

**THE REVIEW OF THE OCCUPATIONAL HEALTH AND SAFETY ACT  
2000 AND THE DRAFT  
OCCUPATIONAL SAFETY AMENDMENT BILL 2006  
BY ANDREW FERGUSON 15 DECEMBER 2006**

## **INTRODUCTION**

The CFMEU thanks you for the opportunity to make a Submission regarding the proposed changes to the Occupational Health and Safety Act 2000. The CFMEU considers that workplace safety is a paramount issue. The CFMEU is opposed to any change that results in the watering down of OHS legislation in NSW. The construction industry is one that continues to suffer fatalities and serious injuries. Some of the changes proposed, particularly those that alter the strict liability nature of the duties of employers and others will compound not improve worker safety in the construction industry.

The CFMEU is also very concerned about the focus of the Terms of Reference of the Review, particularly, terms of reference 2, which provides:

*“Consider the impacts of the above proposals, having regard to best practice solutions that will remove unnecessary regulatory burdens on business, without compromising safety”.*

The focus on the burden and cost to business is misdirected. In the construction industry we have seen many examples where cost cutting has cost lives and have led to serious disabling injuries. We invite you to visit our Wall of Remembrance, erected in memory of workers killed at work in the building and construction industry, at our Lidcombe office as stark evidence of the human cost of unsafe work practices. Arrangements to visit Wall can be made with Jennifer Glass who can be contacted on (02) 9749 0404. Further, we have a number of widows, parents and children of deceased building workers who would like to discuss these issues with you.

In October 2003, Joel Exner, 16 years of age, plunged to his death from a roof. The Coroner, in investigating that fatality accepted a submission by Counsel assisting that the failure to comply with the code of practice in relation to roofing in that case may have well been a cost saving measure. The cost saving would come in that case from not only the cost of the mesh alone, but also the cost savings associated with installing the mesh correctly.

The Coroner asked a very relevant question in relation to the manner in which mesh was placed on the site, the Coroner stated:

*“It would be of interest to know whether roofing contractors tend to put jobs on the basis of a cost analysis based on the code or the practice that appears to exist in the industry to not overlap” (see decision of Magistrate Milovanovich NSW Deputy State Coroner 29 July 2005)*

The building and construction industry has seen too many fatalities and injuries caused by cost cutting. A significant contributing factor to this cost cutting is the pressure that developers place on builders to keep costs down and profits up.

### *The Building and Construction Industry*

Building and construction industry workers and their union are under unprecedented attack by the Federal Government. Not only are they effected by the changes under the Work Choices legislation, in terms of lost award conditions and unfair dismissal rights, but also the *Building and Construction Industry Improvement Act 2005* ('the BCIIA'), which impacts negatively on workers. Workers and their Union, who take any form of industrial action face massive fines-\$22 000 for individual workers. The right of workers to remove themselves from unsafe situations is severely curtailed. Attached is an article from the Canberra Time published on 5 July 2006, by David Noonan the CFMEU National Secretary about some of the issues facing building and construction workers in the current environment.

Under the BCIIA the onus is on workers to prove that a situation was unsafe to avoid being penalised for taking action. This legislation places workers in a very difficult position. If they disagree with their employer they can face termination, with little or no redress, as well as fines imposed by the Australian Building and Construction Commission. In Western Australia, for example, the Federal Government is prosecuting 107 workers, who stopped work in support of their occupational health and safety delegate, who was sacked for raising concerns about workers working in extreme heat. The delegate won his unfair dismissal case, but now the ABCC is prosecuting the workers who face fines of up to \$28 600 plus legal costs.

In NSW, a CFMEU workplace delegate, Barry Hemsworth was sacked for insubordination, after raising with management his concern about employees being required to sign off on job safety risk analysis without adequate training and supervision. The Union has brought a claim for relief from victimisation under the Industrial Relations Act 1996 seeking Mr Hemsworth's reinstatement, however, the employer has challenged the jurisdiction of the NSW Industrial Relations Commission, following the enactment of Work Choices legislation and the recent High Court decision.

In NSW, during 2004-2005 there were 14 fatalities in the construction industry, as recorded by WorkCover<sup>1</sup>. These figures do not include fatalities from occupational disease. Labourers and related workers had the second highest number of fatalities at 23.<sup>2</sup> One fatality is one too many. Over the last 10 years, construction trade services and general construction have the second and third highest number of fatalities, after road transport, in NSW.<sup>3</sup> In terms of workplace injuries, labourer and related workers record the highest number and incidence rate of workplace injuries during 2004/5, with the construction industry having the third highest number of workplace injuries after manufacturing and health and community services.<sup>4</sup> Labourers and tradespersons

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<sup>1</sup> New South Wales Workers Compensation Statistical Bulletin 2004-2005, page 21.

<sup>2</sup> New South Wales Workers Compensation Statistical Bulletin 2004-2005, page 21.

<sup>3</sup> New South Wales Workers Compensation Statistical Bulletin 2004-2005, page 23..

<sup>4</sup> New South Wales Workers Compensation Statistical Bulletin 2004-2005, page 30.

also had the highest percentage of occupational disease in the period 2004/5.<sup>5</sup> Despite and overall fall in deaths and injury in the workplace in NSW, these results for the building and construction industry are worrying.

### *Guestworkers*

The Commonwealth Government has also allowed a much larger number of guest workers into Australia, many of them working in the building and construction industry, either legally or illegally. There are a number of different temporary visas including category 456 and 457 short and long stay temporary business visas. There are an increasing number of these visas issued and recent newspaper reports suggest that there are about 71,000 temporary that will be issued this year alone. There are an estimated 60,000 illegal workers in Australia.

Many of these workers are not trained in the occupational health and safety requirements, are not properly inducted and do not receive training from their employer as to the manner in which should be safely done. The CFMEU has seen many examples of guest workers seriously injured or killed.

The safety initiatives that could be taken in NSW include:

- NSW should maintain a register of Visas approved by State Regional Certification Board.
- Mandatory obligation for employers (controllers/principal contractors – as defined in the NSW OH&S Act) to register and notify WorkCover NSW if using guest workers or have guest workers on their site
- Where language is identified as a problem, WorkCover NSW is to ensure that there are safe management systems in place, including appropriate training, including on rights & obligations, signage, manuals & instructions etc.
- Ensuring workers are working only within their verified skill range as stated on their visa.
- Mandatory workplace safety training, which is competency based, with permits issued upon successful completion.
- Specific industry training to continue, e.g. construction industry Green Cards.
- Certificate of Currency for Workers Comp insurance accurately reflecting number of guestworkers, wages, industry classification. Introduction of “Strict Liability” offence for non compliance is that work must cease.
- WorkCover NSW should develop guidelines for employers (users) and guest workers on rights and obligations.

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<sup>5</sup> New South Wales Workers Compensation Statistical Bulletin 2004-2005, page 40.

- The WorkCover NSW web site should provide information on employer and employee rights and responsibilities in relation to employment of guestworkers (in multi lingual format)
- Employers should be required to sign statement verifying that rights and obligations have been explained to guest workers.
- Establish a new Workers Compensation Insurance policy for employers employing guest workers. Policy to be taken out for entire visa period
- WorkCover NSW inspectors to perform initial visit with particular emphasis on high risk areas, construction, mining, forestry and manufacturing.
- WorkCover NSW should conduct regular audits of sites employing guestworkers
- Specific training for WorkCover NSW Inspectors/Authorised Officers on new Guest Worker regime and potential problem areas
- WorkCover NSW should provide an Interpreter service, available to employers, community and guestworkers
- All employer obligations in relation to guest workers should be underpinned by legislation and penalty provisions.
- Mandatory Reporting of occupational health and safety breaches to DIMA
- “Authorised Representatives” (as defined in NSW OHS Act) should be allowed to issue safety improvement and infringement notices to employers/principle contractors/controllers (as defined in the OHS Act of guestworkers.
- Deeming provision in the legislation that makes the employer/controller/principal (or the primary beneficiary) liable for breaches in relation to guestworkers, even if a corporation is foreign owned.
- Stricter and specific legislation and regulations dealing with guest workers
- Similar provisions should apply to those employing guestworkers as for self insurers, requiring demonstration of financial and administrative capacity to meet liabilities and responsibilities.
- A new specific WorkCover NSW Industry Classification (WIC) to be established for Guest Workers
- Mandatory audit of sites where injuries occur on a site with Guest Workers where a ‘significant injury’ occurs,

The NSW Government must ensure that the Occupational Health and Safety Act 2000 and Regulations provide maximum protection to workers, particularly in the building and construction industry, where workers and their unions face strong opposition from the Federal Government and employers in the industry.

The CFMEU has deep concerns about many of the proposed changes to the *Occupational Health and Safety Act 2000* and what it means to workers in the building and construction industry, particularly those that appear to shift the burden of proof, and therefore, the responsibility away from the employer. The CFMEU details its concerns about the proposed changes below.

### **Insertion of words “*So far as is reasonably practical*”**

The CFMEU opposes the insertion of these, or any other words, into the absolute duties contained in section 8 and other provisions of the *Occupational Health and Safety Act 2000* which have the effect of watering down the strict liability nature of the Act.

We understand that these words are to be inserted into the duties of employers and others for occupational health and safety contained in the Act and that the defences available under section 28 will be deleted.

This will in our view, have the effect of reversing the onus of proof away from the employer. This will have the effect, in the case of prosecutions, or compliance, of shifting the onus onto WorkCover, or a prosecuting Trade Union, to prove that it was reasonably practical for an employer or an occupier of others to meet their obligations under the Act, before succeeding in a prosecution.

Under the current provisions employers and others have an absolute obligation to provide a safe system of work and a failure to do so is a breach of the Act. The onus is then on the employer to make out the relevant defence under section 28 of the *Occupational Health and Safety Act 2000*, i.e. to prove that it was not “*reasonably practical*” to comply with the provisions of the Act.

This shift of onus is a backward step in workplace safety regulation in New South Wales.

### **Proposed amendment to section 20 duties of employee**

The CFMEU also opposes the inclusion of a duty on employees to take a reasonable care for their own safety. It is our view that this amendment is totally unnecessary and that the current provision of section 20 already encompass such a duty.

Section 20 provides that:

*“An employee must, whilst at work take reasonable care for the health and safety of the people who are at the employee’s place of work and who may be affected by the employee’s acts or admissions at work”.*

This duty is broad enough to include the obligations by an employee to look after themselves.

Further, employees have been prosecuted and held liable under section 20, even where they have done an injury to themselves. For example, we are aware of a recent matter before the Chief Industrial Magistrates Court where an employee who was given three written warnings about how to safely perform a task, ignored them and cut off the end of his thumb. He was successfully prosecuted for the breach and the CIM fined him and awarded costs against him.

We are particularly concerned that such a provision will be abused by employers to justify disciplinary proceedings, or even termination of employment, for alleged breaches of the *Occupational Health and Safety Act 2000*. This is of grave concern to us, particularly in the current climate where the unfair dismissal rights of workers have been largely obliterated by the Work Choices legislation. In the circumstances we do not believe that employers should be further empowered to unreasonably victimise their employees.

### **Liability of Officers of corporations**

The proposed amendment to the *Occupational Health and Safety Act 2000* also substantially changes the liability of Directors and Managers. Under Section 26 of the Act, individuals who are concerned in the management of the corporation may be held liable for the act or omission of the corporation in terms of a breach of the *Occupational Health and Safety Act 2000*.

The current provisions of the Act are drafted in such a way as to cast a wide net over who may be individually held liable for contravention by a corporation. There has also been significant jurisprudence from the New South Wales Industrial Relations Commission as to what section 26 means.

The effect of the amendment is to do away with the current provisions and to incorporate into the *Occupational Health and Safety Act 2000* the definition of “officer” as provided for under the *Corporations Act 2001* of the commonwealth section 9.

Legal advice obtained by Union NSW strongly suggests that the effect of the amendments is to narrow the effect of section 26 and that individuals who are currently potentially liable under section 26, will escape liability with the change to the legislation. WorkCover has not provided any justification for the need to vary section 26 in this way.

### **Compliance Advice**

The proposed amendments in relation to WorkCover officers providing compliance advice also raise some important questions as to the enforcement role of WorkCover, as distinct from its information advice and educational role.

The CFMEU is very concerned that by giving inspectors the power to provide detailed advice to employers that this will compromise their capacity to enforce the Act. We

are concerned that WorkCover inspectors will feel pressured not to issue infringement or improvement or prohibition notices or undertake prosecutions.

The CFMEU fears that WorkCover inspectors will be placed in a difficult position where employers will be required to provide advice and that employers will seek to rely on this advice if later prosecuted or action is taken against them under the Act. It may also place inspectors in a difficult position as they may not have the necessary technical knowledge to fully advise employers as to what needs to be done to rectify a particular situation. Employers may rely on the advice from WorkCover Inspectors which may not provide the totality of the information required for the obligations under the *Occupational Health and Safety Act 2000* to be met.

We would also be concerned that WorkCover inspectors might become witnesses for the defence in an action against an employer in a prosecution. Even with the caveats contained in the Bill the position of WorkCover as a prosecutor with duties to the Court to act objectively may be compromised.

The CFMEU does not object to WorkCover providing education and information to employers and industry however, feels that it is not appropriate that this should be done by the enforcement arm of the WorkCover authority and would be best left to others in the WorkCover regime.

### **Dispute Resolution by the New South Wales Industrial Relations Commission Amendment to Section 77**

The CFMEU welcomes the capacity of the Industrial Relations Commission to deal with disputes in relation to right of entry. However, the CFMEU believes that parties should be entitled to seek the assistance of the Industrial Relations Commission without first having to seek WorkCover's involvement.

Such a requirement may unnecessarily delay the resolution of the dispute and delay the rectification required to ensure a safe workplace. Parties should be able to have recourse to the Industrial Relations Commission without first having to rely on WorkCover to resolve the dispute. If the Commission requires WorkCover's assistance it should be empowered to request such assistance.

We would also suggest that the jurisdiction of the Industrial Relations Commission be expanded so that any occupational health and safety dispute can be brought to the New South Wales Industrial Relations Commission for resolution in the ordinary way.

### **New Offence Section 83A Misuse of Powers by Authorised Representatives**

The CFMEU is very concerned that the proposed amendments create an offence of deliberately hindering or obstructing the occupier of the premises, or persons at the premises during work time. The offence is directed at authorised representatives. Authorised representatives have a difficult enough job when it comes to investigating breaches of safety and liaising with employers to ensure that breaches of safety are ameliorated. Moreover, in the building and construction industry authorised representatives already face a myriad of potential fines under the *Building Industry*

*Improvement Act 2005* and the Work Choices legislation. Further offences and penalties are not necessary.

In addition there are provisions currently in the *Industrial Relations Act 1996* (NSW) which allows for an authorised officer who has misused their authority to have that authority revoked. We feel that it is an unnecessary burden on authorised officers to now have to face the prospect of a potential \$11,000.00 penalty. This is unnecessary and unfair

### **Section 86 Notification of Incidents**

The CFMEU opposes the inclusion of the words “*(unless the occupier has a reasonable excuse for not doing so)*” in relation to the notification of incidents. It is the CFMEU’s strong position that the requirement to notify incidences under the Act, either incidences of actual injury or near misses, should be an absolute and strict one and employers should not be given the opportunity to wriggle out of their notification obligations.

The CFMEU indicated in its submission to the OHS Review that many incidents, such as near misses, were not being reported to WorkCover where there was no lost time injuries. This is inconsistent with the intent of the legislation and needs to be addressed.

### **Enforceable Undertakings**

The CFMEU is concerned that the capacity for employers to enter into, with WorkCover NSW, enforceable undertakings will work to undermine the prosecutions of breaches of the *Occupational Health and Safety Act 2000*. Employers may be inclined to enter into unenforceable undertakings to avoid fines and penalties being imposed. They may also use enforceable undertakings to circumvent or avoid a prosecution that has been commenced by WorkCover NSW, or trade union.

Thus, the CFMEU is very concerned about the capacity for enforceable undertakings being used by employers to avoid fines and penalties under the Act. If enforceable undertakings are to be included they should just be another form of penalty that can be imposed after a successful prosecution.

### **Part 6A Safety Recommendation Notices**

The CFMEU welcomes the capacity for employee safety representatives authorised under the Act to issue recommendation notices to their employer in relation to safety issues that need to be addressed. However, the system that is proposed by the amendments is highly complicated and onerous on employee representatives.

The CFMEU considers that the provisions of section 103G (4) that require a notice to set out a number of details including various provisions of the Act or regulations is highly onerous, even for people who are trained in workplace safety. Employee safety representatives are volunteers under the Act; they are workers trying to assist employers in meeting their occupational health and safety obligations. They should be

able to issue a simple form of notice and for the employer then to take the necessary action to rectify the issues raised.

We are also concerned that if there is a dispute about a notice that it will ultimately have to go to the Local Court/Chief Industrial Magistrates Court. This is a highly legalistic solution and it would be better, in the event of a dispute, that it could be referred to the New South Wales Industrial Relations Commission for resolution.

The CFMEU objects to the provisions of section 103J. This provision imposes monetary penalties of \$3,300.00 to \$4,950.00 where an employee representative misuses the powers conferred by the Act. The risk of being penalised will defeat the purpose of these divisions and will be a disincentive for employee representatives to issue notices just in case they end up being fined or penalised under this section.

Workers should be encouraged to participate in formal structures that assist in reducing safety problems in the workplace without fear of prosecution.

### **Section 136 Offensive, Obstructing or Intimidating Inspectors and Others Exercising functions under the Act**

The amendments to the *Occupational Health and Safety Act 2000* seek to provide a “reasonable excuse” defence to employer where they obstruct or intimidate inspectors and others in the functions of this Act. As previously stated the jobs of WorkCover inspectors and/or authorised representatives under the Act can be difficult and employers are often not receptive to such individuals raising issues of safety and carrying out their powers under the Act. We consider it unnecessary to provide employers with a defence when it comes to obstructing or intimidating inspectors of others.

A prosecution under this section is subject to standard of proof of “beyond reasonable doubt”. This is sufficient protection for employers.

WorkCover inspectors and authorised representatives play an integral role in ensuring that employers and others meet their obligations in relation to workplace safety. They play an important role in the ongoing reduction in workplace injury and accidents and those individuals should be properly protected under the Act from intimidation and obstruction in carrying out their functions.

### **Right of Entry**

The CFMEU supports the amendment to the OHS Act which allows access to the workplace for authorised officers to enter workplace to discuss matters of occupational health and safety with workers. This is a positive enactment which will provide workers access to authorised officers, assist in the dissemination of important information in relation to occupational health and safety issues, assist in the up-skilling of workers about occupational health and safety and hopefully give them the support and confidence to address occupational health and safety issues. Of course this provision cannot detract from or reduce an authorised officer’s right to investigate a suspected breach of the Act.

The CFMEU and its officials, delegates and other are available for further comment.  
We encourage you to organise a meeting with the Union at our Lidcombe office.