

Harry Feldman



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Thanks for inviting my comments on the model act. They are more or less in the order the model act is laid out, rather than in order of descending significance.

As discussed, one of my principal concerns is that the act offers no protections to persons employed or contracted for 'private or domestic purposes' under s. 5(2) and those working for voluntary organisations under s. 5(3). I appreciate that the householder or tenant incurs duties of care under s. 28, but only in the capacity of a 'person at the workplace'. They do not appear to have a duty of care to those they employ to maintain the residence as a safe place to work, particularly in their absence. An injured worker may have access to some redress due to the liability of the householder, but that is no substitute for a requirement that the workplace be safe in the first place. Ironically, babysitters, lawn mowers and the like, who may be children themselves and therefore require the highest level of safety and supervision, are unlikely to conduct their work under supervision. Similar concerns apply with respect to volunteers working for voluntary organisations.

I don't think there's any simple way for the act to provide protection to such workers and in many cases it would not be reasonably practicable for a householder, particularly a tenant, to know of possible defects to the structure or to ensure that all necessary safeguards are in place. Nevertheless, they are workers and have no less an entitlement to protection of their health and safety while at work than workers in more formal workplaces.

Another concern is the omission of the interpretation cast on the notion of 'reasonably practicable' in Appendix 2 of the Discussion paper. I don't know what force 'an interpretative document under Part 7' might have, but think it ought to be clear in the text of the act that a business or undertaking that cannot afford the safeguards required to perform work safely cannot afford to perform it at all and is prohibited from doing so.

As we discussed, if there is no class of persons intended to be prescribed for exclusion under ss. 19(3)(b) and 20(3)(b), they should not be mentioned.

I strongly favour the duty to consult under s. 45, which does not require anybody to request consultation and is not restricted to a particular workplace, as in the current Commonwealth act. The definition of *consultation* in s. 46 goes as far as one might expect, although I think s. 46(1)(d) ought to stipulate that advice of the outcome specify the reasons for any decisions taken, especially where there was disagreement and



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workers' views did not prevail. Under s. 46(2), there should be provisions for consultation where an HSR is unavailable for any reason and it should be clear that all affected workers are entitled to be party to consultations even if they are represented by an HSR.

Because there is a marked tendency for OHS concerns to focus on plant, substances, manual handling and the like, I think it is important to make it explicit in s. 45 or 47 or some other appropriate point that 'hazards', 'risks' and 'changes' apply equally to procedures, management practices, staffing decisions, hours of work, software and other less tangible hazards. Furthermore, it should specify that among the changes about which consultation is required is a change to the workplace or a move to another workplace.

In s. 55(3), the most obvious interpretation is 'a majority of workers employed in a work group'. It should be clear how this is to be determined, whether workers on leave are included, what happens if a majority of the workers do not express an opinion on the matter, etc. This would be problematic in any case – who would be empowered to conduct the poll to determine whether a majority wants a union to assist? And who would conduct the poll to determine that? It might prove to be more manageable simply to specify that a union may assist on the request of N or more members of the work group. In my view, N=1.

The provision in s. 63 allowing the HSR of another work group to exercise HSR powers with respect to that work group in the absence of their own HSR is welcome.

The provisions for payment of HSRs and OHS Committee members in ss. 64(3), 65(5) and 72(4) should stipulate that the time spent in training or performing HSR/Committee functions is work, not leave, and may not impact on the workers' leave entitlements. I suppose it is a concern for the involved PCBUs, rather than the drafters of the legislation, but it may not be that obvious how to apportion the cost of wages, super contributions, on costs, etc. under s. 66.

The restrictions on exercise of HSR powers under ss. 76(5) and 80(3) seem to be inconsistent with the option of the HSR not to request training under s. 65(1) and the 'reasonable' hedges under 65(3). While I am sympathetic to the necessity for an HSR exercising those powers to have appropriate training, it would defeat the purpose of electing an HSR if could not exercise those powers. So the only time that it would be strictly reasonable for the HSR to undertake training is immediately, which could impact on the interpretation of 'reasonable costs', as they could entail flying the HSR interstate, TA, etc. Furthermore, if these restrictions pertain, then training must be compulsory for the HSR. I appreciate that an



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HSR has traditionally enjoyed powers without responsibilities, and concur that this is desirable. But HSRs are elected by their workmates specifically in order to be able to exercise HSR powers, so it strikes me as reasonable to demand that anyone standing for an HSR position be prepared to undertake training immediately upon election. The alternative, of course, would be to remove ss. 76(5) and 80(3), and allow all HSRs the full range of powers regardless of training.

The requirement that half the members of an OHS committee not be PCBU nominees under s. 69(4) is welcome.

It is unclear to me who might be intended by the representative of an HSR in s. 73(2)(c). Presumably, when members of a work group elect an HSR, it is because that is the person they want to represent them. I don't see any scope for the HSR to delegate this representative function. The provision in 73(4)(b) that the PCBU representative have the power and competence to act as a representative seems like a good idea, if 'act as a representative' means empowered to make decisions and enter undertakings.

Regarding cessation of unsafe work under ss. 75 and 76, I am not convinced that it is appropriate for workers to persist in unsafe work even if the risk is not 'serious', and even if the hazard is not immediate or imminent. There is no reason a worker should persist in using equipment, handling substances or carrying out practices that will cause less serious injuries or will only affect them after long exposure. Similarly with respect to HSR directions to cease work.

It is not clear what is intended in s. 75(3).

S. 77(3) provides for a worker who has ceased work to accept suitable work at 'another workplace'. In my view, this should stipulate that it is the responsibility of the PCBU to transport the worker to the alternative workplace and back without loss of pay for the time spent travelling. Similarly, s. 78(2)(a) should provide that if a worker is directed to work at another workplace beyond the day on which the cessation of work commences, the PCBU is responsible for transporting the worker from the usual workplace to the other workplace without loss of pay, or some other suitable arrangement that does not entail extra expense or commuting time for the worker.

In s. 82(d), it could be clearer what 'at least 8 days after' means. Without further clarification, I would assume it means 8 calendar days—a pin issued at 1100 on the first of the month can require remedy any time after 1100 on the ninth.



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In s. 85(a), I suspect the person accepting service of the notice ought to be 16 **and** appear to be the PMCW, as in s. 202(1)(c).

The provisions for the burden of proof to rest on the defendant in discrimination cases under ss. 99 and 102(2) are welcome. However, this conflicts with the apparent intention of relieving the defendant of the onus of proof for infractions of the duty of care. I can understand the view that the onus of proof must always rest on the prosecution as a matter of principle. But once the principle has been relinquished, there would seem to be little justification for eroding the safeguards provided to workers in NSW under s. 110 of the NSW OHS Act by shifting the burden of proof from the employer in cases pertaining to their duty of care.

In s. 106(3), it is not clear to whom the reasonableness of the suspicion on the basis of which right of entry is sought must be proven, or whether this needs to occur before entry.

In s. 107(1)(d), the PCBU is only required to permit inspection and copying of records ‘directly relevant to the suspected contravention’, but surely it can’t be up to the suspect to determine what is and is not directly relevant and the entry permit holder can’t make such a determination without actually inspecting them.

It is grounds under s. 130(2)(d) to apply for revocation of an entry permit if the holder obstructs ‘workers at a workplace’. I think this ought to explicitly exclude obstructing unsafe work.

The jurisdictional note associated with s. 157(1)(f) seems to suggest that inspectors may be required to pay for seizing evidence. Is that the intention?

A magistrate considering a request for a search warrant under s. 159(3) should not be permitted to require information in an unreasonable form, e.g. handwritten or in a foreign language.

As has been widely remarked, the model act removes the authority to prosecute enjoyed by unions under s. 106(1)(d) of the NSW act. This is an unwelcome development. The ability of the regulator to prosecute is inevitably constrained by the resources allocated to them, which may entail

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foregoing prosecution for strictly economic reasons. Retention of the unions' authority to prosecute means that PCBUs who contravene the act may be prosecuted even where the regulator is unable and the DPP declines to prosecute.

Finally, I have a particular concern with legal professional privilege preserved in s. 243. In particular, when the PCBU claims that there is no duty to consult over some change in the workplace and that they have secured legal advice to this effect, that advice should not be protected. This is not fanciful, it has actually happened. Granted, the duty to consult is much stronger in the model act than under the current Commonwealth act, but there may be other loopholes.