



Submission to National Review of OHS Laws

11 July 2008

1. Overview

The Institute of Public Affairs (IPA) has been an active participant in the occupational health and safety policy debate for several years. The IPA has, in particular, been a consistent critic of the New South Wales OHS laws, the philosophies that underpin those laws and the ways in which they are applied.

In summary, the NSW OHS legislation perverts internationally accepted principles of OHS regulation. A properly developed OHS framework can work to fulfil the objectives of occupational health and safety policy which are to make the workplace safe. Current NSW OHS legislation does not fulfil that objective.

More specifically, extensive evidence gathered by the IPA on the way in which the NSW laws are enforced provides the conclusion that the processes governing NSW OHS laws are able to be corrupted, and could lead to corruption itself. Existing NSW OHS legislation has resulted in innocent people being convicted. Further, individuals and organisations who should have been prosecuted if the laws had been applied consistently have not been charged or prosecuted.

The IPA is highly supportive of efforts to harmonise national OHS laws. But model laws should not be based on NSW's OHS laws. This submission discusses the evidence and reasoning behind this IPA position and offers answers to some of the questions posed in the May 2008 Issues Paper.

2. Evidence of the corruption of the NSW OHS laws

In October 2006, the IPA released a report on the application of NSW OHS laws. The report, *The Politics of a Tragedy* can be found at <http://www.ipa.org.au/publications/808/the-politics-of-a-tragedy-the-gretley-mine-disaster-and-nsw-ohs/pg/2>

It includes a three-minute video clip which provides an overview of the issues. The report is the result of a two-year investigation.

The report traces the Gretley underground coal mining disaster of 1996 in which four men drowned after drilling into a flooded disused mine. The prosecution process and conviction outcome is explained in the report. What the report highlighted was a glaring display of double standards in the prosecution process because of the failure to prosecute entities who should clearly have been prosecuted.

While the IPA's Gretley report is comprehensive, it is not complete because vital information known to the prosecutors and the NSW Government was not made public. This vital information only became available late in 2006 after a Parliamentary demand for papers forced internal government files into the public domain. These files, previously kept secret, strongly implicated a government department as a major contributor to the Gretley disaster. The department was not prosecuted. A union-owned labour hire company which employed three of the deceased men was not prosecuted. Only the mining company which worked the Gretley mine and the managers of the mine were prosecuted. Yet all three entities, (the mining company, government department and union owned labour hire company) exercised high measures of control at the worksite. The sequence of events surrounding the prosecutions over the Gretley disaster leaves little doubt that there has been a cover-up which merits investigation.

The IPA Gretley report investigated later prosecutions of many other NSW OHS incidents and found that similar double standards occurred and that the application of justice in NSW was failing. It concluded that the design and operation of OHS law in NSW deliberately and systemically distorted basic principles of justice and the rule of law and compromised Australia's international obligations under ILO OHS convention, C155.

For the purposes of this submission, the Gretley story and the evidence of OHS prosecution in NSW reveal significant lessons about the principles of OHS law that should be adopted in the quest for national harmonisation.

It needs to be understood that there are two different and opposing philosophical approaches to the principles that should inform the development of OHS legislation - and any discussion about harmonisation needs to take account of these approaches.

3. The two options for harmonised national OHS laws

3.1 APPROACH ONE: Practicable and reasonable control

The first approach is the one supported by the IPA and is recommended as the philosophical approach that should underpin efforts at national OHS harmonisation.

This is the model that was developed following a massive coal mining disaster in the UK in the late 1960s. The "Robens" report into the disaster made recommendations for the design of OHS laws which have become accepted as best-practice international principles. They are also the basis of International Labour Organisation conventions to which Australia is a signatory. Australia consequently has international legal obligations to incorporate these principles into its OHS laws.

The Robens/ILO principles approach OHS from a practical perspective. The understanding is that everyone who is involved in work contributes in some measure to safe and/or unsafe work practices. The chairman of a large company contributes to unsafe practices if he fails to allocate money for critical maintenance. A cleaner contributes to unsafe practices if he leaves water on the floor in an office building, thus making the floor slippery.

In recognising the simple realities of human behaviour, the Robens/ILO principles require that OHS legislation in the first instance holds everyone involved in work to be responsible and liable for what they “reasonably and practicably control”. The chairman will and should be held responsible for what they control. The cleaner will and should be held responsible for what they control. If several individuals contribute to an OHS incident, each and every individual should be held liable to the extent they exercised ‘reasonable and practicable control’.

This model requires everyone involved in work to pay attention to their actions and to ensure that those actions are safety orientated. It is the model which has the best chance of focusing everyone’s mind on safe behaviours. It is the model that is applied in Australia under Victorian, Tasmanian, Western Australian, South Australian, ACT, Northern Territory and Commonwealth OHS laws. There are variations in legislative terminology and design but the general principles are consistent.

For these jurisdictions, the principal task in the national harmonisation processes is to bring greater clarity, focus and consistency to the design of the OHS Acts around the Robens/ILO principle of “reasonable and practicable control”.

3.2 APPROACH TWO: “Everything is the fault of the employer”

Lying in a fundamentally opposite direction is a completely different philosophy toward OHS law which is alive and active in NSW.

This approach functions on a presumption that, under a capitalist system and in particular in corporations, the duty of all managers, executives and owners is entirely to maximise profit. This duty to make profits leads managers and others to suspend the normal promptings of conscience and duty. In short, every manager and executive becomes amoral and will pay scant regard to matters of safety. The role of OHS law, therefore, is to counter this by instilling such fear of retribution in managers, executives and others that they will operate and behave in a safe manner.

This need to instil fear within managers is the design fundamental of the NSW OHS Act. It does this by:

- Not applying the “reasonable and practicable” test in the descriptions of the duties of care.
- Inserting in the duties of care the words “must ensure” safety.

This approach is only applied to “employers”, not to employees.

The result is that for employers, managers, owners and others the requirement for a safe worksite is absolute. That is, if an OHS incident occurs, then guilt automatically occurs. It is a reverse onus of proof with a presumption of guilt. The employer, manager, owner and others must “disprove” their guilt. This is the first way in which the NSW laws aim to create fear in the minds of employers.

To ensure fear is effective and maximised, prosecutions are conducted in the NSW industrial relations arena where appeals beyond the industrial relations court are not permitted. Appeals are not permitted because the presumption of guilt would prove offensive in normal criminal courts (where OHS prosecution should nonetheless occur). That is, normal criminal courts apply a presumption of innocence and other protections against injustice—features that would clash violently with NSW OHS law.

The final element in the inculcation of fear is the presence of an aggressive culture of prosecution by the government and the extension of prosecutorial powers to NSW unions. At least one judge has made comment on this.

In his dissenting judgment in the Gretley case, Justice Marks said:

...one must query the bona fides of the prosecutor in terms of these proceedings.... If the prosecution of offences is undertaken in an arbitrary, capricious and irresponsible fashion, the laws themselves are bought into disrepute for reasons that are obvious....

I would advisedly, characterize what has happened in these proceedings as constituting more than prosecution, and amounting to persecution of the defendants.

...I regard the conduct of the prosecutor as being, in all the circumstances, unacceptable and as having compromised the processes of this Court.

[Newcastle Wallsend Coal Company Pty Limited @Ors v Inspector McMartin [2006] NSWIRComm 339 at 758]

The investigations of the IPA, detailed in our report *The Politics of a Tragedy*, have found that persecution rather than prosecution is intentional and systemic. This persecution is consistent with the philosophy and design of the NSW OHS Act, namely, to instil fear.

3.3 Choice in national harmonisation

In harmonising Australia's OHS laws, it must be clearly understood that these two opposing approaches offer no "middle ground". There is a clear choice between the two and no "negotiated settlement" designed to appease both approaches is possible.

The Robens/ILO approach recognises the realities of human behaviour in the work situation and seeks to ensure that all people are safety-focused. This is the approach consistent with Australia's international obligations. It creates cultures of safety. It is the approach that the IPA supports.

The NSW approach focuses exclusively on the employer, managers and others as the entities that always cause OHS incidents. It assumes that they will always be at fault and it seeks to intimidate them into safe behaviour. It is an Act based on retribution against a predetermined class in society. In this respect it is "tribal", assuming that some people in society are morally good and others are evil. It is an approach that distorts justice and ignores the truth about the ways in which people behave at work. It sends a signal that some people in the workplace are totally responsible for safety while others (employees) have a lesser responsibility. This creates unsafe work cultures.

3.4 A note on Queensland

Queensland has a similar legislative design to NSW in terms of its "duties of care". However, important differences exist.

- The defences available under the Queensland Act provide “reasonable and practicable” as a defence and, in their application, appear to be effective in this respect. The NSW Act claims to have a similar defence but this has proven to be of no practical value.
- Prosecution in Queensland takes place in normal criminal courts with full rights to appeal.
- There is no evidence of a culture of persecution in the prosecution process in Queensland and unions do not have the right to prosecute.

4. Understanding the culture of safety and its reverse: the choice

The key objective of OHS law must be to construct a legal framework in which cultures of work safety prevail. The second objective must be to enable effective prosecution where people have failed in their responsibilities to safety.

The first objective, achieving safe cultures, prevents injuries and deaths. Prevention is the preferable pathway. It will save the most people from the most harm.

Both the Robens/ILO model and the NSW model provide for prosecution.

But the Robens/ILO model, because it assigns responsibility and liability to everyone in proportion to what they control, is the model that has the greatest chance of creating safe work cultures.

The NSW model, because it assigns responsibility and liability selectively and in unequal measure, diminishes the opportunities for cultures of safety to thrive. People who have imposed upon them artificial responsibility for things they cannot control will look to create processes which avoid accountability. Conversely, when people see that others have had imposed upon them absolute measures of responsibility, they may well assume that they have a diminished need to act responsibility towards others.

It is in the area of creating cultures of injury prevention that the NSW model fails most decisively. In effect, the NSW Workcover Authority must work against its own State Act to develop safe work cultures. It is a daunting task.

But what is also disturbing is the culture of aggressive war against the “bosses” which the design of the NSW OHS Act encourages within the prosecuting authorities. This has led to corruption of the very processes of prosecution. The fact that, in the Gretley case, the union-owned employer of three of the deceased workers was not prosecuted points to a clear corruption of the integrity of prosecution. The fact that the government department responsible for supplying the incorrect maps which led to the deaths was not prosecuted, also points to the corruption of the processes of prosecution.

If the wrong choice is made in the national OHS harmonisation process and a system modelled on NSW is used, Australia risks the emergence of diminishingly safe work cultures and the corruption of the processes of prosecution.

5. On unions and tribalism in the OHS debate

In the OHS debate, Australia suffers from a perverted atmosphere. It is assumed that businesses/employers cause accidents and injuries and it is assumed that unions are the protectors of workers against business. In this respect the debate is conducted along “tribal” grounds. It is a situation that is wrong and which works against the interests of achieving safer work practices. It has unfortunately found legislative expression in NSW—witnessed, in particular, by affording unions the high moral mantle of prosecutor.

But the realities of work do not fit this simplistic black/white view of the world. Work behaviour is far more complicated and grey than this. Unsafe work practices can occur with anyone at anytime. Most people intend to behave safely. Most OHS incidents occur because of conspiring sequences of events. Well-intentioned people make errors of judgement, mistakes, lapses of concentration or have inadequate knowledge or information. Sometimes OHS incidents are the result of reckless and unacceptable behaviour. But it cannot be presumed or predicted who will act unsafely simply because of their status in the work environment. Bosses, workers and union representatives are people who equally have the capacity to behave safely or unsafely.

The Review into national OHS laws spends considerable time in the Issues Paper asking who should be embraced in the OHS responsibility loop. But the discussions and questions leave a gaping omission by not discussing or asking how unions should, like everyone else be apportioned responsibility and liability. This omission is reflective of, and consistent with, a culture which pretends that unions don’t have liability for their actions in like manner to the rest of the community. In the OHS context this works against a proper comprehension and resolution of safety issues.

The reality is that unions and their representatives are an intimate part of the processes and cultures of work. Unions seek to influence and even control work processes (either directly or indirectly). They do this through industrial instruments, committees on which they sit and via direct influence with and over workers on work sites. Sometimes their influence and control can significantly exceed that exercised by managers. Whether that influence and control is positive or negative is not relevant to considering the design of OHS laws. Rather, it is the fact that unions have measures of control over work which is central to the OHS issue.

As a consequence, the IPA believes that unions should specifically be referred to in a model OHS Act as having responsibilities and liabilities under the duties of care.

6. Duties of Care

The most important key to resolving the OHS problems identified by the IPA is to ensure clarity and consistency under the duties of care provisions of the model Act. This is the first and necessary step to achieving national consistency.

6.1 Victorian Model

The Victorian OHS Act of 2004 is arguably the best model upon which the national model should be developed. It most appropriately allocates responsibilities and

liabilities to all participants in work situations within the consistent scope of what people “reasonably and practicably control”. The only omission is unions.

Sections of the Victorian Act which demonstrate the consistent application of “reasonable and practicable control” include:

PART 3—GENERAL DUTIES RELATING TO HEALTH AND SAFETY

Division 1—The Concept of Ensuring Health and Safety

20. The concept of ensuring health and safety

- (1) To avoid doubt, a duty imposed on a person by this Part or the regulations 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 those risks so far as is reasonably practicable.

21. Duties of employers to employees

- (1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

24. Duties of self-employed persons to other persons

- (1) A self-employed person must ensure, so far as is reasonably practicable, that persons are not exposed to risks to their health or safety arising from the conduct of the undertaking of the self-employed person.

25. Duties of employees

- (1) While at work, an employee must—
- (a) take reasonable care for his or her own health and safety; and
 - (b) take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace; and
 - (c) co-operate with his or her employer with respect to any action taken by the employer to comply with a requirement imposed by or under this Act or the regulations.

26. Duties of persons who manage or control workplaces

- (1) A person who (whether as an owner or otherwise) has, to any extent, the management or control of a workplace must ensure so far as is reasonably practicable that the workplace and the means of entering and leaving it are safe and without risks to health.

27. Duties of designers of plant

- (1) A person who designs plant who knows, or ought reasonably to know, that the plant is to be used at a workplace must—
- (a) ensure, so far as is reasonably practicable, that it is designed to be safe and without risks to health if it is used for a purpose for which it was designed; and
 - (b) carry out, or arrange the carrying out, of such testing and examination as may be necessary for the performance of the duty imposed by paragraph (a) ...

28. Duties of designers of buildings or structures

- (1) A person who designs a building or structure or part of a building or structure who knows, or ought reasonably to know, that the building or structure or the part of the building or structure is to be used as a workplace must ensure, so far as is reasonably practicable, that it is designed to be safe and without risks to the health of persons using it as a workplace for a purpose for which it was designed.

29. Duties of manufacturers of plant or substances

- (1) A person who manufactures plant or a substance who knows, or ought reasonably to know, that the plant or substance is to be used at a workplace must—
- (a) ensure, so far as is reasonably practicable, that it is manufactured to be safe and without risks to health if it is used for a purpose for which it was manufactured .

30. Duties of suppliers of plant or substances

- (1) A person who supplies plant or a substance who knows, or ought reasonably to know, that the plant or substance is to be used at a workplace (whether by the person to whom it is supplied or anyone else) must—

- (a) ensure, so far as is reasonably practicable, that it is safe and without risks to health if it is used for a purpose for which it was designed, manufactured or supplied ...

31. Duties of persons installing, erecting or commissioning plant

- (1) A person who installs, erects or commissions plant who knows, or ought reasonably to know, that the plant is to be used at a workplace must ensure, so far as is reasonably practicable, that nothing about the way in which the plant is installed, erected or commissioned makes its use unsafe or a risk to health.

6.2 Model “duties of care” clause for unions

Consistent with the Victorian approach, a clause encompassing unions could read as follows:

Duties of unions and union representatives who exercise control or part control over workplaces

A union or a union representative who has, to any extent, control of a workplace must—

- (a) ensure so far as is reasonably practicable, that persons are not exposed to risks to their health or safety arising from the conduct of the undertaking of the union or union representative.
- (b) co-operate with the employer of the workplace with respect to any action taken by the employer to comply with a requirement imposed by or under this Act or the regulations.

The IPA recommends that a clause of this nature covering unions in the duties of care be included in the model OHS Act.

Answers to specific questions in the National Review Issues Paper

The focus of this IPA submission is the resolution of appropriate duties of care in a model OHS Act. In answering specific Issues Paper questions (below), the IPA is addressing questions relevant to the duties of care within the context of our comments above.

Scope, Application & Definitions:

Q14: Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?

The terms “reasonable and practicable control” contained within the Duties of Care should form the centrepiece for a model OHS Act.

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

Q16: Should the model OHS Act include a ‘control’ test or definition? If so, why and what should it be?

A definition of a control test would be helpful. The definition used in the Victorian OHS Act should be considered as a model.

Q17: What should the role of control be in relation to determining who is a duty holder, the nature of the duty, the extent of the duty and the defences?

“Control” within the framework of “reasonable and practicable” should be the centrepiece of the legislation expressed in both the duties of care for duty holders and defences.

Q23: How and to what extent should the model OHS Act specify an employer's duty of care?

Q24: To whom should these duties be owed?

Employers should have a duty of care commensurate with what they reasonably and practicably control. The duties should be owed to everyone who can be affected by the work activity. The same should apply to all others involved in work activity.

Q25: How, and to what extent, should the model OHS Act specify the worker's duties of care?

Employees should have a duty of care according to what they reasonably and practicably control. That duty should include ensuring their own safety and the safety of any others who may be affected by their work.

Q26: Should the model OHS Act include duties of care for persons who are not performing work (eg. visitors to and workplace, members of the public)? If so, what should the duties be?

Yes. No-one can or should be kept out of the OHS liability requirements but accorded liability according to what they reasonably and practicably control. Visitors, members of the public and others should be included under the duties of care provisions, with wording probably modelled along the lines of duties of care for employees.

A specific, duties of care clause should be created for unions and union representatives. See our earlier comments.

Q31: Do current provisions for persons in control of a workplace clearly express who owes a duty to whom, and under what circumstances the duty is owed? If not, how could this be clarified?

This is the core cause of confusion in national OHS Acts because duties of care are expressed differently and, in the case of NSW, give rise to widely different OHS legislative outcomes. Achieving national consistency and clarity on the duties of care is the first and most necessary step to achieving national harmonisation. In fact, without consistency and clarity in the duties of care, national harmonisation is arguably not possible.

Q32: Should the model OHS Act specify that persons in control of a work area or a temporary workplace also have a duty? If so, to whom?

A work area or temporary workplace should be adequately covered if the duties, as discussed above, are framed appropriately.

'Reasonably Practicable' & Risk Management:

Q37. Should a test of "reasonably practicable" be included in the model OHS Act?

Yes.