

NATIONAL FARMERS'
FEDERATION LIMITED
ABN 77 097 140 166

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Submission – National Review into Model OHS Laws

Submissions – Issues Paper National Review into Model OHS Laws



"A strong, progressive and sustainable farming sector in Australia."

- *Progressive* - modern, innovative and adaptive to change.
- *Sustainable* - economically, environmentally and socially.
- *Farm sector* - farming businesses, agri-business and rural communities.

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1.0 Introduction

- 1.1 The National Farmers' Federation ("NFF") is the peak advocate for agricultural interests in Australia, representing the interests of producers in each State and for major commodities federally. The NFF is chartered with responsibility for issues which affect more than one State or commodity. The NFF's current member organisations are:

State Farm Organisations	National Commodity Councils
AgForce Queensland	Australian Cane Growers Council
New South Wales Farmers' Association	Australian Dairy Farmers Limited
Northern Territory Cattleman's Association	Australian Dried Fruits Association
Tasmanian Farmers' and Graziers' Association	Cattle Council of Australia
Victorian Farmers' Federation	Cotton Australia Limited
	Grains Council of Australia
	Ricegrowers Association of Australia
	Sheepmeat Council of Australia
	WoolProducers

- 1.2 The National Farmers' Federation (NFF) and its member organisations are committed to the reduction of workplace injury. The all too high incidence of workplace fatality and serious injury that lead to

permanent incapacity is a large cost borne by the agriculture industry and rural communities. These costs are borne in the terms of family upheaval and grieving, community distress, personal incapacity and isolation from community. This is not to mention the serious economic consequences for injured persons and business as well as the public perception of agriculture as an industry seeking to attract and maintain a long term labour force.

- 1.2 Workplace safety is importantly an integral component of a productive enterprise. Productivity improvements cannot be achieved unless there is investment in resources, including occupational health and safety (OHS). This is particularly important within the farming community as farms are recognised as high-risk workplaces.
- 1.3 The NFF and its member organisations have a history of working in their own right and collaboratively with OHS regulators and other stakeholders to lead improved workplace safety on Australian farms. This includes the development and implementation of farm specific OHS training, and practical safety guides, posters and management tools for use on farm.
- 1.4 Government needs to play a role in facilitating best practice in workplace safety. NFF believes that while it is important that industry maintains its proactive role, it is incumbent upon governments to ensure that legislative frameworks provide the means to achieve the goal of minimising injury at the workplace. Key features that the NFF believes frames an effective legislative structure include:
 - Emphasising the need for prevention through workplace education and assistance, rather than the allocation of blame and the application of punitive penalties after the fact;

- Creating a shared approach to the implementation of OHS in the workplace;
 - A more reasonable system of penalties, recognising that liability for OHS breaches may not just rest with the employer, but also employees, suppliers and manufacturers;
- 1.5 The NFF believes that part of the proactive role to be undertaken by the Federal Government is to provide a uniform system of legislation and a harmonised implementation across all jurisdictions. That National consistency in OHS was a major theme referred to by participants at the National Farm Health and Safety Conference held in Adelaide in September 2007 reinforces this position.
- 1.6 As such the NFF is supportive of the National OHS Review and welcomes the opportunity to provide the Panel with recommendations as to how Model OHS Laws should be shaped.

2.0 Context: Health and Safety in the farming sector

- 2.1 In 2007, the ABS states that there were approximately 147,000 businesses engaged in farming with an estimated value of agricultural operations exceeding \$5,000 per annum in Australia¹. More than half of these businesses have an estimated value of agricultural production of below \$99,000 per annum, representing a notable decline from the 2004-05 production values of around \$124,000 for the same sample. Agricultural operations utilise around 60% of Australia's landmass.
- 2.2 For 2007 the ABS reports that 334,000 people were engaged in the agriculture and services to agriculture industries² and estimates that of the people working in agriculture 65% are owner managers.³ 51% of people working in agriculture, fisheries and forestry are classed as employees for the purposes of workers compensation.⁴
- 2.3 Agriculture, Fisheries and Forestry is a priority industry within the National OHS Strategy. The Australian Safety and Compensation Council reports that the incidence rate of workers compensation claims in the industry (agriculture, fisheries and forestry) in 2004-05 as 27 claims per 1,000 employees. Whilst this remains higher than the all industries rate of 17 claims per 1,000 employees it represents a reduction from 33 claims per 1,000 employees in 1997-98.

¹ *Australian Farming in Brief 2007*, Catalogue Number 7106.0

² *Year Book Australia, 2008*, Catalogue Number 1301.0

³ *Australian Labour Market Statistics, July 2008*, 6105.0

⁴ Australian Safety and Compensation Council (2008) *Agriculture, Forestry and Fishing*: Information Sheet. Available online – url http://www.ascc.gov.au/NR/rdonlyres/82CD490A-B1DE-48DE-82F2-A642DB9A8845/0/ASCCfactsheet_Agriculture.pdf

2.4 *Beyond Common Sense*

Farm work places are one of the most difficult places to reach with policy instruments available to government. The reasons for this include:

“the presence of family members in the work place, the fact that many farm businesses are operated by people who are self-employed, and the geographical dispersion of farm businesses.”⁵

2.5 In 2006, the Australian Safety and Compensation Commission published a report that investigated options into improving the OHS outcomes for Australia’s agriculture industry. The study utilised Becker’s Health Beliefs Model to outline the importance of changing attitudes in the farming sector as being crucial to improving the OHS outcomes.

2.6 As part of the Health Belief’s model the perceptions held with regards to the expectations of actions and the threat of injury are taken into consideration when making behaviour choices. In particular the model looks at:

- Perceived benefits of action;
- Perceived barriers to action; and
- Perceived self-efficacy to perform action.

⁵ Sandell & Reeve, New Ways of Promoting Farm Health & Safety: Through analysing farmers’ perceptions of risk, Rural Industries Research and Development Corp,

2.7 The recommendations contained within the *Beyond Common Sense* report have been endorsed by the NFF as an underpinning philosophy on improving farm safety.

2.8 As such the submissions contained herein will where possible attempt to utilise the paradigms from *Beyond Common Sense* to analyse how model OHS legislation can be effective in seeking to improve occupational health and safety in the farming sector.

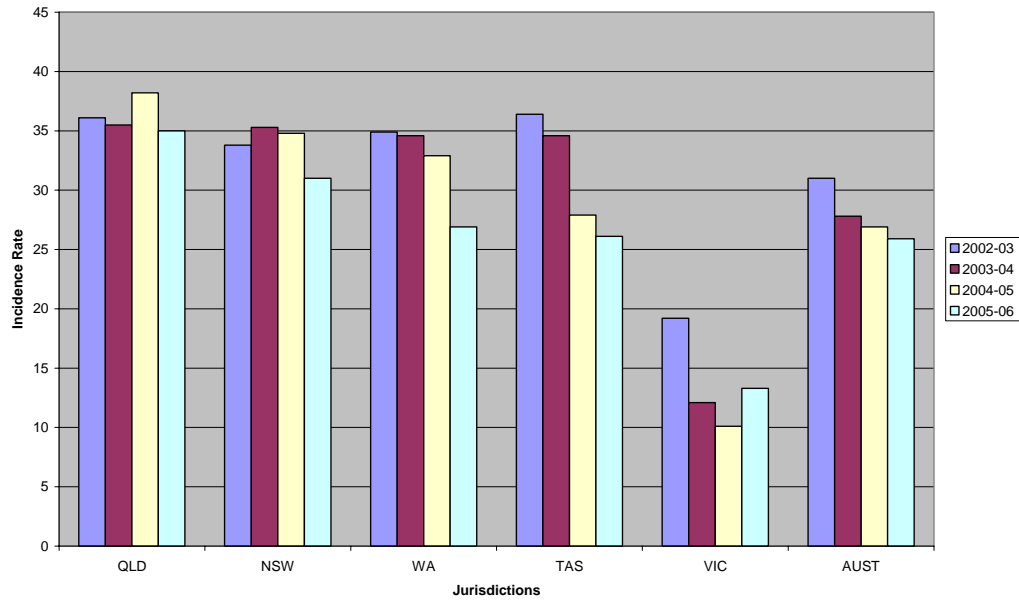
2.9 Comparison of OHS Standards in the Farming Sector

The NFF note that in the principles of review that have been handed to the Panel requires that there be no reduction or compromise in standards for legitimate safety concerns. The NFF respectfully submit that the best means of determining this is by analysing how model OHS legislation will promote and further the objectives of improving the health and safety performance of workplaces. In doing this it is the NFF's opinion a false economy to only examine the powers contained within such model legislation to successfully prosecute duty holders.

2.10 Figure 1 below provides a comparison of the performance of different jurisdictions in reducing workplace injuries in the Agriculture, forestry and fisheries industry. This comparison overwhelmingly points to the success of the Victorian OHS framework in providing safer workplaces in these industries over both the short and long term. This is despite arguments put forward by members of the trade union movement on the superiority of the NSW OHS system which accounts for over half of the successful prosecutions of all Australian jurisdictions.⁶

⁶ *Workplace Relations Ministers' Council "Comparative Performance Monitoring; Ninth Edition. p.17*

Figure 1 Agriculture, Fisheries and Forestry Incidence Rates (Claims per 1000 employees) serious claims



Australian Safety and Compensation Council (2008) Agriculture, Forestry and Fishing: Information Sheet.

3.0 Legislative Approach

- 3.1 As included above, the NFF believes that good OHS legislation should have a number of key principles. If objectives are included within model OHS legislation the NFF believes that these principles should guide the setting of these objectives.
- 3.2 The NFF notes that the objectives of the *Occupational Health and Safety Act 2000* (NSW) (**NSW OHS Act 2000**); and its predecessor the *Occupational Health and Safety Act 1983* have been used to narrow the scope of defences available under the Act.^{7,8} This has resulted in an undue focus by the court on specific events as opposed to the overall preventative efforts of employers in the adjudication of prosecutions under the Act.
- 3.3 The NFF would only support the inclusion of objectives within model OHS legislation if they promote a reasonable and fair approach to workplace health and safety with an emphasis on a shared approach to improving health and safety.
- 3.4 To ensure that objectives are seen in such a manner the NFF would recommend the inclusion of a principle of health and safety protection be included within model OHS legislation. It should be referred to within the objectives and provide reasonable direction to duty holders and courts as to the way that the objectives should be interpreted.
- 3.5 If objectives and principles of health and safety protection were to be included within the model OHS legislation, the NFF believe that the

⁷ *WorkCover Authority of NSW v. Comalco Aluminium Ltd* [1986] NSWIRC 3

⁸ Michael Tooma *Tooma's Annotated Occupational Health and Safety Act 2000* (2nd Ed, 2004), [1.28.05]

relevant provisions within the *Occupational Health and Safety Act 2004* (VIC) (**VIC OHS 2004**) would be the most appropriate for adoption.

4.0 Scope, Application & Definitions:

4.1 Scope

The NFF recommends that the general duties of care be tied to the undertaking of work. Other areas of law are more appropriate in dealing with the societal objectives of protecting the health and safety of members of wider community.

4.2 Model OHS legislation should include definition to provide guidance as to when a matter is related to the undertaking of work. The NFF believe that there will be times at workplaces in which non-work events may cause injury or illness but should not be covered by an OHS duty of care.

4.3 In particular on farming workplaces it is not uncommon for farmers to allow others not related to the farming business to undertake personal activities such as collect firewood or undertake recreational motorcycle riding or shooting. It is the submission of the NFF that a duty of care should not come into being as a result of individuals undertaking such activities within an unrelated workplace.

4.4 The conduct of work should be developed so that it only encompasses work as directed. A common OHS issue that has arisen in the shearing industry is shearers grinding cutters and combs at their own home. This is despite the provision of grinders at the workplace. The NFF submits that in situations such as this a duty of care should not exist.

4.5 Definitions

The NFF believe that there are a number of key terms within model OHS legislation that the provision of a statutory definition would ensure common understanding and interpretation across the jurisdiction.

These include:

- reasonably practicable (or other term that may be adopted as the requisite standard for duty holders to meet).
- employer, employee, and any other specific duty holder mentioned in model OHS legislation.
- undertaking of work.
- control.

In the economic analysis of NSW OHS law commissioned by the NSW Government reduced uncertainty through the use of plain English in the NSW OHSA 2000 was seen as one of the positive features that led to improved OHS performance⁹.

The NFF believes that the inclusion of plain English definitions within model OHS legislation would increase these benefits.

⁹ ACIL Tasman (2007) *Occupational Health Safety: Economic Analysis*: Final report prepared for WorkCover

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

5.1 Control

The NFF believes that the notion of control is important in the development of general duties under model OHS legislation. Model OHS legislation must be cognisant of the actual extent of control able to be exercised by duty holders.

- 5.2 On the issue of control, the NFF is supportive of the approach taken by the High Court of Australia in *Slivak and Lurgi*.¹⁰ In this decision a joint majority judgement recognised that the limit of control of a designer under OHS law to be within the boundary of matters over which the designer can reasonably be expected to control. In doing so the High Court differentiated the duty of the designer from that of an employer.
- 5.3 Likewise the NFF believe that general duties of care should be limited such that the breach of a downstream or upstream duty holder does not necessarily result in others breaching their duty of care.
- 5.4 For example in a farming situation when contractors are engaged with specialist machinery and skills to undertake specific tasks the farm business should be able to rely upon the contractor to undertake their business in a safe manner and to be exercising the requisite control over any employees of the contractor.
- 5.5 The primary means for establishing such control in the opinion of the NFF is through the use of the employment relationship.

¹⁰ *Slivak v Lurgi (Australia) Pty Ltd* (2001) 205 CLR 304

5.6 *Duties of care for employers and employees*

The NFF believes that a similar test/requisite standard should apply for all duty holders under model OHS legislation. This is in line with the recommended objectives of promoting a shared ownership of workplace parties to improving workplace health and safety.

6.0 Consultation, Participation and Representation:

6.1 Consultation

Consistent with the belief that a shared approach within the workplace to improving health and safety is important, the NFF believe that there should be a right of consultation within model OHS legislation.

Prescribed methods of consultation however are unlikely to provide a genuine forum of consultation within small businesses such as farming enterprises.

- 6.2 As such the NFF recommend that “other agreed methods of consultation” such as articulated within s.16(c) of the NSW OHSA 2000 be adapted as a suitable standard of consultation. Regulators should seek to provide specific small business information on different types of consultation that may be adopted in a workplace.

6.3 Right of Entry

The NFF is concerned that the inclusion of right of entry provisions for authorised trade union representatives within model OHS legislation may be used by trade unions for reasons other than promoting health and safety within the workplace. This could include the recruitment members in non-unionised workplaces and as a means to pursue other industrial objectives such as leverage in enterprise bargaining.

- 6.4 If model OHS legislation was to contain a right of entry for authorised trade union officials the right should contain restrictions on the entry and powers subsequent to entry. In the belief of the NFF these should be:

- Entry should only be allowed to trade union officials bearing appropriate authority from the OHS regulator. This authority should only be gained by the union official by undertaking a minimum level of OHS training or education.
- That disqualification from any industrial right of entry will automatically disqualify the union official from right of entry under OHS legislation.
- That the authorised official can be disqualified from the right to entry under OHS legislation should they seek to use their right of entry for an improper purpose.
- That entry can only be exercised in workplaces in which the relevant trade union has members or where employees are eligible to become members of the union.
- That entry can only be for the purposes of consultation about suspected breaches of the model OHS legislation. Notice of entry must be provided to the employer at least 24 hours prior to the intended entry. Notice must specify the suspected OHS breach.
- Upon entry the official has no rights to enforce OHS legislation. Rather the role as mentioned above is to consult with employers and employees to assist them in controlling risk in the workplace. If the official believes that such a risk has not been adequately addressed they would have the ability to notify an inspector of the relevant OHS regulator.

7.0 Regulator Functions, Powers & Accountability:

7.1 *Education and Advice*

The NFF recommends that the model OHS legislation provides a broad legislative duty for regulators to promote the practical nature of safety management and the beneficial productivity gains that it can bring. In particular the NFF recommend that an essential part of this provision of advice is through the provision of face to face information at the workplace.

7.2 As such the NFF believes that the primary advisory function of OHS regulators should be separated from the enforcement function. This is because in the experience of the member organisations of the NFF, employers and self employed persons engaged in primary production are reluctant to seek advice from workplace health and safety inspectors. This reluctance is based on the belief that seeking advice of an inspector may be accompanied by burdensome enforcement action. This is not an unlikely response from a small business operator faced with the uncertainties created by the imprecise nature of the general duties of the relevant OHS Acts.

7.3 The NFF notes that most of the Regulators across the different jurisdictions have implemented a workplace advisory function that is discrete from its inspectorate. One such model that the NFF would recommend for the inclusion within model OHS legislation would be the establishment of a standalone advisory branch that can be easily differentiated from that of the inspectorate. The WorkCover NSW Business Advisory Branch with its small business website, material developed in conjunction with industry and, Business Advisory Officers who can offer workplaces an OHS audit and action plan and training is

an example of such a model. NFF members within NSW however report that the continued use of the same branding as the inspectorate has proved to be an impediment to the adoption of many of the services offered by the Business Advisory Group.

- 7.4 The position taken above however is not mutually exclusive to the belief that a workplace health and safety inspectorate's first response to the workplace should be the provision of advice, as opposed to enforcement action. One such means for placing advice as the primary action of an inspector at a workplace visit has been recently implemented by WorkCover NSW in the form of a recorded advice mechanism – Confirmation of Advice Received (CARs).

8.0 Compliance, Enforcement & Prosecutions

- 8.1 The use of prosecution of breaches of duties under OHS legislation is only a part of the wider strategy that the regulator uses to promote and further the objectives of OHS legislation. This strategy includes the proactive provision of advice, assistance and persuasion, and the use of enforceable notices.
- 8.2 Given this, the NFF believe that the following values should be incorporated in the provisions regarding prosecution contained within model OHS legislation:
- Breaches of general duties under model OHS legislation should be the subject of civil proceedings.
 - Proceedings for breaches of model OHS legislation should only be brought by an agency of the State.
 - The burden of proof as to whether the requisite standard of safety was met should be borne by the prosecutor.
 - Defences should be made available within model OHS legislation that encourage the adoption of safe systems. This should be done by allowing the reliance upon meeting regulation, compliance codes or advice given by a regulator to be defences against an alleged breach of duties under model OHS legislation.
 - A right of appeal to the Supreme Court's appellate jurisdiction to ensure in each state and to the High Court of Australia under s.73(ii) of the Australian Constitution.
 - That model OHS legislation should not contain provisions that automatically deem officers of a body corporate guilty of an offence on the basis of corporate guilt.

8.3. *Civil or Criminal Offences*

General duties contained within existing Australian OHS legislation are by their nature imprecise. That is rather than specifying or condemning a particular action from the duty holder, they define a performance standard of ensuring safety as far as is reasonably practicable (either within the duty itself or in combination with available defences). As such a duty holder may be found in breach of the duty of care without possessing the normal criminal requisite of *mens rea* (that is the relevant state of knowledge or intent to commit a crime). As such the NFF believes that it is inappropriate for general duty breaches to be matters of criminal jurisdiction.¹¹

- 8.4 Member organisations of the NFF have highlighted prosecutions of members for breaches of the general duty of care under OHS legislation arising from isolated incidents not reflecting their general commitment to safety at their workplace. The recording of a criminal conviction against these individuals occurs despite a genuine commitment to safety. The recording of such convictions can affect standing of individuals in businesses, trades and professions, as well restricting their freedom to travel internationally.
- 8.5 Because the use of civil proceedings as an enforcement mechanism achieves the same outcome in meeting the objectives of the OHS legislation as a criminal offence, the NFF considers civil proceedings a more appropriate avenue.
- 8.6 In cases where criminal negligence or recklessness exist, the NFF believes that these cases are most appropriately brought in the

¹¹ Adrian Brooks, 'Rethinking Occupational Health and Safety Legislation' (1988) 30(3) *Journal of Industrial Relations*. 347

traditional criminal jurisdiction. Model OHS legislation could facilitate such action by requiring a coroner (in the case of a workplace fatality) or the regulator (in other cases) to provide the necessary brief to the relevant State Department of Public Prosecution in cases in which they believe criminality to be present.

8.7 Right to Prosecute

The decision to undertake prosecution under model OHS legislation should be seen as a serious decision that carries onerous duties towards the public, the court and the defendant. This decision should only be made in the context of the strategy adopted by the agency charged with promoting and furthering the objectives of OHS legislation in the best interests of the community as a whole.

- 8.8 As such the ability to commence any prosecution under model OHS legislation should be a power only held by the State. .
- 8.9 Chris Maxwell QC, in his report (**the Maxwell Report**) reviewing the *Occupational Health and Safety Act 1985* (VIC) (**VIC OHSA 1985**) outlines convincingly that the right to commence OHS prosecutions should remain exclusively as a function of the State¹². In doing so, Maxwell refuted arguments raised in favour of allowing trade unions to commence prosecutions under OHS law. In particular Maxwell identifies that allowing trade unions to prosecute for breaches of OHS law prejudices the development of trust between unions and employers. Such trust is necessary to continuing the improvement of workplace health and safety across Australia.

¹² Maxwell, C. *Occupational Health and Safety Act Review* (1994). P. 360-362

- 8.10 The existence of statutory provisions allowing prosecutors to collect a portion of the fine (a moiety) ordered from an OHS prosecution such as contained within s.122 of the *Fines Act 1996* (NSW) further erode such trust. Model OHS legislation should not allow the provision of a moiety.
- 8.11 Further to prejudicing the development of trust between employers and trade unions, giving the right to prosecute to parties other than an independent body of the State also weakens employer trust in OHS law overall. This threatens employer engagement with campaigns that promote practical changes to the workplace that will reduce the risks faced by people at work.
- 8.12 As such the NFF recommends against providing parties other than the State from commencing OHS prosecutions. Further model OHS legislation should preclude the awarding of a moiety by the Court.

8.13 *Burden of Proof*

The NFF believes that the prosecutor of alleged OHS failures should bare the full onus of proof, as to whether the required standard of safety performance was met. That is, the general duties expressed within Model OHS legislation should not utilise strict liability or absolute duty provisions.

- 8.14 The issue of using absolute and strict liability in the Commonwealth Legislation has been examined by the Federal Senate Standing Committee for the Scrutiny of Bills¹³. The report contained a number of principles and recommendations that were set out as a starting point for Commonwealth policy on strict and absolute liability. These principles are used by the NSW Parliament's Legislation Review

¹³ Senate Standing Committee for the Scrutiny of Bills, Sixth Report of 2002, Application of Absolute and Strict Liability Offences in Commonwealth Legislation,

Committee when examining Bills before Parliament. In particular the following are of note:

“

- fault liability is one of the most fundamental protections of criminal law; to exclude this protection is a serious matter;
- strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; ...”¹⁴

- 8.15 Absolute duties of care, such as used in Part 2 Division 1 of the NSW OHS Act 2000 and within sections of Part 3 Division 2 of the *Workplace Health and Safety Act 1995* (QLD) (**QLD WHSA 1995**) forbade the exposure of employees and others to risks at the workplace. Whilst these defences are subject to the statutory defences made available within the Acts, the expression itself is symbolically disabling to employers, particularly those in the agriculture industry.
- 8.16 This is because it both reduces the employer’s perceived self-efficacy to adopt safer working behaviours and reduces the perceived benefits of such action. That is, farming employers due to the nature of their workplace will never feel that they can eliminate all risk in their workplace; therefore they feel disempowered to actively put into place controls to manage risk. Further the perceived benefits to action are reduced because it is felt that no matter what is achieved in seeking to manage safety, should something go wrong the fault will be sheeted at the feet of the employer. Particularly in the NSW jurisdiction these perceptions have been hardened by what is perceived as a set of

¹⁴ Legislation Review Digest, Legislation Review Committee, Parliament NSW Legislative Assembly. [Sydney, NSW] : The Committee, 2005, No 3

unfair and unrealistic jurisprudence surrounding the general duties under the NSW OHSA 2000.¹⁵

- 8.17 One of the major reasons proposed by supporters of the maintenance of the absolute duty of care is that of regulatory efficacy. If there was a superior regulatory efficacy from the stating of duties of care in an absolute nature, then it should be able to be argued both in terms of the capacity for the regulator to properly utilise prosecution as a compliance tool; and ultimately in the measures that are used to determine OHS performance.
- 8.18 The Maxwell Report¹⁶ however dismissed the supremacy of an absolute duty of care on the first of these grounds drawing upon the rationale in *Chugg v. Pacific Dunlop*.¹⁷ In this case Deane J expressed the belief that prosecutor has resources of the Government to undertake this task and indeed may have “*more ready access to expert advice than the accused employer*”.¹⁸ As such the use of a fault element within general duties of care can be seen not to hinder the use of prosecution as an appropriate compliance tool when required.
- 8.19 The use of an absolute duty of care on the second ground of comparison also comes under scrutiny. This scrutiny can be seen when comparing the incidence rates recorded in the different OHS jurisdictions. The recent *Comparative Monitoring Report* released by the Workplace Relations Ministers Council provides a basis for

¹⁵ For further information on the jurisprudence on the general duties contained within the *Occupational Health and Safety Act 2000* (NSW) see Combined Employer Group Submission concerning the Discussion Draft of the Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Bill 2004

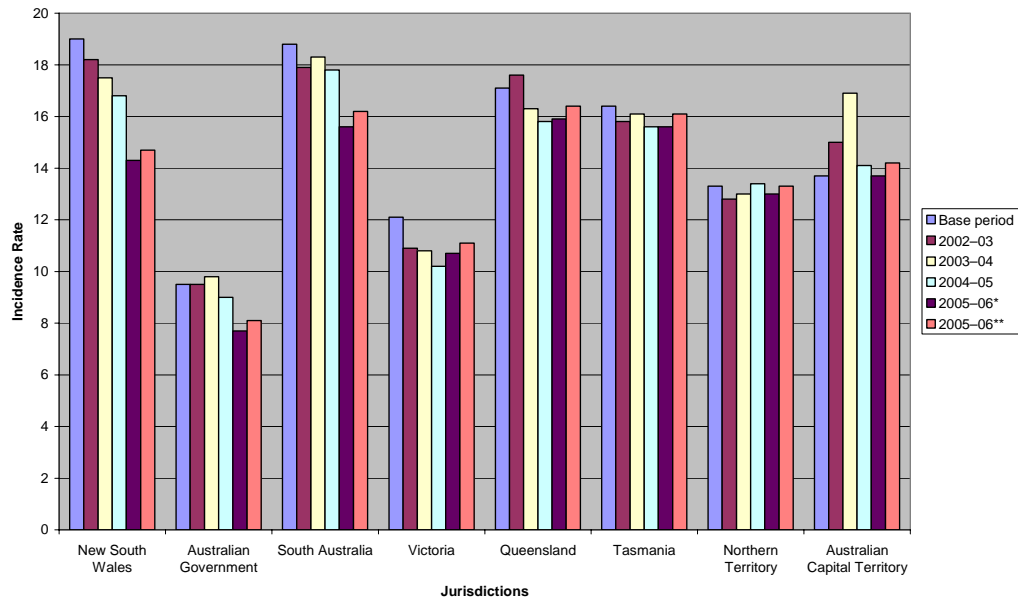
¹⁶ Maxwell, C. *Occupational Health and Safety Act Review* (1994)

¹⁷ *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249

¹⁸ *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 254.

comparing occupational health and safety performance of Australian jurisdictions. This report reveals that the jurisdictions utilising an absolute liability (NSW and QLD) do not have superior outcomes in relation to OHS performance with regards to comparative incidence rates for serious compensated injury and musculoskeletal claims.¹⁹ This can be seen in Figure 2 below:

Figure 2 Incidence Rates (Claims per 1000 employees) serious compensated injury and musculoskeletal claims by selected jurisdictions



Source: Workplace Relations Ministers' Council "Comparative Performance Monitoring; Ninth Edition.

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8.20 On the basis of these comparisons there is no superior regulatory efficacy associated with the use of absolute duties within the duty of care. The NFF therefore recommends that any model OHS legislation should embrace the normal underpinning legal principle of for fault

¹⁹ Workplace Relations Ministers Council (2008) Comparative Performance Monitoring , 9th Report

elements. That is with the requisite standard to be proved by the prosecutor. As such the NFF would recommend the adoption of similar wording to the general duties contained within the VIC OHS 2004.

8.21 Defences

The NFF believes that defences within model OHS legislation should not be narrowly defined. Rather that they should seek to encourage the adoption of safe systems of work.

8.22 The current approach to the defences made available within s.28 of the NSW OSHA 2000 is for them to be narrowly interpreted by the Court.

The reasoning for such an interpretation is to give effect to the objectives of the Act, which have been established to “reflect[ing] the increasing concern with safety in the working community”.^{20,21}

8.23 The effect of such narrow interpretation was presented to the NSW Government by a Combined Employers Submission on the exposure draft Occupational Health and Safety Amendment (Workplace Fatalities) Bill 2005 (NSW).²² The submission in particular highlighted that regardless of the safety systems in place that it was unlikely that an employer prosecuted would be able to successfully raise a defence under s.28.

8.24 The difficulty of actually making a defence against a breach of the NSW OSHA 2000 general duty of care was acknowledged by the Minister responsible for its passing into legislation, the Hon. Jeff Shaw

²⁰ Workcover Authority of NSW v. Comalco Aluminium Ltd [1986] NSWIRC 3

²¹ Michael Tooma, above n.19 [1.28.05]

²² Combined Employer Group Submission concerning the Discussion Draft of the Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Bill 2004

QC, in a paper that he presented to the NSW Labor Council's Occupational Health and Safety seminar in August of 1994. Then, speaking as the Shadow Minister for Industrial Relations, Shaw stated [emphasis added]:

“These two sections raise problems. The duty in section 15 is absolute, and section 53 allows the employer a defence when he or she can prove, on the balance of probabilities, that it was not reasonably practicable to do so. This suggests that the sections 15 and 53 together create a duty on employers to ensure safety from which they can escape only in **unusual circumstances**.”²³

- 8.25 The approach of narrowly defining defences made available under OHS law has the effect of disempowering employers to take proactive steps required to manage safety in their workplaces. This is similar to that argued above with regards to how duties of care are expressed.
- 8.26 The NFF instead believes that defences available under the Act should be used to encourage employers into adopting safety systems. For smaller businesses such as farms, the defences available under model OHS legislation in particular should be used to encourage the physical implementation of practical hazard management.
- 8.27 The Maxwell Report recommended that compliance codes and Regulations should be used as a means through which duty holders could comply with the VIC OHSA 2004. The rationale given by Maxwell for constituting compliance with a regulation or compliance code as compliance with the VIC OHSA is to encourage the adoption of the safe systems that they codify.²⁴

²³ J.W. Shaw and Adam Searle ‘The *Occupational Health and Safety Act 1983* (NSW): Challenges for the Future’ (1995) 37(1) *Journal of Industrial Relations* 72, 75

²⁴ Maxwell, C. *Occupational Health and Safety Act Review* (1994). P.359.

- 8.28 This is not to suggest that the NFF is seeking to return to a prescriptive system of OHS regulation. Rather it proposes that model OHS legislation should require regulators to work with industry to develop simple, practical and flexible means to control high risks hazards. These should be communicated as part of a broad legislative requirement upon regulators to promote the practical nature of safety management and the beneficial productivity gains that it can bring.
- 8.29 Further to this model OHS legislation should provide that when such guidance has been adopted that it is available as a defence against any charges laid for breach of the general duty of care.
- 8.30 Utilising the Health Beliefs model, the NFF believes that the adoption of this proposal will have beneficial developments on safety behaviour in the agriculture industry. This is through the combination of proactively empowering farming employers through using their expertise to develop practical solutions and promoting the ability of farming employers to make the changes required on their own farm for little monetary expense. The proposal also would reduce the disempowering effect of not believing that any effort will ever enable them to meet their legal requirements.
- 8.31 The NFF notes that presently OHS regulators across Australia are seeking to adopt an approach similar to that described within the above proposal. This is being done through working with industry and providing advice into workplaces through without threat of compliance action. Recent announcements by the NSW Government point to WorkCover NSW's new focus on education, information and assistance as being instrumental in a decline of workplace injury in NSW to its lowest level in 20 years. This reduction is readily discernable in figure

2. This achievement reinforces the NFF's belief that these changes should be backed by legislative reform.²⁵

8.32 Right to Appeal

The NFF believe that an integral feature of model OHS legislation should be the inclusion of a clear pathway of appeal for defendants. This should include via the Supreme Court of each jurisdiction and through the operation of s.73(ii) the Australian Constitution to the High Court of Australia.

8.33 Further the NFF does not support the creation of a right for prosecutors to appeal against acquittals on the basis of placing defendants in jeopardy of conviction after being acquitted. The NFF notes that it is accepted position that courts do not hold general appellate provisions to give the Crown the right to appeal against acquittals. This is a right only allowed with specific statutory provision.

8.34 It is noted that the right to appeal is one not enshrined in common law, but is created by statute. As such the drafting of the right to appeal within the model OHS law will determine the "*scope and effect of any right to appeal*".²⁶

8.35 The NFF believes that the right to appeal is an important facility in providing legitimacy of law and for ensuring consistency through common judicial supervision. In particular the NFF oppose the use of

²⁵ The Hon. John Della Bosca, 'Workplace Injuries in NSW lowest in 21 years.'(Press Release, 26 April 2008).

²⁶ Professor Ron McCallum, Peter Hall QC, Adam Hatcher and Adam Searle (2004) *Advice in relation to workplace death, occupational health and safety legislation and other matters*: Report to WorkCover Authority of NSW, p.48

privative clauses such as those contained within the legislative framework of the NSW OHS jurisdiction.

- 8.36 The original courts of jurisdiction for proceedings under the NSW OHS Act 2000 are the Local Court and the Industrial Court of NSW (ICNSW – formerly the Industrial Relations Commission of NSW in Court Session).²⁷ Appeals against decisions handed down by these courts are heard by the Full Bench of the ICNSW.²⁸ Due to the privative clauses contained within s.179 of the *Industrial Relations Act 1996* (NSW), no right to appeal a decision by the Full Bench of the ICNSW exists. Amendments made to s.179 in 2005²⁹ further restricted judicial supervision of the ICNSW to allegations of the Court overstepping its jurisdiction. Since the 2005 reforms this has only been able to be implemented after any right to appeal to the Full Bench of the ICNSW has been exercised.
- 8.37 The perceived lack of procedural fairness presented by the operation of the privative clauses has led to the recent instances in which both the jurisdiction and decisions of the ICNSW have been challenged on a range of grounds. These include the constitutional ability of an arbitral body to deal with criminal jurisdiction,³⁰ and seeking appeal under the *Criminal Appeal Act 1912* (NSW).³¹

²⁷ s.105 *Occupational Health and Safety Act 2000* (NSW)

²⁸ s.197 *Industrial Relations Act 1996* (NSW)

²⁹ *Industrial Relations Amendment Act 2005* (NSW)

³⁰ *Powercoal Pty Ltd and Another v the Industrial Relations Commission of NSW and Another* [2005] NSWCA 345

³¹ *Kirk Group Holdings Pty Ltd and Another v Workcover Authority of New South Wales and Another* [2006] NSWCA 172

- 8.38 These types of appeal have been widely perceived in NSW as a somewhat artificial attempt to obtain procedural fairness within in a court of general criminal jurisdiction.
- 8.39 The NFF would propose that it would be far better for the matter for the proponents of these types of appeal to have had a statutory right of appeal to the NSW Supreme Court. This would then by the operation of the Commonwealth Constitution provide a mechanism allowing an application for special leave to appeal to the High Court of Australia. Such an appellate mechanism would have given the High Court of Australia the opportunity to be active in shaping the jurisprudence surrounding OHS across all jurisdictions.
- 8.40 It is the NFF's belief that it is essential for the High Court of Australia to play such a role to ensure that a uniform enforcement of model OHS legislation is undertaken. As such the NFF agrees with the sentiments expressed by McHugh J's obiter dicta from *Kable v DPP (NSW)*³²:

Without the continued existence of a right of appeal from the Supreme Court of each State to the High Court, it would be difficult, indeed probably impossible, to have the unified system of common law that the Constitution intended should govern the people of Australia...

a State law that prevented a right of appeal to the Supreme Court from, or a review of, a decision of an inferior State court, however described, would seem inconsistent with the principle expressed in s 73 and the integrated system of State and federal Courts that covering cl 5 and Ch III envisages."

- 8.41 A comparison of the decision of the High Court of Australia in the matter of *Slivak v Lurgj (Australia) Pty Ltd*³³ to that of the Full Bench of

³² (1996) 189 CLR 51

³³ *Slivak v Lurgj (Australia) Pty Ltd* (2001) 205 CLR 304

the Industrial Relations Commission of NSW in *WorkCover Authority of NSW v Arbor Products International (Australia) Pty Ltd*³⁴ highlights the above. Both cases considered the duty of care owed by designers and manufacturers under OHS legislation. An analysis of both judgements reveals a possible discrepancy within the approach of the two courts as to the obligations under these duties with regards to how it accounts for factors that may be outside of its control.

- 8.42 Whilst there has been an academic account that has sought to distinguish the two approaches,³⁵ the NFF believe that the ability to appeal *Arbor* to the High Court of Australia would have provided a preferable solution. This would have allowed the High Court to further its development of OHS jurisprudence providing certainty for all Australian designers, manufacturers and suppliers as to how to meet their duty of care under OHS legislation.
- 8.43 In addition to the arguments, the NFF believes that an enshrined path of appeal to the High Court of Australia will provide greater legitimacy and acceptance in OHS law by all sectors of the community. This will be an essential role of model OHS legislation in engaging stakeholders to meet its objective of improving the OHS performance of Australian workplaces. In particular, the NFF believes that an increased confidence in the legal framework of OHS is important to engaging persons working on farms to adopt safer work practices.

8.44 Liability of Officers

The NFF does not support the deeming of an offence against officers of a corporate body on the basis that the conviction of individuals

³⁴ *WorkCover Authority of NSW v Arbor Products International (Australia) Pty Ltd* [2001] NSWIRComm 50; (2001) 105 IR 81

³⁵ Peter Rozen "Suppliers Duties under OHS Legislation", 2 (2001) *Australian Journal of Labour Law* 14

without fault is both an unfair and unacceptable outcome from a legal system.

- 8.45 The NFF would only support offences against officers of the company in which personal liability was to be sustained by the prosecutor. Any such offence should take into account a realistic notion of personal control.
- 8.46 As mentioned above, in instances in which personal actions were seen to be criminally negligent then it is appropriate for the matter to be dealt within in the relevant criminal jurisdiction.

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