Work safety too important to be left to unions

Ken Phillips

Why is it that debate over work safety laws seems to be caught up in party political point-scoring, rivalry between the States and the federal government, and warfare between unions and employers?

Surely the issue is too important for this—at stake is the well-being and lives of every Australian who attends any workplace. Consequently, it's important to understand how work safety laws have developed and identify problems. A pathway through the politics needs to be found.

Work safety laws have a straightforward task. They need to guide, encourage and enforce the highest possible work safety behaviour. The target, even if it seems impossible to achieve, must be for zero injuries and deaths in all work situations. But, as with road laws, the practical challenge is how it is achieved.

Road laws have achieved a high level of policy consensus across Australia. There is significant co-operation between the States resulting in similar management approaches to drink-driving, speeding, policing and prosecutions. States will try different things and learn from each other. About the only time political point-scoring occurs is when demands are made for more road funding. Most importantly, all drivers have imposed upon them a legal requirement to drive safely.

But these same levels of co-operation and consistency across Australia on road safety are not happening with work safety. Similar work safety incidents will lead to prosecution and conviction in one State but not another. Huge fines will occur in one State but small fines in another. Employees have significant responsibility to behave safely in some States but low responsibility in others. WorkCover authorities work closely with and assist businesses in some States, yet refuse to supply help in other States. Any co-operation is at the comparative margins rather than the core issues.

The international principles of work safety laws are clear. The benchmarks were established under the Robens principles (from a UK inquiry in the 1970s) and the International Labour Organisation's Convention (ILOC) 155 to which Australia is a signatory. These principles hold that all persons involved in work should be held liable and responsible for what they control given what is reasonable and practicable in the circumstances.

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Until the late 1990s, most Australian States generally followed these principles in their work safety laws to some degree. NSW, however, breached the principles by applying presumption of guilt against employers without consideration of control, but didn't follow through with aggressive prosecutions.

Around the turn of the century, work safety laws started to be pulled in several directions by powerful forces.

A key force emerged from an apparently unlikely source: the anti-globalisation movement. This portrays corporations as evil and needing to be regulated by the global community. The concept fits neatly with the legal idea in employment law that the employer 'controls' the employee. The two concepts are natural partners. The idea of class consciousness in the work situation holds that the employer/corporation class is all-powerful and will systemically seek to exploit the employee class.

In the late 1990s, these concepts found legal form in amendments to the Federal Criminal Code. In a massive shift from centuries of accepted criminal law in which only individuals were held liable for criminal actions, Australian criminal law was changed so that a legal collective of people, a corporation, but only a corporation, is now held to be capable of committing criminal acts. But the criminal code has no effect unless it's applied in specific legislation. This is what was attempted in Victoria.

In 2000, the Victorian Government attempted to change its work safety laws to reflect the new criminal code and hold corporations criminally guilty for work safety offences. Managers were to be jailed for the criminality of the corporation. The public sector and work done by volunteers were excluded. This meant that criminality under the proposed laws was to be tied to a person's legal status and was dependent upon the payment of money for work. There was community uproar and the Bill was defeated in the Victorian Upper House.

When the Victorian Government gained control of the Upper House it did not attempt to reintroduce these laws. Instead, it introduced new work safety laws which display the closest adherence to the Robens and ILOC 155 princi-

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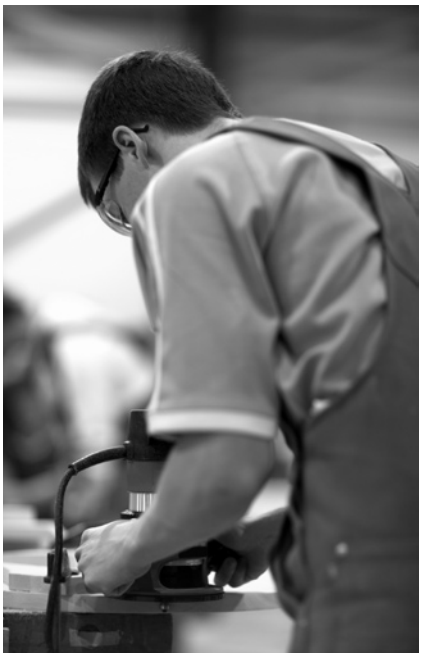
ples in Australia. The 2004 laws apply exactly the same statutory liability to an employee as they do to an employer. This sends powerful signals that everyone must apply equally strong measures of due diligence to work safety. Further, the laws created a break-through by enabling the WorkCover authority to give advice to businesses on safety and for the businesses to be able legally to rely on that advice. No other State has made a similar advance. From a bad start Victoria has become the leader.

But running counter to this positive development is the Australian Capital Territory. In 2003, the ACT passed a modified version of the corporate manslaughter laws that Victoria had earlier attempted. Corporate criminality in work safety laws now applies in the ACT, reflecting the structure of the federal criminal code. But the Commonwealth passed laws exempting Commonwealth-owned corporations from the ACT Act. In effect, the Commonwealth refuses to have its own corporate criminal code applied to itself, but allows the private sector to suffer under such laws. In this respect, work safety laws have developed into a shambles of inconsistent double standards.

NSW also moved in an aggressive direction in 2000. Under a new Act, it reinforced statutory presumption of guilt against employers and enabled unions to prosecute and receive half the fines collected from successful prosecutions. The Robens/ILOC 155 principles are only applied if a legal defence is mounted, creating a distortion of the work safety principles rather than an application of them. There is no trial before a jury and no rights to appeal. In 2005, NSW created first-offence jailing provisions.

Around the year 2000, prosecutions began to leap in NSW and, with only one-third of Australia's workforce, NSW now accounts for 63 per cent of prosecutions. The stacked laws result in a 96 per cent conviction rate and unions are making huge sums of money.

The IPA released a report in October this year (*The Politics of a Tragedy*, available at www.ipa.org.au) which raised serious concerns not only about the laws but about the integrity of the NSW prosecution processes as well. The failure to prosecute a government department and a union majority-owned labour hire company are just two examples amongst many leading to these concerns.



This worker **wants** to work safely

The business community has largely been left floundering in the debate. Bad behaviour by one corporation, such as Hardies in restructuring offshore to avoid asbestos compensation claims, is used against all business. Work safety incidents are frequently used as public relations opportunities.

The Tasmanian 2006 Beaconsfield mine disaster is one example. Tasmania has just given union officials the powers of work safety inspectors, seemingly starting a move in a NSW-type direction.

The politics of work safety has taken on an additional direction with the Commonwealth now offering its workers' compensation scheme (Comcare) to large businesses who trade nationally. In entering Comcare, businesses enter the Commonwealth's work safety laws, thereby escaping State laws. Victoria has mounted a High Court challenge and the States' rights debate has intruded into work safety.

In this environment the movement toward vitally important harmonisation and improvement in work safety laws has come to a stalemate. In fact it is regressing.

And no-one in this debate is purer than anyone else. Unions delight in claiming that only they can look after the safety of workers. Business has generally cowered under a public relations assault.

Yet unions have frequently proven that they are compromised on the issue. The Cole Commission into the construction sector produced significant evidence that construction unions have rorted work safety to achieve industrial relations outcomes. In NSW, unions' commercial interests have despoiled work safety laws and practices. Unions seek the advantages of high moral posturing, yet where they exercise work site control, they deflect liability.

Australia's work safety regimes are being pulled in many opposing directions. Victoria has the benchmark for positive directions and NSW the benchmark for negatives. And then there's a mix of forces from the other States and the Commonwealth.

What is needed is a sharp focus on work safety principles. At the centre of that should be the concept that everyone who is involved in work must be held responsible and liable for the matters over which they have reasonable and practical control. This must apply to everyone, including employers, employees, unions, managers, contractors, suppliers, and the government and private sector in equal measure. To do anything less is to compromise safety.

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