SUBMISSION

OCCUPATIONAL HEALTH AND SAFETY LEGISLATION AMENDMENT (WORKPLACE DEATHS) BILL 2005
INTRODUCTION

The organisations listed below welcome the opportunity to make this submission regarding the Occupational Health and Safety Legislation Amendment (Workplace Deaths) Bill 2005 (the Workplace Deaths Bill):

- Australian Business Limited
- Australian Business Industrial
- Australian Higher Education Industrial Association
- Australian Meat Industry Council
- Civil Contractors Federation
- Hunter Business Chamber
- Illawarra Business Chamber
- Local Government Association of NSW
- Master Plumbers Association of NSW
- Motor Traders’ Association of New South Wales
- NSW Road Transport Association Inc.
- Registered Clubs NSW
- Service Station Association Limited
- Shires Association of NSW

RECENT HISTORY

The Workplace Deaths Bill has its origins in increasing calls for stronger penalties for employers in the event of workplace fatalities.

The campaign particularly focussed on those instances where it was alleged the employer had shown reckless disregard for safety.

Proponents for change called for the introduction of a new crime, “industrial manslaughter”, with substantial increases in financial penalties and custodial sentences.

The Government initially rejected the introduction of industrial manslaughter, a position that was subsequently reinforced by the report of a panel of legal experts.

Late in 2004, the government released a consultation Bill, the Occupational Health and Safety Legislation (Workplace Fatalities) Bill 2004 (the “Workplace Fatalities Bill”).

The Workplace Fatalities Bill promoted vigorous debate and attracted a high level of negative employer response.

That negative response was not primarily directed towards the Government’s objective, viz., to target “rogue employers”, rather it arose from the potential effects of the Workplace Fatalities Bill on the vast majority of employers who take their OH&S responsibilities seriously. The bill did not distinguish sufficiently between employers in the event of a workplace fatality.
Another effect of the debate arising from the Workplace Fatalities Bill was to bring into sharper focus employer dissatisfaction with aspects of the Occupational Health and Safety Act 2000, including the strict liability provisions of that Act.

Government’s decision not to proceed with the Workplace Fatalities Bill and to replace it with significantly new legislation, the Workplace Deaths Bill, which addresses many, but not all employers’ concerns, is welcome.

THE WORKPLACE DEATHS BILL

1. The Offence (Part 2A – Workplace deaths)

   The Workplace Deaths Bill would insert a new Part 2A which would make a person whose conduct, reckless as to the danger of death or serious injury, causes the death of a person at a place of work to whom a duty of care is owed. With respect to Part 2A prosecutions the bill would substitute the operation of s 26 of the OH&S Act 2000 (which transmits corporate culpability to directors and persons concerned with the corporation’s management) by transmitting the corporation’s duty to directors and managers and also insert a new defence of “reasonable excuse”.

   The adoption of a set of criteria which differentiates offences which may be prosecuted under the proposed provisions from other workplace fatalities is welcomed.

   The introduction of these criteria is fundamental to achieving legislation which targets “rogues”.

   There needs to be clarity as to what constitutes “recklessness” within the context of the proposed offence. It would assist if the second reading speech made it plain that the “recklessness” is to be proved with respect to the type of danger which gave rise to the fatality and to the danger of a person’s death or serious injury – not with respect to the accused’s general OHS duties. Similarly we would strongly urge the Government to make it clear that the proof required for a prosecution to succeed under this legislation is to the criminal standard.

   It is also appropriate that Section 26 of the OH&S Act 2000 does not apply in these circumstances. We note that this does not prevent the prosecution of a director or manager for the offence of workplace death if the person has committed an offence under Part 2A.

2. COVERAGE

   While the Government has specifically referred to rogue employers, it is wholly appropriate that all persons with an obligation under Part 2 OH&S Act 2000 be embraced by the proposed changes.

3. MAXIMUM PENALTIES

   The proposed maximum penalties represent twice maximum financial penalties and two and a half times the maximum custodial sentences available under Part 2, s12 of the OH&S Act 2000.
These are significant penalty increases on top of significant penalty increases which occurred with the introduction of the OH&S Act 2000. While it is recognised the government's intention is to target reckless workplace behaviour, employers remain concerned that the new offence is only utilised as intended, i.e. in those circumstances where the alleged offender has acted with reckless disregard for the danger of serious injury or death to another.

4. DEFENCES

Employers' attitudes to defences available under OH&S legislation are coloured by their perceptions of prosecutions under the OH&S Act 2000.

The “conventional wisdom” applying to these prosecutions is employers have little or no chance of mounting a successful defence because of the structure of the Act and the forensic hindsight of the Industrial Relations Commission (IRC) in Court Session.

The IRC has found, and is now entrenching as law, that an employer's responsibility remains even in circumstances where an employee may have disobeyed instructions issued by the employer.

The employee’s actions may be taken into account when determining the penalty imposed on the employer, it may mitigate the seriousness of the offence but does not overcome it. The offence is still found to have occurred.

Given the magnitude of the penalties including custodial sentences, and the gravity of the alleged offences to be covered by this amendment, it is important, in our view, that proper regard be given to the actions of the employee in determining whether or not an offence is proven, not just those under the proposed Part 2A.

5. PROSECUTIONS

We welcome the limiting of commencement of proceedings to an inspector or with the written consent of a Minister.

It is our view that these provisions should apply to the OH&S Act 2000 generally.

6. WANT OF PROSECUTION

Enabling persons who are ordinarily able to commence prosecutions to ask WorkCover in writing why proceedings have not been commenced and requiring WorkCover to reply as soon as practicable unless the matter is with the Director of Public Prosecutions is not dissimilar to provisions in a number of other Australian jurisdictions.

WorkCover prosecutions take some time to be commenced, this can be particularly so when a fatality is involved. As well, WorkCover’s actions may be dependent on the outcome of a coronial enquiry.

Without wanting to unreasonably limit the rights of persons under the proposed s.32B, it is reasonable in our view that WorkCover be given some
time to determine its course of action before it be required to respond to an
application for statement and statement of reasons.

It is also unclear from s.32B whether or not multiple applications may be
made with respect to the same matter. There is no requirement for a capacity
to make subsequent applications since if an application is made whilst
WorkCover is still considering a matter the wording of proposed s 32B(3)
would require WorkCover to give the applicant a statement of reasons for not
pursuing a prosecution at the time that decision is taken.

7. PROCEEDINGS

It is appropriate matters of such gravity should be heard in the Industrial
Relations Commission (IRC) in Court Session. We believe there would be
merit in requiring prosecutions under s.32A be heard only by a Full Bench of
the Commission (see Appeals).

8. APPEALS

Appeals as of right to the Court of Criminal Appeal in the event of a person
being sentenced to imprisonment are welcomed. However Appeals to the
Court of Criminal Appeal are conditional on appeal rights within the IRC being
exhausted. This will be a long and expensive process. Requiring
prosecutions under s.32A to be heard by a Full Bench of the IRC in the first
instance would have the effect of removing one step of the Appeal process.
(Giving effect to this would also require deleting proposed s 5AG(2) of the
Criminal Appeal Act 1912 (schedule 2).

The removal of appeals against acquittals is welcomed.

9. MINOR CORRECTION

The reference in [2] of schedule 1 should be to the Occupational Health and

10. OTHER MATTERS

The Workplace Death Bill is a significant improvement on the Workplace
Fatalities Bill.

We acknowledge the Workplace Deaths Bill addresses in whole or part many
of the issues raised by employers.

It is our view the Workplace Deaths Bill is more closely aligned with the
Governments intention to target “rogues” in the workplace, an intention which
has widespread support within the broader community including responsible
employers.

At the same time both the Workplace Fatalities Bill and Workplace Deaths Bill
have brought long held employer concerns with the OH&S Act 2000 in
sharper focus.
Those concerns lie with the legislation itself, its practical application, its enforcement by the regulator and its interpretation by the Industrial Relations Commission.

We note that the OH&S Act is to be reviewed in the near future.

We strongly urge the Government and WorkCover to allow for a comprehensive review of the Act.

There is general support for improved workplace safety and the need for a legislative framework which encourages and facilitates safer workplaces.

We believe there are grounds to legitimately question whether or not the framework currently applying in NSW, and the manner in which it is enforced, does actually generate the behaviours needed from everyone who has a role to play in making NSW's workplaces safer.