2 February 2005

The Hon. John Della Bosca MLC
Minister for Industrial Relations
Level 30 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Minister

Occupational Health and Safety Legislation Amendment (Workplace Fatalities) Bill 2004

We write regarding the proposed Occupational Health and Safety (Workplace Fatalities) Bill 2004 ("the Bill"). Can I also take the opportunity to record our appreciation for taking the time at short notice to attend our NSW Council meeting on 9 December to discuss the Bill.

Since that time we have had the opportunity to consult with our members and further develop our response to the Bill.

This submission builds on the comments we made on 12 November 2004 regarding the Bill and is designed to put forward some positive suggestions for reform to the Bill to help achieve the Government's stated policy aim of targeting rogue employers.

A number of themes have emerged from our consultation with our members which frame the thinking behind the proposals.

Firstly, we must restate that there is extreme anxiety amongst employers about the Bill in its proposed form. Put simply its structure makes all employers feel they will be treated

like rogues, not just those exhibiting an unacceptable degree of reckless indifference to the safety of their employees.

Secondly, there is a recognition among employers for the need to have appropriate sanctions for employers exhibiting behaviours that are reckless or grossly negligent. Employers generally recognise there is a class of rogue or cowboy employers whose actions should be faced with appropriate penalties.

As we consulted with our members on the Bill it has become clear that employers view that the Bill is too broadly targeted, based as it is on the structure of the current ss8 and 26 offences. The vast majority of employers, including those who are taking their occupational health and safety responsibilities seriously, view the Bill as one that exposes all employers to higher fines or gaol terms if they have a fatality. This arises because the new supposedly limited "rogue" provisions are infected by the experience and perceptions of employers under the strict liability and reversal of onus provisions found in ss8 and 26 of the current Act.

The concept of strict liability has been contained in New South Wales occupational health and safety laws since the enactment of the Occupational Health and Safety Act 1983 ("the OHS Act 1983").

The management of safety in a workplace is complex amalgam of workplace design, systems and behaviour of managers and employees. Strict liability is designed to give employers a powerful incentive to continuously improve these designs, systems and behaviours. Because of this complexity such a goal is deliberately set at a high level that require continuous unending improvement.

Given that the values held by the vast majority of employers accept the significance of protecting employees under their care from harm, this has been accepted by most employers as a difficult, but not unreasonable, standard against which corporate responsibility can be measured.

However, throughout consultation with our members' differences between the spirit of the existing law and the regulator's application and enforcement of the law have emerged.

Firstly, there is perception that there is an unfair concentration on enforcement activities against employers compared to those for employees. There are scant examples of employees being prosecuted under the OHS Act. More importantly there do not seem to be effective non-prosecution remedies used to reinforce to employees that their responsibilities are an important part of the management of workplace safety.

Accordingly a no-fault culture, perhaps mirroring workers compensation rights, permeates employees' attitudes to safety, making employee compliance the single most frustrating part of safety management.

This is a fundamental issue, given the generally held view of all stakeholders that successful management of safety requires the careful co-operation of managers, employees, and the designers of workplaces and workplace systems. The prevalent safety management models among sophisticated employers are based on behavioral based safety research, which at their heart are based on driving commitment from each person in the chain to firstly be aware of their responsibilities and secondly modifying their behaviour to work in safer ways having such awareness. This approach puts slightly different obligations on employers and employees but the psychology driving the approach is common to both.

Secondly, employers perceive that WorkCover has increasingly focused its regulatory activities on enforcement by prosecution at the expense of education and support.

The introduction of the OHS Act in 1983 necessitated a massive knowledge shift from the regulator to employers, as the employer became the primary holder of the responsibility to understand and manage risks in a given workplace. Far from this occurring, there has been a movement in WorkCover's emphasis from being an educative regulator to being focused primarily on enforcement using prosecutions as the primary tool. The high number of prosecutions in New South Wales against comparable jurisdictions emphasises this point.

Outcome based legislation has allowed this shift to be justified, but it has left a massive vacuum in the system of OHS regulation in NSW. This is typified in common employer comments such as "WorkCover used to assist me make my business safer, now they tell what I can't do and never tell me what I can do". An employer is left to manage their risks with little support and then have their systems and processes examined in ex-post facto way by a Court when a failure occurs.

Strict liability leaves an employer with very little defence in such situations, and the defences are deliberately narrowly read as part of the "continuous improvement" regulatory model referred to earlier. Even in the existing legislative framework this perception of inadequate available defences undermines employer confidence in the fairness of the system. The threat of wider custodial sentences for fatal incidents, as proposed in the Bill, exacerbates this problem to an extent where employers' faith in the regulatory regime is severely diminished. Inevitable comparisons are quickly made by employers between their legal rights under OHS law against an ordinary person's legal rights under the criminal law.

A Separate Offence for Reckless Endangerment

The public debate leading to the proposed Bill centered on the need to have appropriate sanctions for rogue or cowboy employers whose actions appeared to the average person as a gross neglect of their duty. This is very different from the policy goal of the strict liability regime to provide a bar high enough to continuously improve workplace safety.

Accordingly, we submit that sanctions aimed at such rogue or cowboy actions require a different legislative structure than the broader aims in OHS regulation for companies to continuously improve their operations, systems and behaviours.

Specifically we submit:

> **A separate offence to Section 8 and Section 26 should be created for the situation where an individual recklessly endangers an employee that has substantially caused the death of the employee. The offence should not be limited to employers and apply to all people within an organisation. The offence should have a separate sanction that could include appropriate custodial sentences. The existing custodial sentence for an individual contained in Section 12 for a breach for a breach of Section 8 removed and only be available where reckless endangerment has occurred. The question of aggravating and mitigating factors for such an offence should not be prescribed and should remain in case law.**
>
> **Section 32 of the recently enacted Victorian Occupational Health and Safety Act 2004 provides a model for such an offence.**

A number of other concerns have been raised through our consultation with members.

Trade Union Prosecutions

The current right for a trade union to prosecute under the NSW OHS Act is at odds with comparable jurisdictions in Australia. This right gives employers no confidence that the system is designed impartially. The fact that it may be a rarely used power, on past experience, is not the point given the magnitude of the increased penalties proposed in the Bill and the publicity being given to the issue. Unions have workplace interests that go beyond simply pursuing safe workplaces, and there is little confidence that they will always separate those interests. Investigation and prosecutions should be limited to the domain of the regulator.

Specifically we submit:

> **The existing right under Section 106(1)(d) should be repealed. Alternatively, we submit that trade union prosecution be disabled for any new offence of reckless endangerment that is created.**

The role of the regulator in investigation and prosecution

Employers have serious concerns about the conduct of WorkCover in investigating and prosecuting matters. It is common view of employers who are the subject of investigations by WorkCover that they are conducted in a way that appears to be designed to find an employers guilty rather than independently assess the facts in a given situation. Again, consistent with the continuous improvement philosophy, there is a sense

that any accident deserves a remedial action to ensure it doesn't reoccur. Questions of objective blameworthiness don't seem to arise.

There is also considerable concern over the application of existing prosecution guidelines. The time delay between incidents and launches of prosecutions that commonly occurs, the perception that particular employers and certain sectors are unfairly targeted exacerbates drives these concerns. The process of prosecutions being initiated in the name of individual inspectors adds to the idiosyncratic nature of the process.

Appropriate measures should be taken to provide stakeholder confidence in the objective nature of the investigation and prosecution processes of the regulator.

Specifically we submit:

> **That published guidelines for the conduct of investigations be established similar to those for prosecutions. Appropriate resources are made available to train those responsible for prosecutions in such guidelines.**
>
> **Existing prosecutions guidelines be reviewed with appropriate input from stakeholders. Particular attention should be given to development of new guidelines for prosecutions under any new offence created for reckless endangerment.**

Jurisdiction and Appeals

The final theme that emerged from consultation with employers who had been prosecuted was dissatisfaction with handling of matters by the Industrial Relations Commission of NSW ("IRC").

The expertise and perspective of the IRC is based around resolving industrial disputation. This perspective is based around balancing the interests of employers and employees during industrial disputation. Traditionally, the IRC has had an arbitral power that specializes in the balancing of those interests by the creation of rights.

OHS prosecutions require a judicial power that is more akin to a traditional Courts power to adjudicate existing rights rather than create new rights or obligations. Employers' lack of confidence is based on perception that these different perspectives can be easily confused during OHS prosecutions before the IRC.

NSW is alone and out of step with the other states in Australia in the use of a specialist tribunal for OHS matters, and this is an anomaly that is made much pronounced by the proposals in the Bill. We recognise this is significant movement so we suggest an appropriately substantial inquiry into considering alternative jurisdictions for OHS prosecutions.

Specifically we submit:

> **The Government review the jurisdiction of the IRC to hear OHS prosecutions.**

The widening of appeal rights in the Bill is welcome but inadequate.

Specifically we submit:

> **Any prosecution under any newly created reckless endangerment offence where custodial sentences are available have full rights of Appeal to Court of Criminal Appeal in New South Wales and the High Court of Australia.**

The ability for the prosecutor to appeal an acquittal in the OHS jurisdiction is inconsistent with the principle of double jeopardy that applies in other criminal matters.

Specifically we submit:

> **The ability for the prosecutor to appeal an acquittal should be removed.**

Minister, as we suggested at the meeting on 9 December, our strong view is that all the above matters need to be considered in an holistic manner in conjunction with the Bill.

We again thank you for this opportunity to comment on the Bill. We trust you will consider this submission as positive contribution to the debate on how we can encourage all stakeholders in organisations to improve workplace safety.

Yours sincerely

Mark Goodsell
DIRECTOR - NSW