

***Response to the New South Wales Review of the
Occupational Health and Safety Act 2000 - Based
on the Review Discussion Paper June 2005***

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1. The Institute of Public Affairs

This analysis is produced by the Work Reform Unit of the Institute of Public Affairs. The IPA is a free-market think-tank. The Work Reform Unit focuses on work regulation and management. Occupational Health and Safety laws are a vital aspect of work regulation. More analysis of OHS laws can be found on the IPA Website at www.ipa.org.au (at 'work reform' then 'work safe').

2. Summary of Responses

The IPA has identified numerous faults in the NSW OHS laws.

In summary, the laws:

- a) Apply different measures of work safe responsibility and liability to different persons in the workplace, thus encouraging unsafe work cultures.
- b) Distort, rather than apply, the internationally accepted principles of OHS legislation, where parties are to be held liable for what they 'control' within bounds of what is 'reasonable and practicable'.

Specifically the laws breach notions of justice by:

- a) Creating presumption of guilt for certain parties and presumption of innocence for others, even though the offences in question are identical.
- b) Denying full rights of appeal.
- c) Conducting OHS prosecutions in a jurisdiction (the Industrial Relations Court) which is not competent for that purpose.
- d) Allowing parties (unions) who have conflicts of interest to conduct prosecutions.
- e) Encouraging conflict of interest by allowing unions who prosecute OHS breaches to collect up to half of the resulting fines.

The IPA response to the Discussion Paper discusses the following questions from the Paper:

Question 3.

Comment is sought on issues in regard to the scope of the general duties.

Answer:

Part 2 of the OHS Act describes the general duties. It is the flaws in the design and structure of Part 2 that distort the accepted international principles of OHS. The 2000 OHS Act is consequently compromised.

Question 4.

Are the general duties appropriate for securing the objectives of the OHS Act?

Answer:

No.

Question 6.

Comment is sought on the issues associated with the defences on the OHS Act?

Answer:

The discussion paper attempts to argue that because the tests of 'control' within the bounds of 'reasonable and practicable' form the basis of defences under the Act, that the internationally accepted principles of OHS have been applied. This argument is, in fact, a demonstration of the distortion of the international OHS principles rather than an application of them.

3. The OHS Act 2000 in context

In Australia, work safety laws are primarily the responsibility of State governments. In March 2005, however, Australia assumed an obligation to adhere to international OHS principles under an international treaty.

The international obligations are set out in Convention 155 of the International Labour Organisation. Signatory countries are required to adopt OHS laws that apply liabilities and responsibilities according to what people 'control' within what is 'reasonably practicable' for them to do. This is in accord with the 'Robens' principles referred to in the Discussion Paper. These guiding principles impose obligations on all parties involved in all aspects of work situations. No-one is exempted.

4. Culture of predetermined guilt

The NSW OHS Act 2000 appears to reflect a perspective that presumes that workplace injury and death are, by their very nature, the 'fault' of a specified class of persons. Those who are regarded as being responsible for death and injury are assumed to be employers.

It is one thing for such a perspective to exist. It is another thing for this view to be the basis of OHS legislation. But this is the position in NSW. The NSW legislation of 2000 has predetermined employer guilt built into the fabric of its design.

This legislative structure, which posits employer guilt, breaches key notions of justice.

4. How the predetermined guilt is created

Employers and the self-employed in NSW are charged with an absolute OHS obligation under the Act which is not measured against what they 'control' or contained within the parameters of what is 'reasonably practicable'.

Div 1

8 Duties of employers

'An employer must ensure the health, safety and welfare at work of all the employees of the employer.' [Extends to 'people']

9 Duties of self-employed persons

'A self-employed person must ensure that people ... are not exposed to risks ... etc'

The legislative use of the word 'must' creates an absolute liability for safety, as there is no consideration granted for 'control' in the context of what is 'reasonable and practicable'. This legislative framework creates a presumption that employers and self-employed persons are to be singled out as the guilty parties where an OHS incident occurs. The Act automatically apportioned guilt to both legal categories once an incident occurs. There is no consideration given to the reality of practical control in determining guilt. It is an Act of clear legislative discrimination.

There is, however, some consideration of 'control' for persons who supply or manage premises, supply plant and equipment and so on:

Div 1:

10. Duties of controllers of work premises etc.

(1) A person who has control of premises used by people as a place of work must ensure that the premises are safe and without risks to health.'

And in relation to plant or substances responsibility exists

'...only to matters over which the person has control...'

Only employees are accorded 'reasonableness' in their actions:

Div 3:

20 Duties of employees.

(1) 'An employee must, while at work, take reasonable care...'

In its structure, the NSW Act applies OHS obligations in a totally inequitable and discriminatory manner:

- a) Employers and the self-employed are assumed to have total control over their workplaces and are, therefore, presumed to be the parties to whom guilt will attach when a breach occurs.
- b) Controllers of work premises and suppliers are allocated obligations over what they control.
- c) Only employees are allocated obligations according to what they can reasonably control.

It is in the realm of penalties that the inequitable standards become even more glaring.

Employers, the self-employed and suppliers, as individuals, face large penalties and even jail for breaches of the Act:

Div 1

Individuals	up to 750 penalty units (\$82,500)
Individual 2nd offence	2 years jail.

Individuals who are employees face comparatively (and mockingly) small penalties and no prospect of jail:

Div 3	
Employees	up to 45 penalty units

The stark difference between the penalties applied to individuals as employers and the penalties applied to individuals as employees demonstrates a systemic bias and inequity within the Act. The Act sends powerful signals to some people at work that they have comparatively minimal obligations under OHS and that other people have heavy obligations. It encourages a work culture of liability and responsibility transference, where 'others' are seen as responsible for safety instead of each individual person. This must lead to dangerous work cultures where responsibility for safety is not shared.

But the NSW Act is not content to stop at that point. It moves on to apply the 'fall guy' principle. Where a corporation breaches the OHS Act, directors and managers are automatically found guilty of the same breach. No evidence or facts are needed to determine guilt.

Div 4

Clause 26. Offences by corporations

- a) 'If a corporation contravenes, whether by act or omission, any provision of this Act or the regulations, each director of the corporation and each person concerned in the management of the corporation is taken to have contravened the same provision....'
- b) 'A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or been convicted under that provision.'

5. Defence distortion

The only occasion in which the Robens principles or ILO Convention 155 are granted any sort of consideration lies in the defence that managers, directors or corporations (who are already presumed guilty) can attempt to mount to disprove their guilt.

Clause 28: Defence

Must prove 'it was not reasonably practicable for the person to comply...'
'the person had no control...' and 'impracticable'.

The fact that 'control' within the bounds of what is 'reasonably practicable' is a basis for individuals to 'un-prove' their guilt is a distortion of the Robens principles, Convention 155, and normal justice, rather than an application of them.

6. Denial of justice

Normal processes of justice are distorted (and sometimes removed) in situations where not only fines but potential jail terms are involved.

Trial is not before a jury and not before a proper Court that has a background and expertise in matters of normal justice. Instead, judgment takes place before the peculiar institution of the NSW Industrial Relations Commission, which has been heavily criticized on more than one occasion by the NSW Supreme Court for stepping beyond its expertise and its brief. And there are no appeals to decisions of the Full Bench of the IRC.

The NSW OHS Act also gives NSW unions the power to undertake prosecutions. And there is an added hook because the NSW *Fines Act 1999 Sect. 122* allows for payment of a share of a fine to go to the prosecutor. This creates compromised prosecutions if:

- a) Unions have political, industrial and other agendas against employers.
- b) Unions have financially vested interests in seeking, initiating and undertaking prosecutions for financial gain.

7. Origins of the current situation

It would appear that aspects of the legislation are predicated on a view which continues outdated notions of class consciousness and class warfare within the work environment. The employment relationship is assumed to be one in which the employee is powerless. The employer is assumed to be all-powerful and controlling. These notions should not be transferred to the area of work safety.

Under the employment contract, the law of vicarious liability involves the transfer of liability of personal actions from the employee to the employer. This may serve sound commercial purposes, but on work safety issues it is an invitation to death and injury.

The bedrock of safe work cultures, systems and behaviours must be that individuals are held liable and responsible for situations and actions over which they personally have reasonable and practical control. Legislation that distorts this foundation contorts work behaviours and invites unsafe workplaces.

8. Conclusion

Work safety is too important an issue for games to be played with it. Laws cannot make people behave safely. But laws can set the frameworks within which work cultures, systems and behaviours are formed. The laws must imbue people with confidence that obligations and responsibilities are applied equitably, fairly and with common sense. The principles of justice must apply. Transference of liability and transference of obligations cannot be allowed to occur. If the law fails in these areas, people will conspire to avoid their obligations for fear of the unjust laws. This sets the scene for work cultures that are endemically unsafe. People's well-being and lives will be placed at risk.

The Robens principles and Convention 155 have laid the international standards for OHS regulation, based on accountability for that which persons actually 'control' within the confines of what is 'reasonably practicable'.

NSW should amend its OHS Act to align the central structure of the Act (under General Duties) so that offences under the Act for all persons in the work situation are judged against what persons actually control within the parameters of what is reasonable and practicable.