COMBINED EMPLOYER GROUP SUBMISSION

CONCERNING THE

DISCUSSION DRAFT OF THE OCCUPATIONAL HEALTH AND SAFETY LEGISLATION AMENDMENT (WORKPLACE FATALITIES) BILL 2004
Introduction

This submission is made on behalf of:

- ACROD Ltd – NSW Division
- Australian Business Industrial
- Australian Business Limited
- Australian Consulting Engineers Association
- Australian Meat Industry Council
- Australian Mines and Metals Incorporated – NSW
- Australian Retailers’ Association - NSW
- Civil Contractors Federation - NSW
- Furniture Industry Association of Australia
- Hunter Business Chamber
- Illawarra Business Chamber
- Motor Traders’ Association – NSW
- NSW Farmers Industrial Association
- NSW Landscape Contractor’s Association
- Registered Clubs Association of NSW
- Timber Trade Industrial Association

(‘the employers’) in response to the consultation draft of the Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Bill 2004 (‘the bill’). The bill was drafted in response to recommendations made in the government’s commissioned Advice in relation to workplace death, occupational health and safety legislation and other matters.

Submissions were made concerning those recommendations. ABL joined with another 9 employer groups in making its submission. In part they said:

As is the case with many inquiries, the Report was established in the context of recent community concern about workplace safety and workplace fatality in particular. There has been a small number of incidents which, on the basis of the apparent facts which are publicly available, suggest significant disregard of the need to ensure a safe workplace. In most instances these cases have not yet been judicially decided.

Public concern and public debate are often expressed in black and white terms. This absence of colour and detail usefully motivates reform but makes difficult the careful crafting of balanced policy solutions. So it is with the Report. Whilst it is not unusual for governments to have to assess the case for legislative reform and make their decisions about possible change against the background of community concern, such concern does not always assist balanced decision making1.

The employers were arguing that government should not respond on the basis that a small number of exceptional events indicates a failure in the system. In most cases there has been no decision from the Commission in Court Session about the matters which gave rise to the belief there is a general deficiency in or failure of the system.

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1 P 4 Submission.
The employers are not insensitive to community concerns and can recognise that there may be occasions when the current maximum penalties may not seem to be adequate. They also accept there may be a very small number of reckless or negligent employees who do not have appropriate regard for the safety of their workforce. The submitting employers and their members do not seek to protect those employers.

However employer recklessness about safety is neither the rule and nor is it increasing.

In your Ministerial Statement to the House announcing the release of the Consultation Draft of the Bill you said:

..., hard-working, responsible employers have nothing to fear from this Bill.
This Bill is aimed at the minority – the rogues whose indifference to health and safety results in death. ²

The majority of employers are hardworking and responsible. The criterion against which the Bill needs to be judged therefore is whether or not its provisions mean that responsible majority do have “…nothing to fear”.

It is our submission that the Bill in its current form does not support that assertion.

The Bill focuses attention on the Act in two important ways. First, the amendments focus attention onto the current operation of the *Occupational Health and Safety Act 2000* and its predecessor 1983 Act (‘the OHS Act’). In our submission recent case law has made it increasingly impossible for employers to comply. Second, they focus attention on their terms and how they would operate in the context of the OHS Act.

**The OHS Act**

The OHS Act places an absolute duty of care on employers and this has been increasingly intensified in recent case law. An absolute duty is an onerous responsibility and one which has no regard to the ability of an employer to foresee and guard against risks, including the acts or omissions of their employees. In *Ridge Consolidated Pty Ltd v Maugher* [(2002) 115 IR 78 at 32] the Full Court said:

As has been frequently stated by this Court, the duty of employers under the *Occupational Health and Safety Act* is absolute. It is not confined to the taking of precautions only when there are “warnings or signals of danger or when experience indicates that a risk to safety has arisen and requires a remedy”: *Ferguson and Nelmac Pty Limited* [(1999) 92 IR 188]

In *Riley v Australian Grader Hire* [(2000) 103 IR 143 at 145] it said:

Section 15 of the *Occupational Health and Safety Act* requires employers to be diligent and proactive to ensure the safety of their employees. Those obligations are not diminished because of the error or negligence of an employee, although such matters may reflect the degree of culpability of the employer for the purposes of sentencing.

It is generally accepted that the prosecution of an employer for contravention of the OHS Act will succeed. We would argue that this is because it is impossible, or virtually so, for an

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² P 12019 Hansard Legislative Council 27 October 2004
employer to meet his or her obligations under the Act. In _WorkCover Authority of NSW (Inspector Childs) v Kirk Group Holdings and Anor_ [unreported (2004) NSWIRComm 207 [124]]³ the Court said:

As _Hungerford_ J stated in his first two principles, the offence created by s15 is independent of fault: every leading authority describes the section as having created an absolute or strict duty; obligations; or liability. The absolute nature of liability under s15 was contrasted with "at fault" liability such as negligence by _Fisher_ CJ in _Cullen v State Rail Authority (NSW)_ (1989) 31 IR 207 at 209:

In _Carrington Slipways Pty Ltd v Callaghan_ [1985] 11 IR 467, it was held that s 15(1) of the Act created an absolute liability in employers to conform with the terms of the section, but it is still necessary to prove that the employer failed in the language of the section in at least one of the many obligations laid upon him. It is correct to say that this failure is not the same as a failure of a duty to take care at common law where the standard of the duty is that of the reasonable and prudent man. Here, the standard is absolute. If there is a failure, subject to s 53 of the Act, however understandable the failure might be, liability is absolute.

At [129] the Court also said:

I note that the statement of principle in _Arbor Products_ appears to qualify the extent of the duty to the hasty, careless, inadvertent, inattentive, unreasonable or disobedient employee to only that conduct which is "reasonably foreseeable". The use of the words “reasonably foreseeable” in that context should not be construed as introducing an element of foreseeability to the duty owed under s 15, or to limit the risks to safety contemplated by s 15 to only those that are foreseeable (as was proscribed by the majority in _Drake Personnel_). Rather, to the extent that the behaviour of careless or disobedient employees may not be reasonably foreseen, that is a matter which may properly be raised in relation to a defence under s 53 of the Act. That is, the unforeseeable behaviour of a disobedient employee may well lead to the happening of an event that could not been reasonably foreseen, and therefore, which was not reasonably practicable for an employer to guard against.

In _O’Sullivan v The Crown in the Right of New South Wales (Department of Education and Training)_ [(2003) 125 IR 361 there is an extensive discussion, repeated subsequently in other matters, about risk and employer liability. The Court said [at 399 - 400]:

Although it is implicit in the judgment of _Hungerford_ J, and indeed in the forgoing analysis, I make it plain that I reject the defendant's submission in this case that the prosecutor must establish that the step required to have been taken by the defendant would have eliminated the entire risk. There is no justification for limiting the broad words of s15 of the Act in such a manner, particularly in the context of an Act which has the stated purpose of securing the health, safety and welfare of persons at work. To accept such a submission would virtually render s15 ineffective and belie almost every decided case, for what risk in an operating workplace can be eliminated entirely? [141 – underlining added]

Simply put, activity involves risk, and all risk cannot be eliminated or controlled. Employers are in breach.

A number of factors then come into play in determining the penalty applied for the contravention. The fact of variability in the sentences imposed for breaches is evidence that

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³ This case was followed 7 weeks later in _Inspector Templeton v Parvese Citrus Pty Ltd_ (unreported [2004] NSWIRComm 322)
this does occur. However, there is also growing doubt about the capacity for employers to defend their conviction. Recent case law suggests that making out a s 53 defence is increasingly unlikely and this does not seem attributable to inadequacy of representation. In Kirk the defendant was represented by two counsel and solicitors. In O’Sullivan the defendant was represented by senior counsel, counsel and solicitor. In O’Sullivan the Court said [at 399]

The distinction must be drawn between a risk, such as the violent behaviour of a member of the public or severely intellectually disabled student, occurring independently of the employer, the general nature of which may be known, and the risks which arise from the manner in which the employer exposes the employee to that risk. To put it another way, the employer fails to ensure the health, safety and welfare at work of its employees by failing to appropriately equip or protect them from risks inherent in their work (as opposed to risks which are merely speculative or unduly remote - see Drake at [145]), notwithstanding that such risks may be caused by external factors, known or unknown. As Hungerford J noted at paragraph 20 of WorkCover v Police Service (No 2), the duty imposed upon the employer is directed at obviating risks where the circumstances create a potential danger to the health and safety of employees at the workplace. It is upon this distinction between a specific risk (the particular actions of an individual in a given context on a given day) and a general class of risk that analysis must concentrate, for focussing too closely on the specific risk immediately preceding the incident under scrutiny can lead to the error so frequently warned against: concentrating on the incident itself. Appreciation of this distinction also makes it clear that the defendant’s preliminary submissions are based upon the wrong risk: when attention is focussed upon the risks which arise from the manner in which the employer exposes the employee to the risks, the defendant’s submissions in this case, as in WorkCover v Police Service (No 2), fall away. [140 – underlining added]

In Kirk it was argued that the nature of the deceased’s conduct was not foreseeable and that a s 53 defence was made out:

The defendants cited the decision in Workcover Authority of New South Wales (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd (2001) 110 IR 182 at [87]:

[87] It is evident from these authorities that what is required by s53(a) of the Act is a balancing of the nature, likelihood and gravity of the risk to safety occasioning the offence with the costs, difficulty and trouble necessary to avert the risk. At one end of the scale, it could not be reasonably practicable to take precautions against a danger which could not have been known to be in existence: see Jayne v National Coal Board [1963] 3 All ER 220 at 224 and Shannon v Comalco Aluminium Ltd at 362. Similarly, if the happening of an event is not reasonably foreseeable then it will not generally be reasonably practicable to make provision against that event: see WorkCover Authority of NSW (Inspector Mayo-Ramsay) v Maitland City Council (1998) 83 IR 362 at 381; WorkCover Authority of NSW v Kellogg (Aust) Pty Ltd at 259 and Austin Rover Ltd v Inspector of Factories at 627 per Lord Goff and at 635 - 636 per Lord Jauncey of Tullichettle.

Similarly, in Genner Constructions Pty Limited v Workcover Authority of New South Wales (Inspector Guillarte) (2001) 110 IR 57, a Full Bench of the Commission held:

It may be that, in some cases, it would not be practicable to guard against a detriment to safety occasioned by an appropriately trained and instructed employee departing from a known safe procedure. This may be so because the risk of the employee failing to follow procedures was not reasonably
foreseeable or on a comparison of the training and instruction required to ensure the employee adhered to those procedures with the risks created. There are limits to the degree of instruction which can be expected to be provided to an experienced employee. [121 – 122]

Yet the defence not only failed but it missed the point:

The issues raised by this case and the manner in which the prosecution has been defended warrant a review of the legal principles which govern the operation of ss 15 and 16 of the Act. [123]

It is our understanding that it is not unusual for employers prosecuted under the OHS Act to focus their submissions on the mitigation of any penalty rather than on the alleged breach of the Act because there is a high expectation they will be found guilty.

**Recommendation**

We submit that the preferred remedy for this situation would be to amend the OHS Act so that the employer be required to meet a test of reasonable practicability. Such an amendment would not only make the OHS Act consistent with the vast bulk of occupational health and safety legislation in this country but also mean that economic activity per se is not in breach of the statute.

**The Bill**

(a) *Causing Death*

The Bill purports to target the “rogues”. However all prosecutions for breaches of the OHS Act where there has been a workplace death would appear to fall under the provisions of the Bill. The new offence comes into play if a person is guilty of a breach of a Division 1 duty (discussed above); the breach causes the death of another person and (less relevantly) the details of the death were contained in the originating documentation.

It should be noted that prosecutions for breach of the Division 1 duties do not focus on the accident (which is not the breach, although it may be indicative of a breach) but on the failure to discharge one or more of the duties, a failure to ensure health, safety and welfare. Thus, for example, a breach does not usually occur on the day of the accident, although a hazard may have crystallised on that day, in most cases the breach has been ongoing. Recent case law is almost deafening on this point.

A consequence of this approach is that foreseeability is almost impossible to demonstrate because, even if the accident itself was unlikely or almost impossible to predict, the failure to ensure health and safety does not require that level of foreseeability. Yet the proposed new offence proceeds on the basis that the breach of statutory duty has occurred and that breach caused the fatality. The foreseeability of the particular sequence of events giving rise to a fatality is not part of a defence.

How do these two factors – the link between a breach of duty and causing fatality – work? Looking at the two recent cases discussed below, which, on the Court’s findings, do not seem to have involved rogue employers, it is difficult to see how they would not both fall under the proposed new offence, provided only that details of the death had been included in the originating documentation.
In *Kirk* the deceased used an all terrain vehicle (‘ATV’) in an inherently dangerous way and in a way that seemed obviously dangerous. Both the defendants (the company and the owner) were found guilty of breaching ss 15 and 16 of the OHS Act 1983 concerning the use of an ATV. The Court found the defendants failed to undertake a risk assessment, train, supervise and instruct concerning the use of the ATV by employees and contractors and rejected the s 53 defences. It said at [159, 160]:

> There is plainly a causal connection between the Company’s failure to provide systems, information, instruction, training, supervision and risk assessment in relation to the use of the ATV (or the specific application of the owner’s Manual on the Farm) and the risk that the ATV may be misused in a manner contemplated in the owner’s Manual when driven off-road or when towing, causing it to overturn.

…First I will deal with the defendants’ submission that there can be no offence in the present case because Mr Palmer’s behaviour leading to the accident as so aberrant and non-sensical that it was not capable of being foreseen and, as such, could not be within the contemplation of s 15.

The defendants were found guilty. The Court also found the linkage between the breach and the fatality. At [166] it said:

> The defendants submitted that the accident which occurred on 28 March 2001 was not foreseeable and, therefore, it was not practicable for the Company to guard against such a risk. I reject this submission for a number of reasons. First, it is the general risk of the use of the ATV (when driven off-road or used for towing) in an unsafe manner, creating a situation where it was capable of overturning that is relevant, not the occurrence of the accident involving Mr Palmer which, as earlier stated, may represent one manifestation of the risk but is not determinative of the general class of risk. …Thirdly, irrespective of whether Mr Palmer’s actions which led to the accident were foreseeable, there remained at all times a risk associated with the operation of the ATV on the Farm against which no precautions were taken.

In *Inspector Templeton v Parvese Citrus Pty Ltd* the defendant (the company) did not prevent employees from parking their cars in the orchards. Although the details about the actual sequence of events were unclear, the deceased became pinned under his tractor after it had collided with his car at the end of a row of trees. The company was guilty of a breach of s 8 of the OHS Act 2000 in that there was not a sufficient system in place that ensured that the parking of cars in the orchard was safe. The Court also found that the defendant was aware that a risk existed in respect to parking cars in the orchard – although it was assessed as low. Although the sequence of events giving rise to the accident was unclear, it was found that the deceased had breached clear guidelines and acted contrary to training.

The defendant pleaded that the deceased parked his car in an unusual position, contrary to normal, which started a chain of events over which the defendant had no control. At [122] the Court said:

> As I have previously determined, I am not concerned with the accident, but rather with the risk to safety caused by cars being parked in the orchard not in accordance with the Manual or the oral instruction given by Mr Parvese.

In rejecting the defence the Court said [126]:

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As I have already observed, the risk was identifiable and known to the defendant and, in my view, there were reasonably practicable measures available to ensure that cars were parked in such a manner so as to eliminate entirely the risk that emerged on the day. In short, it was reasonably practicable for the defendant to comply with the provisions of the Act by ensuring supervision and a safe system of work by having cars parked in the car park, or in a row immediately adjacent the rows being harvested and not at the end of a row.

That is, the defendant was guilty of the breach of Division 1 duty, rather than necessarily guilty the accident itself. The s 28 defence must address the duty, not the accident. Moving to the second step, the contravention meant the deceased parked his car badly on the day. The deceased hit the badly placed car which either caused his death or started the sequence of events culminating in his fatal injury. The contravention caused the death of the deceased.

The Bill provides no statutory bar to prosecution under the proposed new offence and no defence for a defendant except that the contravention led to the fatality.

This is contrary to the stated objectives of the Bill. It also seems that in cases where the risk of injury and possible fatality at the hands of third person is present (such as policing, security, some teaching and nursing, banking and retail, some warehousing) that directors and persons concerned in the management of the entity are more likely to be convicted of a custodial offence than is the third party perpetrator.

**Recommendation**

We submit that to realise the purportedly targeted nature of the Bill it is necessary for the proposed new penalty regime to be applied only to those instances where the defendant is, on the basis of evidence available when the charge is brought, arguably to have been egregious and that the prosecutor be required to identify, in the first instance, under which penalty regime the matter is to be considered. The defendant must have clear and proper access to a defence against the connection between its reckless or negligent actions/omissions and the fatality which is distinct from the s 28 defence against breach of statutory duty.

In other words only those matters where there are grounds for the prosecutor to establish the employer has been grossly reckless or negligent in the discharge of his or her responsibilities should be pursued under the proposed new regime.

An amendment to the Bill to this effect would in our submission align the effect of the Bill with the objective of imposing higher penalties in those circumstances where they are warranted, without unreasonably imposing on the vast majority of responsible employers who may find themselves in a situation where a workplace death has occurred.

(b) **Aggravating Factors**

We understand the origin of the aggravating factors contained in the Bill to be the factors to which the Commission in Court Session has had regard in sentencing, and the purpose in including them in the Bill is to signal their importance.

It is equally important, we would argue that the Bill include those mitigating factors to which the Commission has had regard in determining culpability. The most important of these from

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4 See for example, WorkCover Authority of New South Wales (Inspector Keelty) v Crown in Right of the State Of New South Wales (Police Service of New South Wales) [(2001) 101 IR 268] as well as O’Sullivan
the employer perspective are the acts or omissions of the employee and the extent to which they contributed to the accident.

It also does not seem unreasonable to examine the mitigating factors provided in the Crimes (Sentencing Procedure) Act 1999 – particularly those at s 21A(3)(c) – (i) and perhaps (j) – when considering relevant and reasonable mitigation. It is our strong submission that the existing high penalties in the OHS Act, and the proposed higher penalties in the Bill should not generally lift penalties rather the spectrum should be available to be tailored to the circumstances of the offence.

Including mitigating factors will not diminish the responsibility of employers for the safety of their employees including those instances where the employee has contributed to the accident.

**Recommendation**

We submit that the Bill should include mitigating factors to be considered on sentencing. Just as the inclusion of aggravating factors in the Bill serves to emphasise their importance, the inclusion of mitigating factors will signal to employers and others that there is fairness and balance in the legislation. The proposal for aggravating factors must be weighed against the fact of almost universal statutory breach because of the impossibility of discharging absolute liability.

(c) **Authority to Prosecute**

The OHS Act authorises unions, where any member is concerned in the matter, to institute proceedings for breach of the OHS Act or regulations.

We understand that this is a right enjoyed by unions for over 60 years, however there is now a penalty regime that is significantly different from that which applied when unions were first empowered to institute proceedings. As well, union rights to prosecute now also include the right to appeal an acquittal or inadequacy of penalty in a matter originally brought by the union\(^5\).

The right to prosecute creates two types of moral hazard for unions and these hazards increase as the penalties do. First, unions benefit economically from the moiety system. Second, as the penalties under the OHS Act increase so does the Act provide a greater capacity for unions to use it, or its threat, to underpin industrial objectives. The opportunity presented by the proposed new penalties is immense.

**Recommendation**

We submit that unions’ capacity to bring prosecutions should be rescinded. At the absolute minimum the submitting employers believe that the capacity to institute proceedings under the OHS Act where custodial sentences may result, or appeals against acquittal or the adequacy of penalties should rest solely with the Crown.

**The Bill in Detail**

Putting aside our general concerns there are also matters of detail which we wish to address.

**Schedule 1**

\(^5\) S 197A(4) Industrial Relations Act 1996
(a) Transition

There is no obvious transition provision which confines prosecutions under the new offence to breaches which have occurred after the Bill’s commencement. The bill’s fatalities provisions appear to apply to all prosecutions where the initiating documentation contains details of the death.

The proposed aggravating factors also appear to apply from commencement.

Recommendation

We submit that any changes to penalties or statutory sentencing practice apply to offences committed after to commencement of the legislation.

(b) Aggravating Factors

The aggravating factors also appear to further erode remaining defences. Under the current case law which focuses so strongly on the failure to ensure rather than the sequence of events means that all breaches, or virtually all, are reasonably foreseeable [proposed s 110A(1)(a)]. Thus in *Kirk* the Court said at [133]:

> It is clear from the foregoing cases that careful attention must be paid to the correct identification of the risk the subject of the charges: *Police Service (No 2)* and *O'Sullivan* make it clear that it is inappropriate to seek to artificially confine the risk to one narrowly defined by reference to an accident with the benefit of hindsight: it is the general class of risk which matters. The danger repeatedly cautioned against of focussing too much attention on an accident is twofold: such a misguided focus can obscure the relevant risk, and it can also misdirect an analysis of causation.

At [135]:

> The theoretical and authoritative bases for distinguishing "unduly remote" risks are somewhat unclear and may be examined by the Court at some later date. The distinction is difficult to reconcile with the forceful judicial pronouncements on the absolute, proactive nature of the duty extracted above, such as the Court's observation in *Ferguson v Nelmac Pty Limited* (1999) 92 IR 188 that the duty is not confined to taking precautions only where there are "warnings or signals of danger or when experience indicates that a risk to safety has arisen" and the observation of *Hill* J in *Atco Controls Pty Limited* that "employers should be on the offensive to search for, detect and eliminate, so far as is reasonably practicable, any possible areas of risk to safety, health and welfare which may exist or occur from time to time in the workplace" (emphasis added)…. "

Proposed s 110A(1)(d) provides as an aggravating factor that the offender was reckless or negligent in committing an offence that caused the death or serious injury of a person. This appears to mimic the proposed new offence and seems likely to operate so as to encourage s 12A prosecutions where there is a fatality because the hurdles to be proved are lower. Breach is to a criminal standard and presumably negligence or recklessness must be criminal.

Proposed s 110A(1)(e) provides that financial advantage gained by the failure to implement safe systems of work which constitutes the offence be an aggravating factor. This appears to
confine the factor to employers (and those who are controlling minds) since it could not be said that a wilfully disobedient employee failed to implement a safe system of work. The proposed aggravating factor also seems to reduce the capacity to argue that it was not reasonably practical to comply with the provision. “Reasonable practicability” is essentially a balance of the salience of the risk and the costs of its control. To not devote resources to controlling a risk is necessarily to make a financial gain.
Recommendation
We submit that, if aggravating factors are proceeded with, the Bill’s proposed aggravating factors be re-considered.

(c) Guideline Judgments

The bill also proposes to amend the provisions dealing with guideline judgments and seems to foreshadow some specific judgments. Such judgments appear to be subject to the privative provisions of the *Industrial Relations Act 1996* (‘IR Act’). Whilst the *Advice in relation to workplace death, occupational health and safety legislation and other matters* proceeded to the view that prosecutions under the OHS Act should remain the province of the Commission it also accepted, at least tacitly, that there were rights in criminal procedure which should be protected.

The *Advice* accepted that individuals should be protected against arbitrary treatment in the case of overturned acquittals and sentencing inadequacy and in the event of a custodial sentence (although there were differences about the level of the protection in this latter instance).

The submitting employers believe that because guideline judgments have the capacity to materially alter the exposure to criminal conviction of numbers of employers, they too should be susceptible of review by the Court of Criminal Appeal.

Recommendation
We submit that in the event that enabling amendments to the guideline judgment provisions are proceeded with we would strongly prefer to have some capacity in the Court of Criminal Appeal to review guidelines.

Schedule 2

Schedule 2 of the Bill inserts a new s 5AG into the *Criminal Appeal Act 1912* (‘CA Act’) which provides for certain types of appeal to the Court of Criminal Appeal. Its operation is unclear and seems arbitrary.

(a) Conviction by Local Court

Proposed s 5AG(1) provides that a person convicted and sentenced to a custodial sentence by the Commission in Court Session may, subject to obtaining leave by the Court of Criminal Appeal [s 5AG(3)], appeal against the conviction or sentence. Thus, custodial sentences handed down by a single member of Commission in Court Session are potentially appealable to the Court of Criminal Appeal (and not the Full Commission in Court Session [s 5AG(4)]), as are custodial sentences handed down by the Full Commission in Court Session.

The same does not seem to apply to an appeal from a custodial sentence ordered by a Local Court, including the Chief Industrial Magistrate. Proposed s 5AG(1) of the Bill is confined to the Commission in Court Session. Section 105(3) OHS Act imports ss 197 and 197A of the IR Act for appeals against a Local Court judgment. Section 197 of the IR Act provides that an appeal to the Full Commission in Court Session lies against any order for money, or
dismissal; any conviction or penalty imposed for an offence against the IR Act or regulations; or any civil penalty or dismissal.

Putting appeals against acquittal to one side, this raises questions. An appeal against a conviction from a Local Court (which seems to include one which attracted a custodial sentence) therefore lies in the Full Commission in Full Session at first instance with subsequent access to the Court of Criminal Appeal if the sentence is upheld. This does not seem right. It would seem preferable to transfer these appeal rights to the Court of Criminal Appeal.

Second, it is not clear that s 197 provides an appeal to the Full Commission in Court Session against the imposition of a custodial sentence at all. S 105(3) OHS Act confines appeals from proceedings for offences against the OHS Act and regulations to the IR Act pursuant to ss 197 and 197A. Section 197(1)(b) contemplates appeals from convictions against the IR Act and regulations or appeals from a penalty against the IR Act or regulations. Penalties arising from matters under the IR Act which can be heard by the Local Court are monetary penalties only, not custodial sentences. Whereas ‘penalty’ might be said to be synonymous with ‘sentence’ and to generally include custodial sentences – ‘penalty’ does not seem to have that extended meaning in s 197 of the IR Act. Thus it may be that the only appeal available from the Local Court where it convicts and imposes a custodial sentence is an appeal against the conviction, not the sentence.

(b) Appeal is by Leave

Proposed s 5AG(3) confines appeals to the Court of Criminal Appeal to appeal by leave. Section 5 of the CA Act provides that appeals against conviction on indictment are by right. The decision to treat appeals against criminal conviction (resulting in a custodial sentence, or arising from an overturned acquittal) differently from other appeals against criminal conviction (including conviction not resulting in a custodial sentence) seems difficult to justify, particularly so because criminal breach of the OHS Act does not require mens rea.

It seems unclear whether the Commission’s and Local Court’s charging processes under the OHS Act falls within the broad definition of ‘indictment’ in the CA Act, but should it not, The employers ABL submit that the process should be regarded as sufficiently analogous to attract a grant of power in the same terms as presently exist for appeals against conviction.

Providing access to the Court of Criminal Appeal by leave, rather than as of right, also seems difficult to justify because the Commission’s criminal appeals processes are by right. The incongruity does not seem to be remedied by s 5AG(4) which would enable an appeal not granted leave by the Court of Criminal Appeal to be heard by the Full Commission in Court Session (presumably as of right). Such a right would only apply where the decision at first instance was that of a single judge or magistrate and not when the conviction or sentence appealed against was handed down by the Full Commission (as would always be the case in the event of overturned acquittals).

(c) Appealing Conviction after Acquittal

Proposed s 5AG(2) of the Bill provides access to the Court of Criminal Appeal in the event that the Full Commission in Court Session overturns the person’s acquittal. Such appeal may be “…on any ground which involves a question of law alone.”. Apart from the question of
leave (dealt with above) this is consistent with criminal appeals and presumably also applies to appeals brought under proposed s 5AG(1)(a).

However, proposed s 5AG(2) appears to proceed on the presumption that in some instances when it overturns an earlier acquittal the Full Court of the Commission in Court Session would not also at that time impose a sentence, or not do so in close connection with the reversed verdict.