
draft



New South Wales

Occupational Health and Safety Amendment Bill 2006

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New South Wales

Occupational Health and Safety Amendment Bill 2006

No. , 2006

A Bill for

An Act to amend the *Occupational Health and Safety Act 2000*, and related Acts, following the 5-year statutory review of that Act.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Occupational Health and Safety Amendment Act 2006*.

2 Commencement

- (1) This Act commences on the date of assent, except as provided by subsection (2).
- (2) The following provisions of this Act commence on a day or days to be appointed by proclamation:
 - (a) Schedule 1 [4]–[8], [10]–[23], [32], [34]–[39], [42], [44] and [46] and [49],
 - (b) Schedule 7 [1] and [2].

3 Amendment of Occupational Health and Safety Act 2000 No 40

The *Occupational Health and Safety Act 2000* is amended as set out in Schedule 1.

4 Amendment of Workplace Injury Management and Workers Compensation Act 1998 No 86

The *Workplace Injury Management and Workers Compensation Act 1998* is amended as set out in Schedule 2.

5 Amendment of Industrial Relations Act 1996 No 17

The *Industrial Relations Act 1996* is amended as set out in Schedule 3.

6 Amendment of Crimes (Sentencing Procedure) Act 1999 No 92

The *Crimes (Sentencing Procedure) Act 1999* is amended as set out in Schedule 4.

7 Amendment of Fines Act 1996 No 99

The *Fines Act 1996* is amended as set out in Schedule 5.

8 Amendment of mine safety legislation

The Acts specified in Schedule 6 are amended as set out in that Schedule.

9 Amendment of Occupational Health and Safety Regulation 2001

The *Occupational Health and Safety Regulation 2001* is amended as set out in Schedule 7.

10 Repeal of Act

- (1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.
- (2) The repeal of this Act does not, because of the operation of section 30 of the *Interpretation Act 1987*, affect any amendment made by this Act.

Schedule 1 Amendment of Occupational Health and Safety Act 2000

(Section 3)

[1] Section 3 Objects

Insert after section 3 (b):

- (b1) to encourage employers, employees and others with occupational health and safety duties to take an active role to protect themselves and other people at a place of work against risks to health or safety at the place of work,

[2] Section 3 (e)

Omit section 3 (e). Insert instead:

- (e) to ensure that risks to health and safety at a place of work are identified, assessed and:
 - (i) eliminated, or
 - (ii) if that is not reasonably practicable, reduced to the lowest level that is reasonably practicable,

[3] Section 3, Note

Insert at the end of the section:

Note. See sections 22 and 23 of the *Workplace Injury Management and Workers Compensation Act 1998* for the role and functions of WorkCover in securing the objectives of this Act.

[4] Section 7A

Insert before section 8:

7A The concept of ensuring health and safety

- (1) A duty imposed on a person by this Division (or by any other provision of or made under this Act) to ensure, so far as is reasonably practicable, health and safety requires the person:
 - (a) to eliminate risks to health and safety so far as is reasonably practicable, and
 - (b) if it is not reasonably practicable to eliminate risks to health and safety, to reduce the risks to the lowest level reasonably practicable.
- (2) For the purposes of this Division (or of any such other provision), regard must be had to the following matters in determining what

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Amendment of Occupational Health and Safety Act 2000

Schedule 1

is (or was at a particular time) reasonably practicable in relation to ensuring health and safety:

- (a) what the person concerned knows, or ought reasonably to know, about the hazards giving rise to the risk concerned,
- (b) the likelihood of the risk eventuating,
- (c) the degree of harm that would result if the risk eventuated,
- (d) what the person concerned knows, or ought reasonably to know, about any ways of eliminating or reducing the risk,
- (e) the availability and suitability of ways to eliminate or reduce the risk,
- (f) the cost of eliminating or reducing the risk.

(3) This section is enacted for the avoidance of doubt.

[5] Section 8 Duties of employers

Insert “, so far as is reasonably practicable,” after “must” wherever occurring in section 8 (1) and (2).

[6] Section 8, note

Omit paragraph (a) and (b). Insert instead “”.

Omit the note. Insert instead:

Note. See section 12 for the penalty for an offence against this section and other provisions of this Division. Division 4 makes ancillary provision with respect to those offences, including section 26 (liability of officers of corporations). See also Division 2 for duty of employer to consult employees.

[7] Section 9 Duties of self-employed persons

Insert “, so far as is reasonably practicable,” after “must”.

[8] Section 10 Duties of controllers of work premises, plant or substances

Insert “, so far as is reasonably practicable,” after “must” wherever occurring in section 10 (1) and (2).

[9] Section 10 (3) (b)

Insert “or dwellings (including common property that no resident has an exclusive right to occupy)” after “private dwelling” in section 10 (3) (b).

[10] Section 11 Duties of designers, manufacturers and suppliers of plant and substances for use at work

Insert “, so far as is reasonably practicable” after “must” in section 11 (1).

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[11] Section 15 When consultation required

Insert at the end of the section:

- (2) This Division requires consultation in a particular case only so far as it is reasonably practicable in the circumstances of that case.

[12] Section 17A

Insert after section 17:

17A Determination by inspector of unresolved matters concerning consultation arrangements

- (1) This section applies to negotiations between employers and employees (or persons acting on their behalf) with respect to consultation arrangements under sections 16 and 17.
- (2) Any of the parties to the negotiations may, if agreement is not reached within a reasonable time, ask Workcover to arrange for an inspector to determine any matter concerning consultation arrangements that is unresolved.
- (3) An inspector who determines an unresolved matter must give written notice of the determination to the parties and the parties must give effect to the determination.
- (4) The negotiations to which this section applies and any determinations of unresolved matters by an inspector are to have regard to the diversity of the employees and their work (including any particular matters prescribed by the regulations) so as to ensure that the consultation arrangements provide effective representation for relevant workgroups.

This subsection does not require the establishment of separate workgroups for different categories of employees, places of work or other matters referred to in the regulations.

Note. See clause 23 of the *Occupational Health and Safety Regulation 2001* for particulars required to be taken into account under this subsection.

- (5) A determination of an inspector under this section is subject to review by WorkCover and appeal to an Industrial Magistrate, and for that purpose sections 96 and 97 apply in respect of any such determination as if it were the issue of a notice under Part 6.

[13] Section 18 Functions of OHS committees and OHS representatives

Insert "See Part 6A for issue of safety recommendation notices by approved OHS representatives." at the beginning of the Note to that section.

[14] Section 20 Duties of employees

Insert after section 20 (2) (and before the penalty provision for the section):

- (3) An employee must, while at work, take reasonable care for his or her own health and safety.
- (4) In determining, for the purposes of this section, whether an employee failed to take reasonable care, regard must be had to what the employee knew about the relevant circumstances.

[15] Section 20 (2)

Insert “reasonably” before “necessary”.

[16] Section 21 Person not to interfere with or misuse things provided for health, safety and welfare

Insert “and without reasonable excuse” after “recklessly”.

[17] Section 23 Unlawful dismissal or other victimisation of employee

Insert “section 23A of this Act and” after “See” in the Note to the section.

[18] Section 23 (1) (c)

Insert “or Part 6A” after “Division 2”.

[19] Section 23A

Insert after section 23:

23A Application for reinstatement of employee unlawfully dismissed under section 23

- (1) In this section:
reinstatement includes re-employment.
unlawful dismissal means the dismissal of an employee in contravention of section 23.
- (2) An employee who has been unlawfully dismissed may, within 21 days after the dismissal, apply to the Industrial Court of NSW for reinstatement. The Court may accept an application that is made out of time if it considers that there is a sufficient reason to do so.
- (3) An industrial organisation of employees may make such an application on behalf of the employee.
- (4) The Industrial Court of NSW may, on such an application, order the employer to reinstate the employee in accordance with the terms of the order.

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- (5) If the Industrial Court of NSW is satisfied that the applicant was unlawfully dismissed:
- (a) the Court is to order the employee to be reinstated in his or her former employment or in any other employment that is no less advantageous to the employee, except as provided by paragraph (b), or
 - (b) if the employer satisfies the Court that it would be impracticable to reinstate the employee—the Court may order the employer to pay to the employee an amount of compensation determined by the Court to be appropriate in the circumstances (but not exceeding the amount of remuneration the employee would have received but for the dismissal in the period of 6 months following the dismissal).
- (6) If the Industrial Court of NSW orders reinstatement under this section, it may order that the period of employment of the applicant with the employer is taken not to have been broken by the dismissal.
- (7) An application under this section may be made regardless of whether the employer has been convicted of an offence against section 23.
- (8) The Industrial Court of NSW must not make an order on an application under this section if:
- (a) another Act or a statutory instrument provides for redress to the employee in relation to the dismissal, and
 - (b) the employee has commenced proceedings under the other Act or instrument or has not lodged a written undertaking not to proceed under the other Act or instrument.
- (9) In any proceedings under this section, if an employee establishes that a matter referred to in section 23 (1) (a), (b) or (c) occurred or existed before the employee's dismissal, it is presumed that the employee was dismissed because of that matter. That presumption is rebutted if the employer satisfies the Industrial Court of NSW that the matter was not a substantial and operative cause of the dismissal.

Note. Appeals against a decision of the Industrial Court of NSW under this section are dealt with under Part 7 of Chapter 4 of the *Industrial Relations Act 1996*.

[20] Section 26

Omit the section. Insert instead:

26 Liability of officers of corporations

- (1) If:
- (a) a corporation contravenes a provision of this Act or the regulations, and
 - (b) a contravention of the provision is an offence, and
 - (c) the contravention by the corporation is attributable to an officer of the corporation failing to take reasonable care,
- the officer is guilty of an offence.

Maximum penalty: the same maximum penalty that is applicable to contraventions of the provision by individuals.

- (2) In determining whether a contravention by a corporation is attributable to an officer of the corporation failing to take reasonable care, regard must be had to the following:
- (a) what the officer knew about the matter concerned,
 - (b) the extent of the officer's ability to make, or participate in the making of, decisions that affect the corporation in relation to the matter concerned,
 - (c) whether the contravention by the corporation is also attributable to an act or omission of any other person,
 - (d) any other relevant matter.
- (3) An officer of a corporation who is a volunteer is not liable to be prosecuted under this section for anything done or omitted to be done by the officer as a volunteer.
- (4) An officer of a corporation may be proceeded against and convicted of an offence under subsection (1) whether or not the corporation has been proceeded against or has been convicted of an offence in relation to the contravention.
- (5) Nothing in this section affects any liability imposed on a corporation for a contravention of the provision concerned.
- (6) In this section:

contravene means contravene by act or omission.

corporation means any body corporate (including a body corporate representing the Crown).

officer of a corporation has the same meaning as it has in section 9 of the *Corporations Act 2001* of the Commonwealth. For that purpose, section 9 applies as if a reference to a corporation were a reference to a corporation within the meaning of this section.

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volunteer means a person who is acting on a voluntary basis, regardless of whether the person receives out-of-pocket expenses.

[21] Section 27A

Insert after section 27:

27A Clothing outworkers—applied duties

- (1) This section applies for the purposes of:
 - (a) section 8 (Duties of employers), and
 - (b) Part 2, Division 2 (Duty to consult), and
 - (c) section 20 (Duties of employees) and section 23 (Unlawful dismissal or other victimisation of employee), and
 - (d) any other provision of this Act prescribed by the regulations.
- (2) If the regulations so require:
 - (a) a reference to an employee includes a reference to a clothing outworker engaged by an employer and any employees of the outworker, and
 - (b) the duties of an employer extend to a clothing outworker engaged by the employer, and any employees of the outworker, but only in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control.
- (3) A provision of this Act that applies in relation to a clothing outworker or employer because of this section applies with such modifications as are prescribed by the regulations.
- (4) In this section:

clothing outworker means a person described in clause 1 (f) of Schedule 1 to the *Industrial Relations Act 1996* as an employee.

employer means a person described in clause 1 (f) of Schedule 1 to the *Industrial Relations Act 1996* as an employer.

[22] Section 28 Defence

Omit the section.

[23] Section 32A Reckless conduct causing death at workplace by person with OHS duties

Omit section 32A (6). Insert instead:

- (6) Section 26 does not apply to an offence against this section. However, this does not prevent an officer of a corporation from being prosecuted under this section for an offence committed by the officer.

[24] Section 32B Prosecution for offences under this Part

Omit “by an inspector” from section 32B (2). Insert instead “by WorkCover”.

[25] Section 32B (4)

Omit the subsection.

[26] Part 4, heading

Omit the heading. Insert instead:

Part 4 Industry codes of practice, guidelines and compliance advice

Division 1 Industry codes of practice

[27] Section 40 Purpose of industry codes of practice

Insert “in particular industries” after “employers and others”.

[28] Section 45 Amendment or revocation of codes

Omit “Part”. Insert instead “Division”.

[29] Part 4, Divisions 2 and 3

Insert after section 46:

Division 2 Guidelines

46A Purpose of guidelines

The purpose of a guideline is to provide practical guidance to employers and others who have duties under this Act or the regulations about complying with those duties.

46B Guidelines

- (1) WorkCover may, in accordance with this Division, make guidelines on the way in which:
- (a) a provision of this Act or the regulations would, in WorkCover’s opinion, apply to a class of persons or to a set of circumstances, or

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- (b) a discretion of WorkCover under a provision of this Act or the regulations would be exercised.
- (2) If WorkCover proposes to make guidelines, it must:
 - (a) publish notice of the proposed guidelines in the Gazette and on WorkCover's internet website, and
 - (b) include in the notice a statement that written submissions or comments on the proposed guidelines may be made to WorkCover by a specified date, and
 - (c) provide a copy of the notice to the Workers Compensation and Workplace Occupational Health and Safety Council (or the Mine Safety Advisory Council if in connection with the application of this section to a mine), and
 - (d) give a copy of the proposed guidelines to each person who requests it before that specified date.
- (3) After considering any submissions and comments received by WorkCover by the specified date, WorkCover may make the guidelines (with or without modifications) by causing them to be published in the Gazette as guidelines under this Division.

46C Amendment or revocation of guidelines

Guidelines made under this Division may be amended or revoked by publishing notice of the amendment or revocation, providing copies of the notice and considering any comments or submissions with respect to the notice in accordance with the procedures in section 46B for the making guidelines.

46D Use of guidelines and liability

- (1) Guidelines made by Workcover are not admissible in evidence in any proceedings for an offence against this Act or the regulations.
- (2) Guidelines made by Workcover do not give rise to:
 - (a) any liability of, or other claim against, WorkCover, or
 - (b) any right, expectation, duty or obligation that would not otherwise be conferred or imposed on a person, or
 - (c) any defence that would not otherwise be available to that person.

Division 3 Compliance advice

46E Purpose of compliance advice

The purpose of compliance advice is to provide practical guidance to specific employers and others who have duties under this Act or the regulations about complying with those duties.

46F Compliance advice

- (1) WorkCover may give advice to a person who has a duty under this Act or the regulations about complying with that duty.
- (2) WorkCover's power under this section to give compliance advice may also be exercised by an inspector or, if WorkCover authorises any other person to exercise the power, that other person.
- (3) If compliance advice is given to a person under this section in written form, a copy of the advice must also be given to an OHS committee or OHS representative representing employees affected by the advice.

46G Use of compliance advice and liability

- (1) Compliance advice given by Workcover is not admissible in evidence in any proceedings for an offence against this Act or the regulations.
- (2) Compliance advice given by Workcover does not give rise to:
 - (a) any liability of, or other claim against, WorkCover, or
 - (b) any right, expectation, duty or obligation that would not otherwise be conferred or imposed on a person, or
 - (c) any defence that would not otherwise be available to that person.
- (3) An inspector, or any other person exercising WorkCover's power to give compliance advice, is not liable for any thing done or omitted to be done in good faith.

[30] Section 62 Power of inspectors to obtain information, documents and evidence

Insert "(by answering questions or otherwise furnishing information)" after "evidence" in section 62 (1) (c).

[31] Section 62 (2A)

Insert after section 62 (2):

- (2A) An inspector may record oral evidence given by a person under this section (by means of an audio, video or other recording). The

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consent of the person to the recording is not required if the person is informed beforehand that the evidence will be recorded.

[32] Section 71 Powers supporting taking of things

Insert “, without reasonable excuse,” after “must not” in section 71 (3).

[33] Section 75A

Insert after section 75:

75A Service of notices

Section 101 applies to the service of notices under this Division.

[34] Part 5, Division 3

Omit the heading to the Division. Insert instead:

Division 3 Entry and inspection powers of authorised employees’ representatives—suspected breach

[35] Section 77 Powers of entry of places of work

Insert at the end of the section:

- (2) Any dispute about the entitlement of an authorised representative to enter any premises under this section may, if WorkCover is unable to resolve the dispute, be referred to the Industrial Relations Commission by any party to the dispute. The Commission may make such order as it considers appropriate for the resolution of the dispute in accordance the rights and obligations of the parties under this section.

Note. See section 136 for offence if person obstructs, hinders or impedes lawful entry.

[36] Section 83A

Insert after section 83:

83A Misuse of powers by authorised representative

- (1) An authorised representative who enters premises under this Division must not deliberately hinder or obstruct the occupier of the premises or the persons at the premises during their working time.

Maximum penalty: 100 penalty units.

- (2) The power of the Industrial Registrar under section 299 (4) of the *Industrial Relations Act 1996* to revoke an authority extends to any contravention of subsection (1) by the authorised representative or to any other improper action of the authorised representative in exercising a power under this Division.

[37] Part 5, Division 3A

Insert after section 85:

Division 3A Entry powers of authorised employees' representatives—health and safety discussions

85A Definition

In this Division:

authorised representative of an industrial organisation of employees, means an officer of that organisation (including any person who is concerned in, or takes part in, the management of that organisation) who is authorised under Part 7 of Chapter 5 of the *Industrial Relations Act 1996*.

85B Powers of entry of places of work for discussing occupational health and safety

- (1) An authorised representative of an industrial organisation of employees may enter any premises the representative has reason to believe is a place of work where members of that organisation (or persons who are eligible to be members of that organisation) work for the purpose of discussing matters relating to occupational health and safety.
- (2) After entering the place of work, the authorised representative may discuss matters relating to occupational health and safety at that place with any such member (or person) who wishes to take part in such a discussion.
- (3) Any such discussion may take place only when the member or person is on a work break (including a meal break).

85C Notice of entry

An authorised representative authorised to enter premises under this Division must give the occupier of the place of work written notice of the entry and the reasons for the entry at least 24 hours before entering the premises.

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85D Application of other provisions concerning entry powers

Sections 79, 80, 82, 83, 83A and 85 apply in respect of an entry to premises under this Division in the same way that those sections apply in respect of an entry to premises under Division 3.

Note. See section 136 for offence if person obstructs, hinders or impedes lawful entry.

[38] Section 86 Notification of incidents

Insert “(unless the occupier has a reasonable excuse for not doing so)” after “following incidents” in section 86 (1).

[39] Section 90 Offence: failure to comply with investigation notice

Insert “(unless the occupier has a reasonable excuse for not doing so)” after “must”.

[40] Section 91 Issue of improvement notices

Insert after section 91 (4):

- (5) An inspector who issues an improvement notice is to give a copy of the notice to the chairperson of an OHS committee or (if there is no committee) to an OHS representative representing employees affected by the notice. The notice may also be given to any other person representing the employees as the inspector considers appropriate.

[41] Section 93 Issue of prohibition notices

Insert after section 93 (2):

- (3) An inspector who issues a prohibition notice is to give a copy of the notice to the chairperson of an OHS committee or (if there is no committee) to an OHS representative representing employees affected by the notice. The notice may also be given to any other person representing the employees as the inspector considers appropriate.

[42] Section 102 Exhibition of notices

Insert “, without reasonable excuse,” after “must not” in section 102 (2).

[43] Part 6, Division 5

Insert after section 103:

Division 5 Undertakings

103A WorkCover may accept undertakings

- (1) WorkCover may accept a written undertaking given by a person to remedy a contravention or alleged contravention of this Act (except section 32A) or the regulations by the person or to take action to prevent any such further contravention by the person.
- (2) WorkCover may accept the undertaking by giving the person notice in writing of its acceptance of the undertaking.
Note. Proceedings against the person for the contravention concerned is stayed if an undertaking given by the person is accepted - see section 103C.
- (3) The person who has given an undertaking may, at any time, vary the undertaking with the written acceptance of WorkCover.
- (4) WorkCover must lodge an undertaking (or variation) that it has accepted with the Registry of the Industrial Court of NSW within 7 days of that acceptance.
- (5) Information relating to undertakings that have been accepted by WorkCover is to be publicly accessible on WorkCover's website.

103B Withdrawal of undertaking

- (1) The person who has given an undertaking may, at any time, withdraw the undertaking with the written consent of WorkCover.
- (2) If WorkCover is satisfied that a person has contravened an undertaking given by the person, WorkCover may withdraw the undertaking by notice in writing to the person.
Note. The withdrawal of the undertaking enables proceedings to be taken against the person for the offence concerned. An alternative to withdrawal of the undertaking, is proceedings in the Industrial Court to enforce the undertaking under section 103D (1) and (2). Whether or not the undertaking is withdrawn, action may be taken in the Industrial Court to penalise the breach of the undertaking - section 103D (3).

103C No proceedings for offence where undertaking in force

- (1) Proceedings for an offence against this Act or the regulations cannot be instituted or continued against a person in respect of the contravention or alleged contravention to which an undertaking that has been accepted under section 103A relates, unless the undertaking has been duly withdrawn under section 103B.
- (2) A court before which any such proceedings are taken may, for the purposes of those proceedings, determine whether an undertaking relates to the proceedings and whether any such undertaking had been contravened and duly withdrawn by WorkCover.

- (3) The period within which any such proceedings may be taken following the withdrawal of an undertaking is extended by the period during with the undertaking remained in force.

103D Enforcement of undertakings

- (1) If an undertaking has been lodged with the Registry of the Industrial Court of NSW, Workcover may enforce the undertaking as if it were an order of that Court.
- (2) If the Industrial Court of NSW is satisfied that the person who gave the undertaking has contravened the undertaking, the Court may make any one or more of the following orders:
- (a) an order that the person must comply with the undertaking or take specified action to comply with the undertaking,
- (b) any other order the Court considers appropriate to remedy the contravention of the undertaking.
- (3) In addition, WorkCover may take proceedings in the Industrial Court of NSW for the contravention of the undertaking as if it were an order of that Court. Any such proceedings may be taken whether or not the undertaking has been withdrawn.

103E Admissibility of evidence relating to undertakings

- (1) Except as provided by this section, evidence concerning an undertaking under this Division (including negotiations relating to an undertaking, whether or not an undertaking is entered into) is not admissible in any criminal or civil proceedings before any court or tribunal.
- (2) Any such evidence is admissible in connection with the following:
- (a) proceedings for a contravention of the undertaking,
- (b) proceedings to enforce the undertaking.
- (c) proceedings relating to the entering into of the undertaking.
- (3) To avoid doubt, any such evidence is not admissible in proceedings for the offence to which the undertaking (or negotiations) relate in the event that the undertaking is withdrawn or not finally entered into.

[44] Part 6A

Insert after Part 6:

Part 6A Safety recommendation notices

103F Employee safety representatives

- (1) For the purposes of this Part, an employee safety representative is a person authorised under this section to issue safety recommendation notices.
- (2) The following persons are authorised to issue safety recommendation notices:
 - (a) the chairperson of an OHS committee for the purposes of protecting employees represented by the committee,
 - (b) an OHS representative for the purposes of protecting employees represented by that OHS representative (being employees not represented by an OHS committee).
- (3) A person is not authorised to issue safety recommendation notices unless the person has undertaken a course of training approved by WorkCover for the purposes of this Part.
- (4) A person is not authorised to issue safety recommendation notices if the person's authority is withdrawn under section 103J.

103G Issue of safety recommendation notices

- (1) If an employee safety representative believes on reasonable grounds that an employer:
 - (a) is contravening a provision of this Act or the regulations; or
 - (b) has contravened such a provision in circumstances that make it likely that the contravention will continue or be repeated,

the employee safety representative may issue to the employer a safety recommendation notice that makes recommendations to the employer about remedying the contravention or the matters occasioning it within the period specified in the notice (being a period of at least 8 days after the issue of the notice).

- (2) A safety recommendation notice may only be issued in respect of the contravention of a provision that directly affects the health or safety of the employees for whose protection the employee safety representative is authorised to issue the notice.

Note. Section 103F (2) describes the relevant employees for whose protection the representative is authorised to issue notices.

- (3) A safety recommendation notice may not be issued until the employee safety representative has consulted the employer (or a representative of the employer), in accordance with applicable

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consultation arrangements established at the place of work, about remedying the contravention or the matters occasioning it and has given the employer a reasonable opportunity to remedy the contravention or matters.

- (4) A safety recommendation notice must:
 - (a) state the employee safety representative's belief on which the issue of the notice is based, and
 - (b) state the grounds for that belief, and
 - (c) specify the provision of this Act or the regulations in respect of which that belief is held, and
 - (d) include information about the employer's right to seek a review of the notice by an inspector, and
 - (e) be in a form approved by WorkCover.
- (5) A safety recommendation notice may include recommendations as to the measures to be taken to remedy the contravention or matters occasioning it. A recommendation may:
 - (a) adopt by reference, the requirements of any industry or other code of practice or standard, and
 - (b) suggest to the employer a choice of ways in which to remedy the contravention or matter.

103H Request for attendance of inspector at place of work to determine whether safety recommendation notice should be confirmed

- (1) An employer to whom a safety recommendation notice has been issued may, within 7 days after the issue of the notice, request WorkCover to arrange for an inspector to attend at the place of work to inquire into the matter if the employer does not accept the recommendations of the notice.
- (2) If the employer does not make such a request within that period, the employee safety representative who issued the notice may request WorkCover to arrange for an inspector to attend at the place of work to inquire into the matter if the representative believes on reasonable grounds that the employer has not remedied the contravention or matter to which the notice relates.
- (3) WorkCover must ensure that an inspector attends the place of work as soon as possible after a request is made under this section (but in any case within 14 days after the request is made).
- (4) The inspector must, as soon as possible:
 - (a) inquire into the contravention or matter to which the safety recommendation notice relates, and

- (b) determine whether or not to confirm the notice.
- (5) If the inspector determines to confirm the notice, the inspector must issue an improvement or prohibition notice under Part 6 that requires the employer to comply with the recommendations of the notice (with or without variation). The requirements of the improvement or prohibition notice replace the recommendations of the safety recommendation notice.
Note. For failure to comply with a notice see sections 92 and 94 and for rights of review and appeal see sections 96 and 97.
- (6) If the inspector determines not to confirm the notice, the inspector must withdraw the notice and notify the employee safety representative and the employer in writing of the withdrawal of the notice. The notification must set out the reasons for the inspector's determination.
Note. An inspector attending a place of work may also provide compliance advice under Division 3 of Part 4.
- (7) A further safety recommendation notice cannot be issued to remedy the same contravention or the same matters occasioning it.

103I Review and appeal against decision of inspector to withdraw safety recommendation notice

- (1) An employee safety representative may apply in writing to WorkCover for a review of the determination of the inspector to withdraw a safety recommendation notice issued by that representative.
- (2) An application must be made within 7 days after the notice is withdrawn or, if the regulations prescribe a different period, within the period so prescribed. An application for review may be made only once in respect of any particular notice.
- (3) WorkCover is to review the determination of the inspector that is the subject of a duly made application for review and may:
 - (a) confirm the determination of the inspector, or
 - (b) revoke the withdrawal of the safety recommendation notice and exercise the powers of the inspector to issue an improvement notice or prohibition notice in respect of the contravention or matter.
- (4) An applicant for review who is not satisfied with a decision of WorkCover to confirm the determination of the inspector to withdraw the safety recommendation notice may appeal against the determination of the inspector to a Local Court constituted by an Industrial Magistrate sitting alone.

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- (5) The Local Court may, on the appeal:
 - (a) confirm the determination of the inspector, or
 - (b) revoke the withdrawal of the safety recommendation notice and refer the matter back to WorkCover to determine under subsection (3) having regard to the matters raised in the appeal.
- (6) An improvement notice or prohibition notice issued by WorkCover in accordance with this section is taken to be a such a notice issued by an inspector under this Act, except that an application to WorkCover by the employer for review of the notice under section 96 is not available.

103J Misuse of powers of employee safety representative

- (1) An employee safety representative must not misuse the powers conferred by this Part.
Maximum penalty:
 - (a) in the case of a previous offender - 45 penalty units, or
 - (b) in any other case - 30 penalty units.
- (2) WorkCover may, by notice in writing to a person, withdraw the authority conferred on the person by section 103F to issue safety recommendation notices if it is satisfied the person has misused the powers conferred by this Part. WorkCover may, by a similar notice, restore that authority.
- (3) For the purposes of this section, a person misuses the powers conferred by this Part if the person's use of those powers is not a genuine use of those powers for the protection of the health and safety of the employees concerned or if the person's use of those powers is excessive or otherwise unreasonable in the circumstances.

103K Provisions relating to safety recommendation notices

- (1) A safety recommendation notice may be withdrawn at any time by the employee safety representative who issued it. The withdrawal has effect when notification of the withdrawal is given in writing to the employer concerned.
- (2) A safety recommendation notice (including notification of the withdrawal of such a notice) may be issued or given to an employer by delivering it personally to the employer or to a representative of the employer at the place of work concerned.
- (3) The issue or withdrawal of a safety recommendation notice does not affect any proceedings for an offence against this Act or the

regulations in connection with any matter in respect of which the notice was issued.

103L Regulations

The regulations may make further provision with respect to safety recommendation notices under this Part and, in particular, for or with respect to:

- (a) the training of employee safety representatives, and
- (b) the exhibition or service of a safety recommendation notice.

[45] Section 106 Authority to prosecute

Omit section 106 (c). Insert instead:

- (c) by WorkCover, or

[46] Section 133 Application of Act to mines: references to WorkCover

Omit “Part 4 (Industry codes of practice), and section 114 (Orders regarding costs and expenses of investigation).” from the note.

Insert instead “Part 4 (Industry codes of practice, guidelines and compliance advice), Division 5 (Undertakings) of Part 6, section 106 (c) (Authority to prosecute), section 114 (Orders regarding costs and expenses of investigation) and section 136B (Disclosure of information by WorkCover).”

[47] Section 135 Plant affecting public safety - extension of Act

Omit “Part 4 (Industry codes of practice)” from section 135 (2) (b).

Insert instead “Part 4 (Industry codes of practice, guidelines and compliance advice)”.

[48] Section 135A Dangerous goods - extension of Act

Omit “Part 4 (Industry codes of practice)” from section 135A (3) (b).

Insert instead “Part 4 (Industry codes of practice, guidelines and compliance advice)”.

[49] Section 136 Offence of obstructing or intimidating inspectors and others exercising functions under Act

Insert “, without reasonable excuse,” after “must not” in section 136 (1).

[50] Sections 136A–136B

Insert after section 136:

136A Fraud and false claims relating to occupational health and safety

- (1) A person who, by deception, obtains, or attempts to obtain, for himself or herself (or for another person) any financial advantage in connection with any authority conferred by or under this Act on the person (or other person) is guilty of an offence if the person knows or has reason to believe that the person (or other person) did not have that authority.

Maximum penalty: 500 penalty units or imprisonment for 2 years, or both.

- (2) A person who holds himself or herself out as having an accreditation, licence or other authorisation conferred by or under this Act is guilty of an offence if the person does not have, and is aware that he or she does not have, that authorisation.

Maximum penalty: 70 penalty units.

- (3) In this section:

deception means any deception, by words or conduct, as to fact or law, including the making of a statement or the production of a document that is false or misleading.

136B Disclosure of information by WorkCover

- (1) WorkCover may communicate any matter which comes to its knowledge in the exercise of its functions under this Act:

(a) to an officer or authority engaged in administering or executing a law of New South Wales, of the Commonwealth or of another State or a Territory relating to occupational health and safety, and

(b) to any other public officer or authority (of this or any other jurisdiction) prescribed by the regulations.

- (2) In this section:

this Act includes the *Occupational Health and Safety Act 1983*.

[51] Schedule 3 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

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Amendment of Workplace Injury Management and Workers Compensation Act 1998 Schedule 2

Schedule 2 Amendment of Workplace Injury Management and Workers Compensation Act 1998

(Section 4)

[1] Section 22 General functions of the Authority

Insert after section 22 (1) (d1):

- (d2) to provide advice and information to employers, workers and others about the occupational health and safety legislation and the workers compensation legislation,

[2] Section 23 Specific functions

Insert after section 23 (1) (n):

- (n1) to ensure that as part of its advisory services, the Authority:
 - (i) disseminates information about the duties, obligations and rights of persons under the occupational health and safety legislation and provides guidance for the purpose of assisting persons to comply with their duties and obligations, and
 - (ii) initiates or promotes events such as conferences and forums, and the publication of information, relating to occupational health, safety and welfare, and
 - (iii) engages in, promotes and co-ordinates the sharing of information to achieve the objects of the occupational health and safety legislation, and
 - (iv) promotes public awareness and discussion of occupational health, safety and welfare issues and an understanding and acceptance of the principles of health and safety protection, and
 - (v) develops and implements programs to provide incentives for employers to implement measures to eliminate or reduce risks to health or safety; and to otherwise improve occupational health, safety and welfare.

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Schedule 3 Amendment of Industrial Relations Act 1996

Schedule 3 Amendment of Industrial Relations Act 1996

(Section 5)

**[1] Section 196 Appeals from and references by members of Commission in
criminal proceedings**

Insert after section 196 (2):

- (2A) In addition, section 5F of the *Criminal Appeal Act 1912* applies to any such appeal against an interlocutory judgment or order in the same way as it applies to an appeal to the Court of Criminal Appeal in respect of proceedings for the prosecution of offenders on indictment in the Supreme Court.

[2] Section 196 (3)

Insert “or (2A)” after “subsection (2)”.

**[3] Section 197A Appeals against acquittals in proceedings for offences
against occupational health and safety legislation**

Omit the section.

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Amendment of Crimes (Sentencing Procedure) Act 1999

Schedule 4

**Schedule 4 Amendment of Crimes (Sentencing
Procedure) Act 1999**

(Section 6)

Section 27 Application of Division

Insert “, or against Part 2A,” after “Part 2” in section 27 (2A) (a).

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Schedule 5 Amendment of Fines Act 1996

Schedule 5 Amendment of Fines Act 1996

(Section 7)

[1] Section 117A Disclosure of information by State Debt Recovery Office

Insert at the end of section 117A (1) (c):

or

(d) to WorkCover for the purposes of subsection (3A).

[2] Section 117A (3A)

Insert after section 117A (3):

(3A) If a fine has been imposed for an offence under the *Occupational Health and Safety Act 2000* and a person died as a result of the commission of the offence:

- (a) information may be disclosed to WorkCover about whether the fine has been paid or is outstanding (in whole or in part), and
- (b) WorkCover may disclose that information, on request, to the next of kin of the deceased.

Schedule 6 Amendment of mine safety legislation

(Section 8)

6.1 Coal Mine Health and Safety Act 2002 No 129

[1] Section 3 Definitions

Omit “Mineral Resources” from the definition of *Department*.

Insert instead “Primary Industries”.

[2] Section 150 Bringing concerns regarding health, safety or welfare to the attention of operators

Omit the section.

6.2 Mine Health and Safety Act 2004 No 74

[1] Section 3 Definitions

Omit “Mineral Resources” from the definition of *Department* in section 3 (1).

Insert instead “Primary Industries”.

[2] Section 131 Bringing concerns regarding health, safety or welfare to the attention of operators

Omit the section.

Schedule 7 Amendment of Occupational Health and Safety Regulation 2001

(Section 9)

[1] Clause 6 Application of provisions providing for alternative duties if primary duty not reasonably practicable

Omit the note to the clause. Insert instead:

Note. Clause 6A provides that the alternative duty applies only so far as is reasonably practicable.

[2] Clause 6A

Insert after clause 6:

6A Duties to apply so far as is reasonably practicable

- (1) If a provision of this Regulation imposes a duty to take or refrain from taking any action for the protection of health or safety, the duty applies only so far as is reasonably practicable to take or refrain from taking that action.
- (2) Subclause (1) extends to provisions of this Regulation made under section 135 or 135A for the protection of public health or safety.

[3] Clauses 357 and 358 and clauses 10 and 12 of Schedule 4

Omit “Department of Mineral Resources” wherever occurring.

Insert instead “Department of Primary Industries”.

[4] Clause 358 Application of Act to mines: references to WorkCover

Omit clause 358 (1) (a1)–(b). Insert instead:

- (a) section 17A (Determination by inspector of unresolved matters concerning consultation arrangements),
- (b) section 32B (3) (Reasons for non-prosecution of offence),
- (c) Part 4 (Industry codes of practice, guidelines and compliance advice),
- (d) section 106 (c) (Authority to prosecute),
- (e) Division 5 (Undertakings) of Part 6,
- (f) Part 6A (Safety recommendation notices),
- (g) section 114 (Orders regarding costs and expenses of investigation),

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Amendment of Occupational Health and Safety Regulation 2001

Schedule 7

- (h) section 136B (Disclosure of information by WorkCover),
- (i) section 77 (2).