

NSW LIBERAL/NATIONALS SUBMISSION

Introduction

Frustration at the failure of the NSW State Government to enact change in the area of occupational health and safety (OH&S) legislation has characterised the NSW Coalition's dealings with relevant interest groups.

The NSW Government has refused to release a report on a review of NSW OH&S legislation (the Act) that was due to be released in April 2007. The refusal of the NSW Government to make the report public has prohibited the NSW Coalition from best examining the issues surrounding current NSW OH&S legislation.

If NSW's role in a national approach is to be best examined, the release of the Stein report for public consideration is crucial.

Issues

On 4 May 2006, the NSW Minister for Industrial Relations, the Hon. John Della Bosca MLC, tabled the Report on the Review of the *NSW Occupational Health and Safety Act 2000* together with a draft Bill titled the *Occupational Health and Safety Amendment Bill 2006*.

In presenting the Report together with the draft Bill, Minister Della Bosca noted the Government had been engaged in extensive consultation on changes to the Act over a period of 10 months with employer and employee groups. Some of the arguments put to the Minister and inturn argued by him are set out below:

Employers argued:

- They need greater certainty that they could fulfil their obligations.
- They thought it was unfair that individual workers appeared to have little imperative to be responsible for their own actions, leaving employers to carry all workplace safety responsibility.
- Existing defences to prosecution under the Act are not enough to protect employers who had done all they could to make their workplaces safe.

Employees argued:

- They wanted greater protection for the vulnerable.
- Supported the notion that they should be held accountable for their actions.

Some of the amendments to the Act sought by the draft Bill include:

- The introduction of a 'safety recommendation notice'. "*Through this mechanism, appropriately trained and authorised OH&S committee chairpersons and OH&S representatives will be able to make formal safety recommendations without involving a WorkCover inspector, thereby resolving local issues locally.*"¹

¹ Della Bosca MLC, the Hon John, "Occupational Health and Safety Act Review", *New South Wales Legislative Council Parliament Hansard*, 4 May 2006.

- Allowing for “enforceable undertakings to be available as an alternative to prosecution for legislative breaches, except for the offence of reckless conduct causing death.”²

WorkCover NSW supported the proposed improvements to the Act that continued to deliver safer workplaces, with Mr Della Bosca stating,

“The [NSW] Government supports WorkCover’s finding that the policy objectives of the Act remain valid and that, along with the amendments in the consultation draft bill, the terms of the Act remain appropriate for securing those objectives [delivering safer workplaces].”³

Stein Review

On 26 May 2006, Minister Della Bosca announced an extension on the consultation period on proposed changes to the Act to 7 July 2006.⁴ Then in October the NSW Government referred the Act together with the draft legislation to former judge the Hon. Paul Stein AM QC after “employers and unions had been unable to agree on central aspects of draft legislation”.⁵ After promising to introduce the draft Bill into the House before the Parliament rose (9 June 2006), the Minister then gave Paul Stein until the end of April 2007 to report back on the Act and draft legislation.⁶

The Stein inquiry invited submissions (which had already been garnered in the State Government’s consultation process) with the closing dates for submissions being 15 December 2006.⁷

The Stein report, while completed has yet to be made public and interest groups remain frustrated at the lack of action and direction for the future of OH&S laws in both NSW and nationally.

The NSW Coalition has sought to have the NSW Government table the Stein report but the NSW Government continues to deny both the NSW Parliament and public access.

In refusing to release the report, Minister Della Bosca argued:

“The matter is not urgent because our occupational health and safety framework is working well”⁸

² Ibid.

³ Ibid.

⁴ Della Bosca MLC, the Hon John, “Consultation period on changes to OHS Act extended”, *Media Release*, 26 May 2006.

⁵ Della Bosca MLC, the Hon John, “Occupational Health and Safety Act Review”, *Media Release*, 23 October 2006.

⁶ Della Bosca MLC, the Hon John, “Occupational Health and Safety Act Review”, *Media Release*, 23 October 2006 and Della Bosca, the Hon John, “Occupational Health and Safety Act Review”, *New South Wales Legislative Council Parliament Hansard*, 4 May 2006.

⁷ WorkCover NSW Website, “Review of Occupational Health and Safety Act 2000”, retrieved 28 November 2007 from http://www.workcover.nsw.gov.au/OHS/OHSAct2000Review/ohs_act_public_submissions_2006.htm.

⁸ Della Bosca MLC, The Hon John, “Occupational Health an Safety Legislation Report”, *NSW Legislative Council Hansard*, 7 May 2008.

However, this assertion is not supported by statistics with the incidence rate of workplace injury in NSW well above that in Victoria, the state with the most comparable economy in terms of industry mix (see Annexure A).

Minister Della Bosca has indicated the Stein report specifically looks at the different OH&S systems in place in both Queensland and Victoria.⁹ The differences between state practices is obviously a crucial element to the national debate and the public interest would be best served by the public release of the Stein report to examine these issues.

The NSW Coalition is not alone in calling for the report to be released. The NSW Business Chamber reported in May this year that the NSW government had refused the Chamber's Freedom of Information request to access the Stein Report into workplace safety. The NSW Business Chamber CEO, Kevin MacDonald argued:

"This report has been sitting on the Minister's desk for a year and the decision of the Government to refuse this FOI raises questions about the Government's willingness to engage in a dialogue on improving workplace safety in NSW.

"Dozens of community, business groups and trade unions made submissions to the Stein Review and a year after its completion no one is any the wiser about its findings."¹⁰

For the interests of NSW employers and employee groups to be best represented in the national debate on OH&S laws, the Stein Report must be made public.

Duties of Care – Who owes them and to whom:

The fundamental obligation on employers under the Act is very strict, that they *"must ensure the health, safety and welfare at work of all the employees of the employer"*.¹¹

The NSW Coalition does not support the NSW system of the strict liability model on obligations of employers as set out in *section 8* of the Act. The Division 1 General Duties under the principal Act should be amended so that the obligations of employers is a requirement to do all things *"reasonably practicable"* to ensure safety in the workplace.

A definition of what constitutes *"practicable"* should also be included in amended legislation. In it's 2005 submission to the NSW Review of the Occupational Health and Safety Act 2000, the Combined Employer Group argued *"practicable"* means practicable having regard to (similar to section 20 of the Victorian *Occupational Health and Safety Act 2004*):

⁹ Della Bosca MLC, The Hon. John, "Occupational Health and Safety Report", *NSW Legislative Council Hansard*, 7 May 2008.

¹⁰ MacDonald, Kevin (CEO), "NSW Workplace Safety: FOI for Stein Report blocked by Government", *Media Release*, NSW Business Chamber, 16 May 2008.

¹¹ NSW Occupational Health and Safety Act 2000, No. 40, Division 1 General Duties, Section 8 (1).

- (i) the likelihood of the hazard or risk manifesting and the level of harm posed if the risk or hazard did manifest;*
- (ii) what the duty holder reasonably should have known about the hazard or risk and ways of eliminating or reducing it;*
- (iii) the availability and suitability of ways to remove or reduce that hazard or risk;*
- (iv) the cost of eliminating or mitigating that hazard or risk.¹²*

Under current NSW OH&S legislation, an employer is presumed to be guilty for failing to meet their strict obligation that they “ensure the health, safety and welfare at work of all the employees of the employer”¹³

There needs to be an increased involvement by all parties (employers and employees) in the delivery of occupational health and safety outcomes. In NSW there is currently no shared responsibility.

The NSW OH&S Act contains no specific duty for employees with respect to their own health and safety. This is in contrast to Commonwealth, ACT, NT, SA, TAS and VIC legislation which all place some form of responsibility on employees for their own safety.

Those who argue that changes to the obligations of parties under NSW OH&S laws represents a dilution of employer duties are not supported by the comparative performance of other states¹⁴ (See Annexure A).

‘Reasonably Practicable’ & Risk Management:

A quintessential example of what is wrong with NSW’s OH&S scheme is best highlighted by a case examined by the *Australian* newspaper and referred to in a speech by NSW Liberal Leader Barry O’Farrell in November 2007:

“One example of why businesses big and small across this State are seeking these reforms—reforms that provide employer ease as well—is the case highlighted more than a year ago by the Australian. Rob Partridge used to run a small plumbing company on the New South Wales Central Coast. In 1998 there was a dreadful accident in which an elderly resident at a retirement village was killed after a thermostat failed and she was scalded in the bath. WorkCover prosecuted Mr Partridge over the accident. This case demonstrates the extraordinary level of duty of care imposed under the existing New South Wales Occupational Health and Safety Act.

Despite that he had not installed the thermostat and was rarely at the retirement village, Mr Partridge was deemed to be "in control" of the premises for plumbing purposes. It did not matter that he had strictly followed the manufacturer's instructions in servicing the thermostat. He

¹² Combined Employer Group, “NSW Review of the Occupational Health and Safety Act 2000”, *New South Wales*, 2005, p. 7.

¹³ NSW Occupational Health and Safety Act 2000, No. 40, Division 1 General Duties, Section 8 (1).

¹⁴ Combined Employer Group, “NSW Review of the Occupational Health and Safety Act 2000”, *New South Wales*, 2005, p. 13.

had tested the device only three months before the accident. The internal fault it developed could be detected only with the aid of stereo microscopic magnification—not something usually done by the average plumber. In the article Mr Partridge said the following about this case:

It wrecked my life. I had a good business, a lot of clients; mentally it's devastated me. I had to plead guilty. The barrister said, 'It's going to cost you \$50,000 to fight it, and WorkCover only has to find one minor thing you did wrong, remotely connected to it'.

The article continued:

The most serious fault the industrial court could attach to Partridge was that he failed to gather information regarding the expected lifespan of the mixing valve and consequently failed to advise [the retirement village] as to the need to replace the mixing valve when the valve's lifespan had expired.

I repeat: This was the result despite the device having been tested three months earlier and having been found to be acceptable. That is why the current Act is flawed: it demonstrates a one-sided approach to workplace safety and puts enormous responsibility on employers like Mr Partridge and others across the State. The Act fails to place any requirement for responsible action on workers.”¹⁵

Consultation, Participation and Representation:

In February 2008 the NSW Coalition held a forum with interest groups to discuss the State's OH&S laws.

Some of the organisations represented at the forum included:

- NSW Business Chamber
- Employers First
- Association of Consulting Engineers Australia
- Civil Contractors Federation
- Motor Traders Association of NSW
- Timber Merchants Association
- Australian Institute of Company Directors

Input from these organisations has been a major contributing influence in the NSW Coalition's understanding on the issues behind the call for reform of OH&S legislation.

Some of the concerns raised by interest groups at the forum included:

- The language employed by the OH&S legislation needs to be better defined so employers can be certain they are meeting their requirements.
- There is a need for a fairer system with shared responsibility.

¹⁵ O'Farrell MP, Barry, "Occupational Health and Safety Bill 2007", *NSW Legislative Assembly Hansard*, 29 November 2007.

- Employers need to start educating employees to “supervise themselves” as the idea of a supervisor behind every employee is not possible, but that is what the legislation expects.

Prosecutions:

The NSW Coalition objects to the rights of unions to bring OH&S prosecutions. NSW is the only state where unions conduct OH&S prosecutions.

In his review of the Victorian OH&S legislation, Chris Maxwell QC examined the rights of unions to bring prosecutions and concluded:

“The prosecution of persons for criminal offences is a matter of the utmost seriousness. It is, in my view, properly the exclusive function of the State, and should be performed by a State agency – whether a Crown Prosecutor (subject to the DPP) or a prosecuting authority ...

I can see no justification for conferring on any other party – whether a union, a worker or anyone else – a statutory right to bring a prosecution.”¹⁶

It is inappropriate for unions who specifically represent employees to act as an independent body in bringing prosecutions. Furthermore, the current role of unions in bringing OH&S prosecutions in NSW only adds to the antagonistic nature of the current scheme. The focus of unions should be on developing a relationship between employees and employers to improve health and safety outcomes. The current prosecutorial role of unions does not foster relations between employee and employer groups.

Moieties

The right of union prosecutors to moiety is enshrined in the *NSW Fines Act 2001* which states:

122 Payment of share of fine to prosecutor
(cf *Fines and Penalties Act 1901* sec 5 (3))

(1) *This section applies where:*

(a) the Act imposing or authorising the imposition of a fine or other penalty does not make any provisions for its application when recovered, and

(b) the prosecutor is not a police officer.

(2) *The court before which proceedings are taken to recover any such fine or other penalty may direct that such portion of it (not exceeding one-half) is to be paid to the prosecutor.*

(3) *For the purposes of this section, fine does not include an amount of the kind referred to in section 4 (1) (e) or (f).¹⁷*

¹⁶ Maxwell QC, Chris, “Occupational Health and Safety Act Review”, *Victoria*, March 2004, p. 362.

¹⁷ NSW Fines Act 1996, No. 99, Division 8 Miscellaneous, Section 122.

While some argue that the use of this provision by unions isn't enough to warrant its exclusion from future legislation, the mere perception that unions undertake prosecutions as a means of raising funds undermines the objectives of the legislation, in particular:

“to provide for consultation and co-operation between employers and employees in achieving the objects of this Act”¹⁸

Removal of the unions right to prosecute would address the issue of moieties and the effect they have on the integrity of the process.

Appeals

Elsewhere in NSW criminal and civil law proceedings the final court for appeal is the High Court of Australia. However, under NSW legislation, appeals in criminal OH&S matters are limited to a Full Bench of the Industrial Relations Commission in Court Session¹⁹.

The Chief Executive of Employers First argues:

“In the occupational health and safety jurisdiction, not only is the employer’s right to appeal severely restricted, but the prosecutor, WorkCover, has an unlimited right to appeal against an acquittal of the employer. This amounts to double jeopardy for the defendant, a concept shunned elsewhere in the legal system.”²⁰

The penalty for an individual found guilty of a workplace death under the Act is \$165,000 or imprisonment for 5 years, or both. Such a conviction should not continue to be treated differently to other criminal convictions with respect to appeals.

The seriousness of this offence, also suggests that prosecutions under Section 32A of the Act (workplace deaths) are criminal matters and so should be dealt with in criminal courts.

Conclusion

The State's dysfunctional occupational health and safety system is failing NSW employees and workers. The absence of a consistent model across the states is a barrier to future investment and business growth.

This submission identifies a clear need for reform. The recommendations for change articulated throughout this paper largely mirror the Victorian OH&S system. Rather than delaying improvements to workplace safety by re-inventing a new system, the NSW Liberal/Nationals support the use of the Victorian OH&S system as a model capable of being adopted in all jurisdictions.

¹⁸ NSW Occupational Health and Safety Act 2000, No. 40, Part 1 Preliminary, Section 3 (d).

¹⁹ NSW Industrial Relations Act 1996, No. 17, Part 7 Appeals and references to Commission, Section 196.

²⁰ Brack, Garry (Chief Executive), “Inquiry into the NSW Occupational Health and Safety Legislation”, *Employers First*, 18 December 2006, p. 33.

Annexure A

Information from the Workplace Relations Ministers' Council **Comparative Performance Monitoring Report** Ninth Edition – February 2008

Appendix Table 1 – Summary of key jurisdictional data, 2005-06

Jurisdiction	Claims	% of claims	Employees	% of employees	Hours ('000)	% of hours
New South Wales	48 280	34.6	2 863 740	31.9	4 765 046 760	32.2
Victoria	28 960	20.7	2 249 300	25.1	3 657 430 590	24.7
Queensland	29 110	20.9	1 617 210	18.0	2 642 110 690	17.9
Western Australia	12 230	8.8	918 860	10.2	1 538 249 550	10.4
South Australia	11 860	8.5	658 960	7.3	1 059 012 820	7.2
Tasmania	3 430	2.5	193 080	2.2	298 441 200	2.0
Northern Territory	1 340	1.0	89 500	1.0	151 378 940	1.0
Australian Capital Territory	1 780	1.3	117 480	1.3	188 129 750	1.3
Australian Government	2520	1.8	260 810	2.9	481 893 360	3.3
Seacare	120	0.1	3 670	0.0	15 895 010	0.1
Australian Total	139 630	100.0	8 972 590	100	14 797 588 670	100
New Zealand	24 720		1 808 205		3 344 892 480	

Comparative Performance Monitoring Report, 9th Edition, February 2008, p. 35.

Incidence rates of serious injury and disease claims by jurisdiction (Claims per 1000 employees)

	S'care	SA	Qld	Tas	NSW	ACT	NT	WA	Vic	Aus Gov	Aus Total
2001-02	37.7	21.6	19.3	17.8	22.4	14.0	13.2	13.5	14.0	11.2	18.2
2002-03	36.6	20.9	19.5	18.5	21.4	16.5	14.6	14.5	12.9	11.8	17.7
2003-04	40.4	21.3	18.3	17.9	20.7	18.8	14.6	14.7	12.9	12.7	17.4
2004-05	24.6	20.8	17.9	18.2	20.0	15.9	15.3	14.8	12.2	11.7	16.8
2005-06	33.8	18.0	18.0	17.7	16.9	15.2	14.9	13.3	12.9	9.7	15.6
2005-06 Aus Av											

Comparative Performance Monitoring Report, 9th Edition, February 2008, p. 6.

NSW remains above the national average for incidence rates of serious injury and disease claims and above VIC and WA.

**Frequency rates of serious injury and disease claims by jurisdiction
(Claims per million hours worked)**

	Tas	SA	Qld	NSW	ACT	NT	WA	Vic	S'care	Aus Gov	Aus Total	NZ
2001-02	11.3	13.4	11.8	13.1	8.6	7.8	8.2	8.6	8.7	5.8	10.9	6.7
2002-03	11.5	12.8	11.9	12.5	10.1	8.4	8.6	7.8	8.4	5.9	10.6	7.2
2003-04	11.3	13.3	11.3	12.3	11.7	8.6	8.9	8.0	9.3	6.7	10.5	7.4
2004-05	11.5	12.9	10.8	11.8	9.7	8.9	8.8	7.5	5.7	6.4	10.1	7.5
2005-06	11.5	11.2	11.0	10.1	9.5	8.8	8.0	7.9	7.8	5.2	9.4	7.4
2005-06 Aus Av												

Comparative Performance Monitoring Report, 9th Edition, February 2008, p. 6.

NSW remains above the national average for frequency rates of serious injury and disease claims and above VIC and WA.

Below (pp. 10- 11): Enforcement activity by jurisdiction –
Comparative Performance Monitoring Report, 9th Edition, February 2008, pp. 16-17.

Indicator 14 – Enforcement activity by jurisdiction

	NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Aus Gov ^a	Seacare	Total Aus	NZ
Total												
workplace interventions												
2001-02	n/a	50 343	13 835	10 600	10 325	8 256	1 883	n/a	134	n/a	95 376	24 474
2002-03	n/a	48 425	17 375	18 774	12 582	6 003	2 233	n/a	194	n/a	95 586	23 552
2003-04	n/a	43 719	21 615	10 085	16 991	4 523	3 188	1 360	245	191	101 857	24 503
2004-05	n/a	41 842	21 068	11 708	21 841	6 964	4 384	2 476	203	277	110 763	20 989
2005-06	n/a	41 163	26 218	11 356	18 908	6 506	5 522	3 950	189	206	114 028	21 064
Number of proactive workplace interventions												
2001-02	n/a	38 550	n/a	6 335	n/a	4 188	1 435	n/a	74	n/a	n/a	13 676
2002-03	n/a	37 878	n/a	5 072	n/a	2 788	1 542	n/a	113	n/a	n/a	12 278
2003-04	n/a	33 606	13 251	5 809	8 973	1 915	2 393	n/a	146	181	66 274	12 124
2004-05	n/a	33 601	17 023	7 028	10 081	2 857	3 597	n/a	133	275	74 595	9 748
2005-06	n/a	27 834	23 344	6 310	9 075	2 953	4 623	n/a	113	201	74 453	10 985
Number of reactive workplace interventions												
2001-02	n/a	11 793	n/a	4 265	n/a	4 068	448	n/a	60	14	n/a	10 798
2002-03	n/a	10 547	n/a	3 702	n/a	3 125	691	n/a	81	12	n/a	11 274
2003-04	n/a	10 113	8 364	4 276	7 958	2 608	795	n/a	99	10	34 223	12 379
2004-05	n/a	8 241	4 045	4 680	11 760	4 107	787	n/a	70	3	33 693	11 241
2005-06	n/a	13 329	2 874	5 046	9 832	3 553	899	n/a	76	5	35 614	10 079
Number of infringement notices issued												
2001-02	1 471	n/a	99	n/a	n/a	n/a	71	0	n/a	n/a	1 641	0
2002-03	1 289	n/a	289	n/a	n/a	n/a	242	0	n/a	n/a	1 820	0
2003-04	915	n/a	488	n/a	n/a	n/a	31	0	n/a	n/a	1 434	6
2004-05	1 652	n/a	462	n/a	n/a	n/a	7	8	n/a	n/a	2 130	32
2005-06	1 195	n/a	499	n/a	n/a	n/a	47	28	n/a	n/a	1 769	20
Number of improvement notices issued												
2001-02	10 517	11 922	6 246	9 818	1 025	420	19	77	8	3	40 055	17 302
2002-03	12 646	14 964	11 136	10 263	1 977	346	22	80	18	0	51 452	14 652
2003-04	17 927	12 492	16 200	11 848	2 748	198	29	202	17	1	61 662	14 044
2004-05	18 213	12 117	13 348	12 391	4 688	423	17	163	12	9	61 381	10 691
2005-06	14 832	11 168	16 463	11 691	3 573	297	49	427	12	6	58 517	1 743
Number of prohibition notices issued												
2001-02	786	3 102	1 188	887	191	109	25	39	2	2	6 331	^d
2002-03	779	2 904	1 256	895	364	131	56	48	9	2	6 444	990
2003-04	1 139	2 303	1 696	870	814	87	14	90	6	1	7 020	1 117
2004-05	1 421	2 308	1 788	963	899	266	14	66	20	6	7 751	745
2005-06	1 212	1 876	2 223	708	623	125	54	68	10	19	6 918	417

	NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Aus Gov	Seacare	Total Aus
Number of field active inspectors	2001-02 301	226	127	70	57	n/a	10	12	16	1	820
	2002-03 301	236	148	70	57	n/a	10	12	16	2	852
	2003-04 301	236	155	94	89	25	12	12	16	15	945
	2004-05 301	236	189	94	89	27	12	12	16	3	979
	2005-06 301	236	206	103	89	29	12	12	22	3	1013
Number of field active inspectors per 10 000 employees	2001-02 1.1	1.1	1.0	0.9	1.0	na	1.1	1.0	0.7	3.3	1.0
	2002-03 1.1	1.1	1.1	0.9	0.9	na	1.1	1.0	0.7	6.3	1.0
	2003-04 1.1	1.1	1.1	1.2	1.4	1.4	1.4	1.1	0.7	15.4	1.1
	2004-05 1.1	1.1	1.2	1.1	1.4	1.4	1.4	1.0	0.6	8.7	1.1
	2005-06 1.1	1.1	1.3	1.2	1.4	1.5	1.4	1.0	0.8	8.2	1.1
Number of legal proceedings commenced	2001-02 1550	186	131	29	21	33	2	1	0	0	953
	2002-03 1462	217	122	43	16	38	0	2	0	0	900
	2003-04 1336	206	136	65	45	9	1	27	0	0	825
	2004-05 1587	188	190	64	45	7	0	14	0	2	1 097
	2005-06 1459	136	174	37	71	15	0	19	1	0	912
Number of prosecutions resulting in conviction	2001-02 1455	115	114	41	8	11	2	0	0	0	746
	2002-03 1443	105	101	38	22	24	0	2	0	0	735
	2003-04 1399	110	120	43	30	7	0	5	0	0	714
	2004-05 1384	93	156	48	31	7	0	11	0	1	731
	2005-06 1340	70	143	41	51	12	0	5	0	0	662
Total amount of fines awarded by the courts (\$'000)	2001-02 \$9 500	\$6 069	\$1 593	\$187	\$101	\$32	\$2	\$0	\$0	\$0	\$17 484
	2002-03 \$13 000	\$2 997	\$1 994	\$152	\$379	\$199	\$0	\$3	\$0	\$0	\$18 724
	2003-04 \$13 300	\$4 159	\$2 024	\$385	\$628	\$87	\$0	\$55	\$0	\$0	\$20 668
	2004-05 \$11 500	\$3 294	\$3 344	\$457	\$439	\$78	\$0	\$32	\$0	\$0	\$19 145
	2005-06 \$13 878	\$3 532	\$3 823	\$383	\$1 042	\$157	\$0	\$134	\$0	\$0	\$22 949