUBMISSION ON BEHALF OF

Aged and Community Services Association of
NSW & ACT Inc
Aged Care Association of NSW
Australian Business Industrial
Canberra Business Council
Clubs NSW
Hire & Rental Industry Association Limited
Hunter Business Chamber
Illawarra Business Chamber
New South Wales Business Chamber

JULY 2008

This Submission is made on behalf of:

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The organisations making this submission represent over 40,000 employers of all sizes operating across a diverse range of industries and activities throughout the regions and cities of NSW and the ACT.

The businesses represented here operate in both the commercial and not-for-profit sectors and between them provide significant employment.

A number of the members represented employ in other states as well as in NSW or the ACT, and this submission reflects the experience of the submitting organisations and their members in dealing with occupational health and safety systems.

For occupational health and safety, what ultimately counts is performance – outcomes – fewer injuries or disease, less lost time. It is our view that both the nation's occupational health and safety performance, and NSW occupational health and safety performance, which, compared to the rest of Australia, is not good, can be improved. For that to occur the underlying legislative framework must be seen to be fair and balanced.

It is clear from the available statistics that different jurisdictions in Australia are achieving different outcomes, and that these differences are not because of the mix of industries in the different jurisdictions. We would argue that the differences are in no small way a result of the different legislative frameworks which apply, and differences in the way that the systems are regulated and enforced by the relevant regulators and courts.

We believe that it is crucial that the Model Act which results from the work of the Review Panel is one which satisfies the criteria of fairness and balance. However, and equally important, the improved national outcomes of properly balanced harmonised legislation will be lost if the actual implementation and enforcement of the Model Act differs or becomes inconsistent in the various jurisdictions.

Introduction

We welcome this opportunity to make a submission to this Review.

While Australia's OHS Systems have a common basis and are similar there remains significant diversity.

That diversity is undoubtedly dysfunctional and adds unnecessary costs to business and is an economic impost on the country.

As significant as that impost is there is also the cost arising from less than optional OHS outcomes. Costs that are borne by injured workers business and the community.

It is clear from the Comparative Monitoring Report that notwithstanding the shared philosophical basis for all OHS systems in Australia there is a diversity of outcomes.

Consequently it is our contention that while harmonisation is a preferred outcome any benefits that may accrue from harmonisation will be dissipated if the harmonised system which results does not achieve improved and improving OHS outcomes.

Obviously the legislative framework which emerges will have an important role to play but it is only one element in the mix of influences.

While the differing OHS outcomes achieved in the various jurisdictions is a consequence of the legislative framework it is or contention that the differences are also a consequence of how the legislation is administered by local regulatory authorities and interpreted by courts.

It is absolutely essential in our view that achieving the agreement of the Commonwealth States and Territories as to the content of model OHS legislation is only part of the story. Unless there is also agreement as to how the legislation is to be administered ad enforced there is every prospect that with the passage of time the various jurisdictions will diverge and harmonisation, and the benefits that are expected to flow from harmonisation will not be realised.

Legislative Approach

Regulatory Structure

The shape and structure of the model legislation needs to be considered in the context of how it is to be used. The Model Act is intended to be adopted across all jurisdictions so as to produce a harmonised approach to OHS regulation across Australia. The extent to which there will, in fact, be harmonisation will depend ultimately on the extent to which each jurisdiction gives effect to the legislation.

While the jurisdictions are committed to a harmonised system there appears to be scope within the Inter-Governmental Agreement for there to be some diversity[1].

If this is in fact the case then it is essential that the model legislation limits the extent to which diversity might occur. In an ideal environment a single national OHS system would be the preferred outcome. This is not a politically sustainable objective at the moment. Consequently if the goals of harmonisation via model legislation are to be sustained over time then diversity in the content, administration and enforcement of the legislation needs to be minimised.

Recommendations by the Review Panel with respect to the content of the Model Act need to keep this important consideration at the forefront of their considerations. (Q1,2)

The name of the Act should be dictated by its scope and purpose. There seems little reason to expect "Occupational Health and Safety Act" or "Workplace Health and Safety Act" would cause concern among the principal stakeholders. (Q3)

The Objectives of the Victorian Occupational Health and Safety Act 2004 provide an appropriate template for objectives for the Model Act. (Q4).

The Model Act would also be aided by the inclusion of a set of Principles. Those Principles, which should also guide the formulation the Act and regulations, and also the administration and enforcement of the legislation should address:

- the mutual obligations of both employers and employees with respect to workplace safety
- the need fairness. Legislation that is not seen as fair is unlikely to be readily embraced particularly by employers. NSW has a legislative framework which is not seen as fair. Employers believe the NSW Act does not fairly recognise the reality of workplaces, they believe they are required to achieve outcomes which are impossible and if they are prosecuted they have few prospects of successfully defending that prosecution. The evidence is clear. Despite legislation that the trade union movement will argue is the best in Australia, and an enforcement regime which has resulted in more prosecutions and higher aggregate fines than all other jurisdictions combined NSW doesn't have the safest workplaces in Australia[2]. It is also essential that given offences under OHS legislation are criminal offences the judicial processes are also fair, and seen to be fair. Those convicted of an offence under OHS legislation should not denied appropriate rights of appeal

[1] Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety –cl 5.1.8

[2] Workplace Relations Ministers Council, Comparative Performance Monitoring Report (Nith Report) February, 2008

- reasonableness and practicality. The systems approach to the regulation of OHS requires duty holders to make decisions, to discriminate between situations and circumstances and to act in a considered way. That is the obligation the legislation should impose on duty and it is the standard against which they should be judged. (Q6)

Scope, Application & Definitions

The rights and obligations of duty holders and others affected by the legislation should not be different simply because they are in a different industry.

That said some states have adopted industry specific legislation to address issues that are specific to the affected industries.

If the inclusion of industry specific legislation has the effect of delaying the harmonisation process then it would be preferable that that legislation be identified and dealt with as a second phase in the harmonisation process. However if the industry specific legislation is inconsistent in any way with the Model Act then that industry specific legislation should be brought into harmony with the Model Act as a matter of urgency. (Q7,8)

It is essential OHS jurisdictions be able to improve co-ordination. NSW recognised this issue and it was addressed in the consultation draft Occupational Health and Safety Bill 2006. The extent to which coordination may be improved will depend on the nature of the legislation e.g. should jurisdictions be able to investigate matters on behalf of another? (Q9)

The focus of the Model Act should be workplaces and occupational health and safety matters arising from work. To extend the duties of care under the legislation to a broader societal obligation would be to materially change the nature of the legislation. (Q11)

The ability of the Model Act to cover evolving situations will be a function of the way in which the Act is framed. By maintaining a principles based approach to the legislation it will be possible for the Act to address emerging issues by the use of regulation, codes and other instruments . (Q12,13)

A nationally consistent approach will depend on there being common application and understanding of key terms across jurisdictions. Those key terms need to be defined in the legislation. The terms listed below are not intended to be exhaustive but constitute in our view the minimum terms that need to be specifically defined:

- reasonably practical
- employer
- employee
- duty of care
- any other specifically identified duty holder e.g. controller of premises, designer
- workplace
- employee representative - (Q14,15)

Duties of Care – Who owes them and to whom?:

A definition of "control" as it applies to the operation of the Model Act is critical. In establishing the definition regard has to be given to what constitutes genuine control and where any liability might lie.

The NSW system is replete with examples of where the actual control a situation is questionable but the courts have determined that person has committed an offence. Such findings may be justified on the basis of established case law but what they fail to do is reasonably reflect reality and we would argue community expectations. The consequences of this situation are not only to place an impossible burden on some duty holders in some circumstances but to also bring the credibility of the system into question. As the NSW experience also clearly demonstrates an onerous system does not produce the best outcomes. Success depends on the active engagement of all duty holders and when one of those duty holders believes the system is unbalanced they are unlikely to actively engage. (Q16)

As a general principle the determination of control should give precedence to the issue of who has actual control of the circumstances. This principle has particular significance when a duty holder has reason to rely on the skills and/or expertise of others for the performance of a task or function e.g. the installation/repair of plumbing. This principle also has applicability when considering whether or not control can be delegated or relinquished. (Q17,18)

The allocation of responsibilities where there may be multiple duty holders is a difficult issue. As has been seen in the labour hire industry both the provider of labour (the employer) and the hirer (host employer) have been found accountable in circumstances where the labour provider has had no direct control over the activity of the hired out employee[3]. Again as a general principle the allocation of responsibility should be determined by which party has control at the time of the alleged breach, not because the legislation provides for multiple duty holders and because it is possible for the regulator to pursue more than one party for an alleged breach. (Q19)

The Model Act should continue to rely on the employment relationship as the basis for establishing safety obligations. The responsibilities of other duty holders identified in the Act should also be referenced to the effect of their activities on the workplace. Other "employment type" relationships such as labour hire, apprentices/trainees etc. can be addressed via the duties of the employer or controller of premises. Differing types of employment relationships are emerging and may be expected to emerge in the future however for the vast majority of employers and workers the normal employer/employee relationship will remain the predominate form of engagement. If over the passage of time there is a need to specifically address new types of relationships then the Inter-Governmental Agreement provides an appropriate mechanism for this to occur[4]. Volunteers represent a particular problem. On the one hand it can be argued that persons who undertake voluntary positions, for which they are unpaid, should not be unreasonably exposed to the threat of prosecution. To do so would be to provide a significant disincentive for engagement. On the other hand it can also be argued that there should be no differences and that volunteer organisations and the persons who work in them should not be exposed to lower safety

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[3] Inspector Stephen Gill v J D Thompson Personnel Pty Limited; Inspector Stephen Gill v Visy Paper Pty Limited [2005] NSWIRComm 73 (10 March 2005)

[4] Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety

requirements. The need to exclude volunteers from OHS legislation depends on the balance of the legislation. If the legislation is properly balanced and fair then there should be no reason to exclude volunteers because the argument people will be reluctant to take on the roles because of liabilities which attach to them are onerous should not exist. (Q20,21,22)

The definition of the employers duty of care has been a significant issue within the NSW jurisdiction. It is our view that the employers duty should be “as far as reasonably practical”.

Opponents of this definition argue that “reasonable practicability” is addressed in defences available under the NSW Act consequently no change is required. They also argue that burden of proof required is on the balance of probabilities therefore the current NSW Act provides adequate protection to defendants.

We reject this proposition. Whatever legal arguments may be advanced in relation to the retention of the absolute duty of care the operational consequences are clear. It is accepted wisdom in NSW that defendants “best” option is to plead guilty and to seek to mitigate any penalty that may be imposed. That doesn’t make for good law and it doesn’t generate respect for the law. Of equal concern is the extent to which the legislative framework acts as a disincentive to prospective employers to invest in the NSW economy. It would be tragic if this situation were to be replicated on a national basis and Australia’s ability to attract investment and create employment in a global economy was undermined by OHS laws that investors regard as unreasonable and unfair. This is not to argue that safety standards should be lowered simply to attract investment. On the contrary we argue that the general application of “reasonably practical” to the definition of obligations will result in better safety outcomes. (Q23,24)

With respect to an employee’s duty of care for themselves and others at the workplace we believe s25 of the Victorian Occupational Health and Safety Act 2004 is appropriate. (Q25)

Similarly S 23 of Victorian Occupational Health and Safety Act 2004 is an appropriate model for the duty of care which should be exercised with respect to persons other than employees at the workplace. (Q26)

We do not support the inclusion of legislative provisions for the appointment of persons with specific OHS responsibilities. (Q27,28,29)

Current NSW legislation imposes significant and unreasonable obligations on officers of bodies corporate. While we can understand the need for legislation to have regard to who is controlling the mind of a corporation it is repugnant that a corporate officer may be subject to a prosecution and perhaps a conviction merely because he/she is an officer of a corporation that is alleged to have committed an offence. The Model Act must make provision for a causal link between the acts or omissions of the corporate officer and the alleged offence. (Q30)

The expansion of OHS obligations to cover an activity beyond the immediate focus on the workplace e.g. conception, disposal and/or use outside Australian jurisdictions would result in the legislation having a scope which is beyond that which can be reasonably expected. It is also possible that such a development will also significantly complicate the development of the legislation as regard will have to be given to its interaction with obligations that may exist under other legislation. It is also potentially

inconsistent with one of the underlying principles which we believe should apply to the Model Act, namely, control. (Q33,34,35,36)

Reasonably Practicable' & Risk Management

The 'duty of care' as it applies to all duty holders, required under the Model Act should be "as far as is reasonably practicable". The Victorian OHS Act 2004 (*insert section)* provides useful definition.

It is clear that the requirements of the Victorian Act still place a significant obligation on duty holders and it not realistic to argue, as some would, that the inclusion of reasonably practical in the definition of the offence will result in some catastrophic change in safety standards or it will become impossible of extremely difficult for regulators to achieve a successful prosecution. This is patently not correct as is demonstrated by the Comparative Monitoring Report[5] which shows jurisdictions where "reasonably practicable" is included in the definition of the duty. That duty should be further qualified by the inclusion of a "control" test. (Q37,38,39, 40).

Compliance with standards and whether or not compliance with a standard constitutes compliance with the Act has been an issue in NSW. We would argue that compliance with a standard should result in compliance with the duty of care. It is illogical from our perspective that compliance with a relevant standard , which is there to guide to duty holders and which represents informed views on the matter covered by the standard does not constitute compliance. (Q41)

One of the goals of the legislation should be to provide duty holders and regulators with certainty. In the simplest terms employers say "tell us what to do and we will do it". The inclusion of appropriate definitions such as 'hazard" and "risk management" are essential to contributing to that certainty. Similarly given this is legislation that is to be regulated and enforced across multiple jurisdictions standard definitions are important for consistency by regulators and courts. (Q42,43,44)

[5] Workplace Relations Ministers Council, Comparative Performance Monitoring Report (Nith Report) February, 2008 , Indicator 14 – Enforcement activity by jurisdiction

Consultation, Participation and Representation

As the Discussion Paper notes there is widespread agreement between employers and employees that consultation is essential for improved safety outcomes.

How the duty to consult may be best satisfied should remain a matter for agreement between employers and their workforces. The vast majority of workplaces in Australia do not employ significant numbers of people consequently complicated, highly structured and closely defined approaches to consultation are not appropriate and may actually act as a disincentive for both parties to consult. The Model Act should provide for alternative means by which the duty may be satisfied with a prima facie reliance on the parties to adopt a methodology that best suits the views of the enterprise. The NSW provisions (OHS Act 2000 Division 2) provides a template. (Q45,46.47,48)

Consistent with our position on consultation we do not support a mandatory requirement for the appointment of health and safety representatives or committees. In the event it is the recommendation of the Review Panel that such provisions should be included in the Model Bill then it is our view that primary consideration needs to be given to the objective of facilitating and encouraging cooperation between the workplace parties for the furtherment of workplace safety. That said we believe it is inappropriate that health and safety representatives/committees are given powers/roles that are counter to this objective. Consequently we do not believe it appropriate that representatives be given the authority to issue improvement notices or take other actions against the employer. Those activities are in our view properly the function of the regulator.

OHS representatives/committee members need to be provided with the skills and knowledge necessary to fulfil their obligations under the Model Act. There is a diversity of approaches to training across Australian jurisdictions which in part reflect the requirements for representatives under their respective legislation. Key to determining the requirements must be a recognition that many of the people who undertake the role will have been elected to their position by their peers. Any unreasonable threshold requirements e.g. unnecessary excessive training/qualifications and staff movement may place onerous training obligations on employers particularly smaller employers and that in regional area access to training may be difficult to access and expensive. (Q49-58)

Authorised representatives of employee organisation enjoy the right to enter workplaces. The issue which arises with respect to OHS matters is the continuing concern for employers that authorised representatives may on occasions use this right for purposes other than the resolution of OHS matters.

It is our fundamental position that unions should not have the right to commence proceeding against employers for an alleged breach of OHS legislation. As was identified by Maxwell[6] to give one of the industrial parties the right to prosecute the other is anathema to the development of a cooperative approach at the workplace. Consequently we contend that the powers of authorised officials should be limited to that which is reasonably necessary for them to determine if a contravention of OHS legislation may have occurred so they may then advise the regulator. That determination should generally be limited to discussion with members of the authorised representative's union and management. Authorised representatives should not be

[6] Occupational Health and Safety Act Review, Chris Maxwell, March 2004, para. 1742

able to exercise a right of entry without notice nor exercise powers of investigation. (Q59,60,61,62)

In the event of disputes over OHS matters at the workplace the Model Act should provide a framework which encourages the resolution of disputes at the lowest possible level. In the event resolution cannot be reached resolution should rest with the regulator. Given the potential consequences which arise from a breach of OHS laws we do not consider it appropriate that dispute resolution by alternative dispute resolution means is appropriate. (Q63,64,65,66)

The right to cease or not to undertake unsafe work is a common law right. It is also inappropriate that persons other than the regulator have the power to direct that work cease. (Q67,68,69,70)

Employees are currently generally protected from discrimination with respect to OHS and we can see no reason for additional provisions in the Model Act. Similarly we believe the right to bring actions should reside with the aggrieved party. (Q71-78)

Regulator Functions, Powers & Accountability

The Model Act must define the establishment, functions, powers and accountability of providers. While there may be state differences the core function and activities of the regulators must be the same irrespective of jurisdiction. (Q79)

One of the key issues for employers and other duty holders as to the activities of the regulator is certainty – how does the regulator interpret and apply it powers. Good policy would dictate that the activities of regulators within and across jurisdictions will be consistent. In the event this is not the case the pursuit of harmonisation will we eroded over time. The separation of advisory and enforcement functions has been a matter of debate in NSW for some years. It is instructive that in recent times WorkCover NSW has chosen to create and expand its Business Advisory activities, activities that are undertaken by a different cohort of staff from inspectorate. Market feedback would indicate that the dedication of resources to helping duty holders meet their obligations by people who are not inspectors has been successful. Separation of functions may be difficult in smaller jurisdictions but that difficulty should not limit the opportunity elsewhere. (Q80,81,82,83)

The requirements for the appointment of inspectors vary from jurisdiction to jurisdiction. The Model Act should seek to establish some minimum requirements but bearing in mind it may take some time for all jurisdictions to adapt to those requirements. One of the reasons advanced by WorkCover NSW in the past in respect of inspectors providing guidance to employers was a concern that the Authority or the inspector may find themselves subject to legal action in the event there was an incident after the advice had been given. This is simply addressed by providing appropriate indemnities within the legislation. (Q84,85,86,87)

Review of decisions by inspectors is fundamental to the credibility of the system. As far as is possible the review process should be carried out by processes located within the regulator with recourse to the appropriate external body e.g local court. (Q88,89)

Compliance & Enforcement

The Model Act should define an enforcement hierarchy. This is model legislation to be applied across jurisdictions consequently defining the enforcement hierarchy is essential for consistency. On balance the detail of the enforcement hierarchy is probably best dealt with outside the Act provided there is appropriate reference within the Act. (Q90,91)

Regulators need access to a range of enforcement measures of increasing weight and seriousness. Improvement notices, prohibition notices and infringement notices are all legitimate and useful responses. Provisional improvement notices, issued by persons other than inspectors are not appropriate. As previously noted in this submission providing OHS representatives with such a power, however it may be constrained, is not supportive of a collaborative relationship at the workplace. The conditions attaching to any notice issued by an inspector need to be consistent with the matter giving rise to the notice. It would not be helpful to closely specify time requirements within the legislation. All notices should be subject to appeal and as a matter of principle notices should be stayed during that notice period. Given the seriousness, or potential seriousness of matters giving rise to prohibition notices it is not appropriate they be stayed during appeal/review but in those situations that appeal/review process must be rapid. (Q92,93,94,95)

Infringement notices are an appropriate response to relatively minor infractions of OHS laws e.g. a failure to use provided PPE. It is appropriate they be dealt with under OHS law. (Q97,98,99)

The ability for the regulator to seek an injunction with respect to the enforcement of OHS legislation is reasonable but only in those circumstances where the regulator has utilised other enforcement activity at first instance e.g. improvement or prohibition notices. The regulator should be required to prove not only that it had utilised other enforcement measures and those measures had not been complied with but the requirements contained in those other enforcement measures are valid. (Q100)

Enforceable undertakings, as an alternative to prosecution, were generally supported by employers at the time of the release of the 2006 Consultation Bill. That support was maintained notwithstanding the fact it was clear enforceable undertakings were not to be a ‘soft option’. However that support was dependent on there being no threshold requirement for an admission of fault or liability. The Bill provided that WorkCover could commence a prosecution in the event the duty holder did not comply with the undertaking. Given there may be occasions when duty holders are prepared to enter into undertakings as an alternative to prosecution and whether may be some doubt as to fault we would argue that agreement to fault or liability is not an appropriate or helpful precondition. (Q101,102,102)

Prosecutions

The prosecution of OHS offences currently involves a mix of criminal and civil prosecutions. For example in NSW prosecutions are criminal matters with the prosecution required to prove the offence to the criminal standard but with the defence required to meet the civil standard. Whether or not prosecutions should be regarded as civil or criminal offences is a difficult question and the answer probably lies in a mixture of the two but it is not immediately clear where the delineation may occur. The answer may lie in having regard to the objectives of prosecutions and frequency of prosecutions. If the consequence of the Model Act is prosecutions are reserved for the most serious of cases then it follows that maintaining offences a criminal matters may be appropriate. If however the reverse applies and prosecution becomes the remedy of choice then there needs to be a mechanism by which matters may be differentiated. (Q104,105)

On the assumption OHS prosecutions will continue to be regarded as criminal offences the defendant should as a matter of right be entitled to the same appeal rights as are available to any other person convicted of a criminal offence. As to the question of specialist court's opinion is divided in NSW. The fact the hearing of matters in the Industrial Court is a relatively recent development. Notwithstanding arguments that the use of a specialist court enables the development of expertise on balance we favour the discontinuation of this practice. In the alternative it is essential that full appeal rights from a specialist court must be put in place. (Q106,107,108,109)

The right to prosecute for offences under OHS legislation should rest with the Crown or an instrument of the Crown. It is entirely inappropriate that one of the industrial parties has a right of prosecution against the other. Attached for the information of the Panel (*Attachment A)* is a history of the right of unions to prosecute OHS matters in NSW. It is right that has evolved over time and has its origins in matters other than OHS and it is a right which has not always been the sole preserve of unions. Defenders of the current situation will argue, among other things, that it is a right that is seldom exercised and it is not unique in that other parties other than Crown or Crown representatives have the right to commence proceedings under other legislation. Both arguments miss the point. Repeating Maxwell [7] giving one industrial party the right to prosecute the other is not conducive to the collaborative relationship needed for OHS at the workplace. Similarly with respect to the argument other legislation permits others to prosecute, those bodies e.g local councils, have an entirely different relationship with defendants than unions have with employers. The right of unions to attract a moiety from prosecutions is a consequence of the Fines Act[8] in NSW. While it is not a specific provision of OHS legislation the consequence is to bring the system into question and to undermine its credibility. While ever unions retain the right to prosecute and receive moieties the system cannot avoid being regarded as open to misuse and abuse, particularly where onus of proof rests on the defendant. (Q110,111,112,113)

NSW law currently reverses the onus of proof. NSW is an absolute liability jurisdiction.[9] It has been, and continues to be argued that the application of reverse onus in social

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[7] ibid

[8] Fines Act 1992 – Sect 122

[9] See Cahill v State of New South Wales (Department of Community Services) (No 3) [2008] NSWIRC 123 for a recent comprehensive review of NSW law by Boland J President NSW Industrial Court

legislation such as OHS legislation is not unusual nor does it offend the rights of the accused as set out in international instruments. Whatever the fine legal argument that may support this proposition the reversal of proof is in our view unfair and unwarranted particularly in a jurisdiction where the obligations imposed on duty holders are such that it is most impossible to mount a sustainable defence. (Q117-121)

The proposition that an officer of a corporation may be liable for an offence simply because the corporation of which he/she is an officer is unreasonable. While it is understood that the aim of such an approach is to ensure those who may direct/influence the activities of an organisation are not able to improperly avoid their obligations it is also a consequence of such an approach that persons who have not been directly involved in a event may also find themselves exposed to prosecution, even where the matters giving rise to the prosecution are beyond their expertise or experience. Given the issue of "control" should be added to any definition of "reasonable practicability" under the Model Act it follows for an officer of a corporation to be guilty of an offence there needs to be a causal link between the acts or omissions of the officer and the event. (Q122,123,124,125)

Penalties, other than financial penalties should be the exception rather than the rule. Notwithstanding the fact custodial sentences are available in NSW for repeat offenders there have been no custodial sentences imposed. To date there have been no prosecutions under s32A of the Act with respect to workplace deaths. The NSW Act provides for custodial sentences of up to 5 years under s32A. But that section also requires reckless conduct by the defendant, the prosecutor to determine to prosecute under the Section before the commencement of proceedings, bars prosecutions by unions and provides for expanded appeal rights. Custodial sentences for OHS offences can only be justified where there is a specific offence relating to workplace death and that offence requires reckless conduct by the defendant. Consistency in sentencing will be critical to the credibility of a harmonised system. The production of a national register of decided cases may assist however in the first instance consideration should be given to creating a mechanism by which the equivalent of sentencing guidelines to be applied across all jurisdictions might be produced and published. (Q128 -133)

Penalties involving custodial sentences are discussed above. Alternatives to financial penalties such as enforceable undertakings, restoration orders or other actions deemed appropriate have a legitimate role to play in enforcement of OHS. The goal of the OHS system must be to improve OHS outcomes. The imposition of fines may in part achieve that outcome however how successful that is open to debate. As NSW statistics show high prosecution rates and high penalties have not produced the safest workplaces in Australia. Consequently we are supportive of the use of alternative penalties particularly where those penalties will result in a contribution to improved OHS. What those penalties should be and when they should be applied will depend on the facts of the case. Courts should be encouraged to consider alternatives. (Q134,135)

NSW employers vigorously opposed an initial Bill intended to create a specific offence regarding workplace deaths. At the same time employers recognised there may be rare occasions when a higher level of penalty may be warranted. Employers also recognised that there was a community expectation that very serious offences which involved death would attract a higher level of penalty. As general rule NSW employers remain opposed to the creation of a specific offence for workplace death. There are two considerations with respect to this issue. The penalties that accrue where the offender is a corporate entity and those where the offender is a natural person. Where the

offender is a corporation then it is reasonable to provide for more severe penalties within the OHS legislation. Where the offender is a natural person then this is matter that should be properly dealt with under the relevant Crimes Act. Person accused of acts or omissions leading to the death of another person should not be subject to different standards simply because the death was or was not related to the conduct of work. (Q136,137,138)

There are two issues to be considered with respect to the non-collection of fines. Those circumstances where the entity fined is genuinely unable to pay and as a consequence may cease trading and those where the winding up of a business is used as a device to avoid payment. It would be wrong to impose additional obligations on directors and officers of businesses in the first example, conversely where it can be shown that avoidance strategies have been applied then some capacity to reach behind the corporate structure may be appropriate. However the acceptability of such an approach requires that the system which gave rise to the penalties is itself seen as fair and balanced. (Q139,140,141)

Other Issues

It is noted that the Inter-Government Agreement will, in the first instance, require consensus from the Workplace Relations Ministerial Council[10] for the making of model regulations. It is not entirely clear as to whether or not the ongoing operation of the model legislation will require similar consensus when it comes to the making of regulations within jurisdictions.

The challenge for the harmonised system will be to ensure that regulations remain consistent across jurisdictions over time and that the volume of regulation is not overwhelming. As a general rule regulations should not be made and unless there is a completing reason for that to occur. (Q142,143)

Codes of Practice need to be developed with the genuine participation of industry. It has been argued that the appropriateness of Robens style legislation is that it enables the system to be responsive the a changing environment and one in which it is unreasonable to expect all expertise resides within the regulator. Similar arguments, with which we do not agree, may be advanced in support of the use of a reverse onus of proof. Nevertheless there is a recognition that it is industry not the regulator which knows about the OHS risk and how to best eliminate mitigate or manage the risks associated with that industry. Consequently the Model Act should be unequivocal with respect to the need to engage with and have genuine regard for the input of industry. (Q144)

NSW provides, with some exceptions for a single reporting system. Without suggesting the NSW model is the benchmark as a general proposition there should be a requirement that the act of reporting as required under OHS , workers compensation or other relevant legislation constitutes meeting OHS requirements. e.g. the reporting of a spill to the EPA should be regarded as meeting reporting requirements under OHS legislation. (Q145)

Regulatory decisions should be subject to external review. The process attaching to that review should have regard to alternative dispute resolution processes however provision needs to be made for determinative decisions by the review body. (Q146,147)

The means of engagement of the key stakeholders, employers and employees, with the regulator vary from jurisdiction to jurisdiction. There is perhaps not perfect model. Engagement also occurs a different but hopefully complementary levels e.g, Industry Reference Groups in NSW and the Occupational Health and Safety and Workers Compensation Council of NSW. The legislation should provide for the appropriate tripartite consultation mechanisms and should have regard to roles of those bodies in providing advice to the relevant Minister and/r regulator. Consultation bodies that are there simply to give the impression of consultation and in engagement and which do not have any capacity to influence will become ciphers and loose the support of the industry partners. (Q148,149)

Mutual recognition should be regarded as a transitional phase with the end gaol being a single national system administered within each jurisdiction i.e. a licence to operate particular machinery issued in Perth should be a national licence not a WA licence which is recognised in other jurisdictions. (Q150,151)

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[10] Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and safety - 5.3.3

Cross jurisdictional cooperation should be facilitated however within the context of this general proposition consideration will need to be given to the operational consequences. In the example given in the Issues Paper what are the consequences of cooperation. Collaboration may facilitate the resolution of the issue within one state but if it were to transpire that the manufacturer was successfully prosecuted does that mean the manufacturer could also be prosecuted for the same alleged offence in each jurisdiction. Care will need to be given to the framing of recommendations so that what is an entirely sensible and reasonable proposition does not become distorted. (Q152)

ATTACHMENT A

THE HISTORY OF THE RIGHT TO PROSECUTE UNDER FACTORIES LEGISLATION

It is true as noted in the Discussion Paper that a general capacity to initiate prosecutions was given to industrial organisations by the *Factories and Shops (Amendment) Act 1943* ("the amending act"). However, three points need to be made.

First, the 1943 amendments expanded an existing situation concerning prosecutions. These rights to prosecute were directed to trade and industrial interests and seemed no more than a use of private enforcement as a supplement.

The *Factories and Shops (Amendment) Act 1927* inserted a new s 49A, "Furniture to be marked with maker's mark" and extended to secretaries of registered organisations with members in the furniture industry some powers of inspectors, including prosecution.

Part IV, "Trade Descriptions" (ss 75 – 96), was inserted by the *Factories and Shops Amendment) Act 1931* and dealt with the correct labelling of furniture and footwear. S 87 provided that prosecutions under the new Part IV could be brought by any person or that person's attorney.

The *Factories and Shops (Amendment) Act 1935* inserted Part V, "False Advertisements" (s 97) and amended s 87 so that prosecutions could be brought by a person "…whose rights were impaired" or that person's attorney or agent.

The *Factories and Shops (Amendment) Act 1936* also inserted Part VI, "Shops: Registration and Closing Hours – Day Baking – Tobacco Licenses – Hairdressers' Licences" (ss 98 – 128).

Second, by 1943 the *Factories and Shops Act 1912* ("FSA") dealt with a wide range of subject matter, only a part of which could be characterised as being directed towards safe workplaces. Initially the FS Act contained three parts. Part III (ss 63 – 74) dealt with the minimum wage, overtime and tea money. This part was repealed in by the *Factories and Shops (Amendment) Act 1936*.

Part II (ss 3 – 62) dealt generally with OHS matters, but also regulated such matters as the activities of Chinese workers in connection with furniture. For example, the amending act beefed up s 49, "*Hours of Work of Chinese and others in furniture factories*" and under 49(10) secretaries of industrial organisations of employers or employees in the furniture industry were given, subject to the approval of the Commission, certain entry and prosecution powers of inspectors "…in relation to a furniture factory in which Chinese are employed."

Prosecutions to one side, the 1943 amendment also introduced a number of substantial new provisions. It dealt with trade descriptions, misleading advertising, post-war shopping hours and extending the definition of factory. In the area of prosecutions the amending act actually contained three amendments concerning organisations' rights. All three amendments extended powers to industrial organisations of both employers and employees.

As well as protecting against unfair competition in the furniture industry, the amending act altered s 52, "No prosecution without written consent of Minister", to provide under a new s 52(1A) that "…proceedings for the recovery of any penalty…" could be commenced "…by the secretary of an industrial organisation of employers or employees whose members are engaged in the industry concerned."

Finally, the amending act applied certain provisions concerning proceedings and appeals in s 54(2) to prosecutions brought under s 87. The amending act added to the existing s 87 list of those who could prosecute "...or by the secretary of an industrial organisation of employers or employees whose members are engaged in the industry concerned…".

Third, no policy outcome occupational health and safety can be ascertained from this history. The second reading debates about the amending act confirm there was no OHS policy intention behind giving employers and unions the power to bring prosecutions. The main focus in the second reading speech was the shopping hours which should apply when the war ended.

Apart from shopping hours, debate was focussed on shoddy shoes and furniture in the Legislative Assembly and in the Council there was some focus on shearing. The second reading debate does not shed a different light on the prosecutions amendment from that provided by the history of the FSA. That debate merely points out that the changes were accepted, and this is not surprising. The right to prosecute was, and was seen to be, primarily directed towards the enforcement of trading/baking/producing hours and trade protectionism/consumer protection.

Subsequent prosecutions were, and continued to be, mainly found in these areas and not in the Part II employee welfare provisions. The right accorded to the secretaries of industrial organisations of employers and employees to bring prosecutions was introduced and expanded on the basis of organisations whose members were engaged in the industry concerned, that is, it followed the organisation's eligibility[11]. This also points to the measure being directed towards trade protectionism rather than employees' health and safety.

The *Factories and Shops Act 1912* was repealed by the *Factories, Shops and Industries Act 1962*. The combined effects of ss 52, 54 (dealing with proceedings and appeals) and 87 were re-enacted in s 145. Relevantly s 145(1)(b) provided proceedings for an offence against the Act or regulations may taken by:

> "the secretary of an industrial union of employers or employees…whose members are engaged in the industry concerned: Provided that proceedings for an offence under Division 1 of Part VIII may be taken and prosecuted by a …secretary of an industrial union as aforesaid, or by any person whose rights are impaired."

Division 1 of Part VIII dealt with trade descriptions. S 145(5) permitted informants to conduct the case in person or by a representative. The prosecutions power was not seen in any different light, and indeed the F, S & I Act 1962 continued the diverse focus of the FS Act.

> The [NSW] *Factories, Shops and Industries Act* is a veritable ragbag, controlling a diverse assortment of matters connected with this threefold topic. Though all of its parts

[11] *Mitchell v O'Dea* [1953] AR 340. The industrial/protectionist bent of the FS Act is demonstrated by this matter, it concerned a union prosecution under s 52(1A) concerning opening hours by a shop operating at the relevant time with no employees.

> regulate "industry" in some way, it is only by extreme laxity that we can distil any unifying focus on industry out of its varied approaches."[12]

Even if a genuine policy reason for extending prosecution rights in the way could be discerned there is none which is relevant to the regulation of occupational health and safety under the OHSA.

The History of the Right to Prosecute under OHS Legislation

The OHSA 1983 marked a significant departure from the Factories, Shops and Industries ("FSI") regime. The act introduced a systematic approach to the improvement of occupational health and safety universally which drew strongly on the Robens approach focussing on the collaborative efforts of employers and employees.

Relevantly the power of industrial organisations to enter and to bring prosecutions was not continued into the OHSA 1983. Reasonably so, because such a provision is inconsistent with the major policy thrust of the Act. The new act was introducing broadly cast generally stated absolute duties on various functional groups and this binding but ill-defined duty, so open to successful prosecution, had nothing in common with the prescribed requirements had nothing in common with the rescinded F S I legislation.

Presuming that one reason to extend prosecution rights under FSI legislation was supplementation of the inspectorate it is noteworthy that in his second reading speech for the OHSA 1983 Mr Hills drew attention to the fact that the government was also increasing the number of inspectors to operate under the new act. S 48 of the act confined prosecutions to inspectors and those authorised in writing by a prescribed person.

The *Occupational Health and Safety (Workers Compensation) Amendment Act 1987* amended s 48 by inserting a new s 48(1)(b):

> "48(1) Proceedings for an offence against this Act or the regulations may be instituted only –
>
> (a) …, or
>
> (b) by the secretary of an industrial union registered under the *Industrial Arbitration Act 1940* any member or members of which are concerned in the matter to which the proceedings relate."

This bill was one of a number of cognate bills primarily dealing with a number of significant changes to workers compensation. Some significant changes were made to the OHSA 1983 mainly directed towards showing a "get tough" policy to employers. Collectively the bills also doubled OHS and workers compensation penalties and transferred OHS prosecutions to the Commission. As well, the second reading speech promised more inspectors and a "comprehensive injury and illness information system …[to] allow the activities of the safety inspectorate to be targeted."[13] and a major hazards prevention unit.

The speech then turned to the failure of rehabilitation and, *inter alia*, the disincentive provided to successful and timely rehabilitation by access to common law.

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[12] P 121, Merritt A, *Guidebook to Australian Occupational Health and Safety Laws*, CCH Australia Ltd, 1983

[13] P 12208 Hansard, Assembly 14 May 1987.

Virtually not mentioned throughout, prosecution was raised once in the second reading debate:

> "Other provisions specified in the amendments proposed in the *Occupational Health and Safety (Workers compensation) Amendment Bill* include in schedule 1 the capacity for the secretary of an industrial union to commence proceedings in the Industrial Commission of New South Wales on behalf of workers concerned in the matter of an offence under the Act without seeking the consent of the Minister in writing. The effect of this amendment will lead to a speeding up of the matter by a better use of the functions of the Industrial Commission and, given the industrial experience of its officers, and their long accumulation of specialised knowledge in this field, the proceedings should be dealt with much more expeditiously. It is further proposed to introduce an additional penalty of up to two years' gaol should any second or subsequent offence be proven where it is determined that an employer has created a situation of wilful repetition of dangerous working conditions."[14]

Since the "officers" referred to appear to be those of the Industrial Commission rather than of industrial unions this is something of an opaque (and inaccurate) explanation. The capacity was to industrial unions of employers and employees. The current situation where the right is conferred on the secretary of a union of employees was eventually achieved by the *Statute Law (Miscellaneous Provisions) Amendment Act (No 2) 1992*.

The compelling impression is that a restored right to bring prosecutions was part of a price for the removal of access to common law damages when compensable injuries were suffered. Access to common law occupied much of the debate over the bills and on this issue the government faced significant attack from the opposition.

(To avoid doubt on this matter the CEG reiterates that it does not support access to common law damages. Workers compensation operates on a no-fault basis and is oriented to restoring an injured worker expeditiously and as closely to full capacity as is practicable. The employer bears the premium cost of an injured worker whose injury is largely, or wholly, of the employee's making as well as where the employee contributed little, or not at all, to his or her injury. Second, as has been often noted, and confirmed as recently as the [Sheahan Report] access to common law operates against the objective of expeditious restoration of function.)

There was no sustainable policy reason linked to the OHSA behind the grant of the right to unions to prosecute. Since that time demographic changes, the even greater inevitability of guilt and massively increased fines means that there is even less justification for retaining the right.

[14] P 12467 Hansard, Assembly 26 May 1987.