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Submission to
the National Review Into Model Occupational Health and Safety Laws
Response to the Issues Paper May 2008

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Independent Contractors of Australia (ICA) is an association which was formed to protect the rights of independent contractors. Independent contractors are small business people. ICA operates through its Website at www.contractworld.com.au.

With the dramatic changes in the nature of work and workforce engagement systems over the last 20 years or more, it is important that government regulatory regimes understand and respond to the new environments in positive and constructive ways. ICA was formed, in part, to assist that understanding.

ICA is pleased to see the efforts being made to harmonise OHS laws nationally. It is a development long overdue. If successful, appropriate harmonisation should:

- Give clarity to OHS laws and objectives and enable all businesses and workers in Australia to achieve much improved work safety outcomes. The goal is and must be constant striving for zero deaths and injuries at work.
- Enable a sharper focus on resources to improve safety.
- Produce productivity gains for the Australian economy.

However, the right sort of harmonisation must be achieved.

This submission

A. Recommends adopting the Victorian OHS laws as the model for national laws.
B. Focuses on the misuse of definitions under some OHS laws and on how such misuse distorts the achievement of safer OHS objectives.
C. Addresses some of the specific questions raised in the May 2008 Issues Paper.

A. Victorian OHS laws are the best model for national laws

In 2003-04, Victoria reviewed its OHS laws and introduced a new Act. ICA made submissions to the Victorian Review (the Maxwell Review) and strongly supports the Maxwell Report and the Victorian legislation that followed.

In responding to the national review of OHS laws, ICA recommends that the Victorian OHS laws be used as the model for national laws in the proposed harmonisation process. In particular, the national review should carefully note and adopt the principles of OHS laws

discussed in the Victorian Maxwell Report. Key principles which are reflected in the Victorian laws and explained in the Maxwell Report include:

- **Everyone at work is responsible:** Everyone involved in the work environment has equal and similar statutory responsibilities and liabilities to make work safe. There are no differences between parties based on legal definitions of status—for example, employers vs employees. No-one is outside the responsibility loop. This is critically important because it sends clear messages that OHS is a joint and mutual responsibility.

  [Unions: The only addition we would make on this issue (which is not in the Victorian legislation) would be to include unions as a specific category with responsibility and liability under statutory duties of care. Currently, where unions exercise control over work situations they do not have specific statutory liabilities. This is a significant omission from all Australian OHS laws and is discussed further below.]

- **Practical Control**: Everyone is held liable for what they *reasonably and practically control*. This is critical to maintaining public faith in the OHS schemes. People must know that they will only be held liable for those things over which they have reasonable and practicable control and that if they have not had control, then they will not be held accountable. This is vastly different from what has occurred in NSW over the last few years, where people who have not had effective control have suffered OHS convictions. This situation in NSW creates distorting behaviours, primarily accountability avoidance, which act against safer work.

- **Criminality:** The distinction between normal criminal law and the peculiar nature of OHS criminality is discussed in the Maxwell Report and reflected in the Victorian OHS Act. That is, under normal criminal law there must be intent and injury must occur. Under OHS law, breaches can occur even where injury has not occurred and best endeavours toward safety have been made. As a consequence, OHS prosecution can occur where injury has not happened. This means that important principles of justice must be observed, including the presumption of innocence. This is reflected in the Victorian laws under the duties of care provisions.

  No industrial manslaughter: As a consequence of recognising the distinction between normal criminal law and OHS criminality, the Maxwell Report and the Victorian OHS laws reject/exclude the concept of and make no provision for OHS industrial manslaughter. Instead, manslaughter prosecutions are subject to normal criminal processes. ICA strongly endorses this approach which avoids the illogical and dangerous features of industrial manslaughter laws in the ACT and NSW.

- **Deeming of OHS compliance**: In Victoria, if a person has complied with Codes of Practice or the directions of an OHS inspector, the person is deemed to have complied with the OHS Act. This is important to the integrity of OHS Acts and regulations. If compliance with Codes or an inspector's instructions does not constitute compliance with the Act, then, from a practical perspective, the Codes are meaningless and irrelevant. In such circumstances the public cannot have faith in the integrity of the state's OHS regime. By deeming compliance with Codes and inspectors' instructions as compliance with the OHS Act, the state is demonstrating confidence in its own systems and drives a high level of accountability through the entire system.

- **Inspectors' indemnity from prosecution**: In Victoria, authorised WorkCover Authority inspectors and the Workcover Authority are exempt from prosecution if an OHS incident occurs after the inspector has given a direction. The Maxwell Report highlighted the fact that if this exemption did not exist, inspectors (understandably) refused to give OHS instructions to businesses. This made a mockery of the OHS system and diminished the capacity for work safety information to be freely and widely shared.

Detailed reasons behind each of these important features are discussed in the Maxwell Report.

ICA believes that the Victorian laws, post-Maxwell, have subtly but importantly changed OHS culture in Victoria. Before Maxwell, relationships between the Victorian WorkCover Authority and business were marked by strongly built-in elements of suspicion, fear and aggressive distrust. This is the culture that continues to exist in NSW. The relationships in Victoria are now more open, oriented towards practical results and imbued with higher levels of trust and engagement. The Workcover Authority still conducts OHS prosecutions, as it should, but does this with a greater moral authority than in the past. This is important, because better community trust and faith in the state-imposed OHS system should be expected to contribute to higher levels of voluntary compliance and voluntary initiation of better OHS practices, than in systems where trust is low.

B. Language and the problem of the corruption of OHS Principles

The National Review Issues Paper describes the principles of OHS regulation used by all jurisdictions as those espoused by the Robens Committee in the United Kingdom in 1972. The Review Issues paper also highlights the fact that Australia has OHS obligations arising from its being a signatory to the International Labour Organisation Conventions on OHS (C155).

The Productivity Commission described the Robens principles this way:

> This involves a general duty of care imposed on those having control over aspects of the workplace, backed by detailed regulations and codes of practice. (p xxv)

and

> … involves a principal OHS Act that codifies the duties of care that are owed under common law.… The duty is imposed on employers, the self employed, owners, occupiers of premises and suppliers. The duty is owed to both employees and others (workers other than employees, customers and visitors) who may be affected by the worksite, activity or equipment. Workers have obligations not to put others at risk and to obey the reasonable instructions of their employer in relations to OHS. (P40)
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> [The Productivity Commission 'Interim Report National Workers' Compensation and Occupational Health and Safety Frameworks', October 2003.]

ILO Convention 155 of 1981, Article 4 states:

> The aim of the policy shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment.

ICA supports these principles, re-expressed in simple lay language as: 'any individual who has any measure of control of a worksite must contribute to ensuring so far as is reasonably practicable that all people affected by the work are safe.'

ICA believes, however, that this core principle is subject to being corrupted by the language, concepts, practices and legalities of 'employment'. This tendency to corrupt the Robens principles because of 'employment' is evident in the National Review's Issues Paper and is the focus of ICA's submission.

B1. The interface between OHS principles and 'employment language'

Employment is a legal and managerial state which in many respects presupposes that an employee is a person who is less than an adult. That is, that in exchange for payment, adults enter a work environment where they agree to surrender significant levels of control over their own actions to the managerial group (delegates of the employer) within the firm. The legal idea of employment holds that the employer has the 'right to control' the employee.

Around the period when the Robens principles were established, employment was the near-dominant mode of workplace engagement used inside firms. Further, full-time, permanent and career-based employment applied extensively. It was only natural that legislative draftspeople crafted OHS legislation and regulation using 'employment' language. Hence, OHS legislation almost universally identifies the 'controllers' of worksites by describing them as "employers" and describing the persons to whom "employers" owe a 'duty of care' as "employees". To embrace others who are not employees, legislation generally attempts to describe contractors and others under 'employment deeming'-type language.

This structuring of OHS legislation around employment language has created two flaws which potentially limit the full implementation of the Robens principles:

1) The 'employment deeming' approach creates potential confusion about the duty of care—its range and to whom it is owed. In other words, it creates the danger that particular types of persons may be overlooked in legislation.
2) The identification of the "employer" as the entity in control of a worksite creates possibilities that others, who are not employers but who exercise some form of control over a worksite, may escape the duty of care that they should exercise.

In addressing the potential legislative and regulatory holes created by employment language, and to cover those holes, legislation has tended to layer additional descriptions of classes of people to cover all possibilities—for example, describing contractors as employees etc. This approach, however, has tended to layer confusion upon confusion rather than creating simplicity and ease of comprehension. And the elements of legislative confusion are reflected in education and OHS administration and enforcement policies, procedures, practices and attitudes. It is probable that the confusion and lack of clarity could be a contributing factor to workplace injury. Certainly the lack of clarity would not assist good quality OHS practices.

B2. A changing society and shifting work models

Further complicating the complexity of this historically structured legislation is the shift away from employment and, more particularly, away from permanent and full-time employment. This change in the nature of work in society is well recognised.

Employment has declined. Only 51 per cent of the workforce are engaged as full-time, permanent employees. Twenty-eight per cent of the private-sector workforce are not employees. It would appear that this massive shift in the nature of work away from permanent, full-time engagement and employment is continuing. It represents a significant challenge to all those levels of government that regulate labour.

OHS is challenged because the legislative and regulatory holes already in evidence as a result of the dependence on employment language are likely to be enlarged by social changes in the way in which work is organised.

B3. International Labour Organisation Definition

The move away from employment in the work environment has led the ILO to consider how independent contractors should be treated within the framework of work and regulation.

In 2003, the ILO came to a Conclusion on definitions of employment/non-employment after struggling with the issue since 1996. In June 2006, the ILO adopted a historically important 'Recommendation' which established a new international labour standard.

The key definition in the 2003 Conclusion is *clause 1* which reads;

> *The term employee is a legal term which refers to a person who is a party to a certain kind of legal relationship which is normally called an employment relationship. The term worker is a broader term that can be applied to any worker, regardless of whether or not she or he is an employee….*
> *Self-employment and independent work based on commercial and civil contractual arrangements are by definition beyond the scope of the employment relationship.*

The key statement in the 2006 Recommendation is *clause 8* which reads:

> *National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.*

This precision in definition by the ILO is helpful in indicating the limitations of employment-dependent language in OHS regulation. Importantly, independent contractors are workers who operate through a commercial contract instead of an employment contract. Consequently, in the context of labour regulation, independent contractors are not employee-like. They are not, like employees, something less than an adult. Independent contractors are people who exercise control over their work. In the context of OHS law, independent contractors should and must be treated as having full responsibilities and liabilities to work safely.

B3. Moving Forward. Constructive approaches to achieving quality OHS outcomes with new work engagement arrangements

ICA agrees that accommodating the new arrangements is the process most likely to improve OHS outcomes. The starting points are:

1) Ensure terminology in OHS legislation and regulation is not employment-dependent, but written in language aligned to OHS principles, namely, to keep people safe.
2) Ensure that all parties who are in work situations or who influence work situations—including government, unions, committees and others—have liability and responsibility apportioned to their behaviours.

B4. Resolving OHS definitional issues

ICA believes that the precise language adopted by the ILO offers scope for better constructing modern OHS law. ICA takes the view that to achieve good legislative and regulatory design, attempts to use 'employment' as the catch-all approach distort and confuse the specific objectives being targeted. Each regulatory environment should look to its specific and particular objectives and seek to embrace the new forms of work without prejudice for or

against any one form, study each of the forms, and seek to align each form to the specific objectives.

Employees and independent contractors

Rather than focus on the different status of employees and independent contractors, it is better to look at the issue of 'worker'. This is an approach used by the ILO and which the ICA supports. Some comment on the differences between the two (as traditionally conceived under OHS) may nonetheless be useful.

At common law, employers are vicariously liable for their employees. Because of this, there has tended to be a policy drift under OHS in terms of accountability: although employees have, in theory, been accountable for those of their actions that lead to accidents, in practice that accountability has been significantly and systemically ignored. By comparison, independent contractors are fully accountable for their actions both *de jure* and *de facto*. ICA believes that, as a consequence, the law creates an environment in which employees may be less likely to behave in a safe manner at work than are independent contractors.

The parallel with car driving is strong. Driving laws do not assume any difference in responsibility for driver actions because of a driver's legal status. Holding all drivers responsible is considered important for achieving safer roads. The Maxwell Report's emphasis on considering "worker" responsibility is akin to "driver responsibility". ICA takes the view that, when looking for a generic definition (worker), the responsibilities apportioned to workers for their actions should parallel those of independent contractors—that is, that people are held genuinely accountable and liable for their actions.

The transference of responsibility and liability—because of the vicarious liability of employees—is not consistent with the objective of safe work practices.

Managers

'Employers' are better thought of as being a 'business' (considered in the broad sense of an entity undertaking an activity). For OHS purposes, in most businesses, control is exercised by delegated employees acting as 'managers'. This particularly applies in large public and private corporations, and in the public service.

Unions and control

As foreshadowed above, a significant omission in most OHS considerations is any discussion of the liability and responsibility of unions for the control they exercise on worksites. This is a surprise. Unions exercise considerable, significant (and sometimes near-dominant) control of some worksites, yet are not, it appears, currently held liable or responsible for the level of control they may demonstrably exercise.

Unions exercise their formal control of worksites by being delegated instruments of industrial relations legislation. Unions can exercise considerable informal control over worksites through their relationships with employees and managers of worksites. Unions rarely have common-law contracts with parties to a worksite, but are normally formal parties to industrial instruments. Through their formal involvement over awards and enterprise agreements, through their positions on OHS committees and through their informal powers, unions can and do exercise considerable power of veto over managers' actions and options for actions. In effect, unions frequently assume a level of quasi-managerial control.

Normally, unions can be said to exercise a positive control over OHS, but this should not be presumed within OHS policy discussions, parameters, legislation or systems. The fact is that unions exercise control and this should be recognised and encompassed within OHS legislation and, like all other parties who exercise control, unions and union officials should be accountable and liable for actions commensurate with the level of control they exercise. To exclude unions from the OHS accountability umbrella is to create OHS inconsistency and is likely to diminish the objective of achieving safer worksites.

C. Answers to some of the questions raised in the May 2008 Issues Paper

Legislative Approach:

Q1. *Which regulatory approach or approaches should be taken in the model OHS Act and why?*

ICA recommends adopting an approach along the lines of the Victorian model. See our earlier discussion.

Scope, Application & Definitions:

Q10. *Should general duties of care be tied to the conduct of work, to the workplace or other criteria?*

Duties of care should be expressed as broadly as possible to encompass all work aspects relevant to work safety. However, this should be underpinned by the expression 'reasonable and practicable'.

Q11. *Should general duties of care under the model OHS Act be extended to members of the public? If so how?*

Yes. The model used in the Victorian OHS Act can readily be extended to create a duty of care for members of the public. In addition, specific provision should be made to cover unions and their officers as having a legislated duty of care. To leave unions out exposes a glaring 'double-standard' in the approach to work safety. All provisions should be subject to the test of what is 'reasonable and practicable'.'

Q12. Should the scope and application of the model OHS Act be sufficiently broad and flexible to accommodate new and evolving types of work arrangements? If so, how should this be achieved?

Yes. See our earlier discussion. The Victorian Act gives us a model for how this can be achieved legislatively. In principle, the application of the model Act should not be restricted by modelling around common law or other contract definitions—for example, employee vs employer. The practical needs of OHS require looking through and beyond artificial legal constructs to the realities of human behaviour and seek to capture those human behaviours.

Q14. Which terms are critical for achieving national consistency? How should they be defined in the model OHS Act?

The first and most critical issue is to achieve consistency in the expression of duties of care. Without national consistency in the duties of care, confusion cascades from within the system. Most States and the Commonwealth display a consistency in approach with their use of terms along the following lines:

"an [….] must ensure so far as is reasonably practical..."

"an [….] shall take all reasonably practical steps to protect the health and safety…"

"an [….] must take reasonable care…"
"an [….] must take reasonable care for his or her own safety…"
It would be beneficial to achieve one national set of wording under duties of care but this is not essential, providing that the words "reasonable and practicable" are explicitly referred to.

Only NSW and Queensland do not follow this approach under their duties of care. Those two States, therefore, should not be used as a basis for crafting the model OHS Act.

Duties of Care – Who owes them and to whom?

***Q16**. Should the model OHS Act include a 'control' test or definition? If so why and what should it be.*

Any definition of control should be broad and is really only needed to ensure clarity for the public so that they understand the intent of the Act and its application to people in their respective situations. However, such a definition should not artificially restrict the courts in their investigations of the practical issues of control following OHS incidents.

***Q18.** Should control be able to be delegated or relinquished? If so, in what circumstances and what should be the legal effect of doing so be?*

In modern commercial arrangements it is normal for work functions to be delegated or contracted out to other entities. The advantages of specialisation, the inability of central command-and-control style management to be fully competitive and the decline of employment all contribute to this development. Independent contractors are generally the end manifestation of contracting-out processes.

Such delegation of function may shift the allocation of commercial risk and liability—for example, workers' compensation, commercial loss, etc—but it should not be seen to shift or remove responsibility for OHS. OHS responsibility should not be confused as a strict function of commercial law. Independent contractors, as should everyone, must accept their responsibilities to make sure that work is safe but they cannot accept the responsibilities of others.

The issue is one of balance. The stark fact is that no-one should think that they can contract out of OHS responsibilities. Yet a properly functioning economy must allow everyone to contract out functions to suit business needs according to individual circumstances. No artificial constraints to this should exist. However, when contracting-out occurs, the reality is that a larger number of players become responsible for work safety in a shared process of mutual responsibility. When duties of care in legislation successfully embrace all potential parties in equal measure, shared responsibility becomes enforceable. The measure of responsibility each party has is subject to the test of reasonable and practical control.

***Q19.** Should the model OHS Act clarify responsibilities where multiple duty holders and multiple duties are involved? If so how should this be achieved?*

The model Act should make it clear that all duty holders are expected to be accountable subject to the practical realities of what each duty holder controls. Refer answers to question 18 (above).

***Q20.** Is primary reliance on employment relationships a valid basis for framing safety obligations?*

No. See our earlier discussion.

Q21 *How should the model OHS Act provide for duties owed to non-employees such as contractors, labour hire personnel, volunteers, apprentices/trainees and other persons performing work?*

Each of these mentioned classes of persons are owed a duty of care and owe duties of care to others. Too often, technical legal terminology confuses the objectives sought to be met. The reality is, however, that OHS seeks to prevent, and therefore imposes a duty of care to prevent, harm being done to "*people*" who could be at risk of harm from a work activity.

Q22*. Is there a broader concept that more effectively covers the various work arrangements?*

The reforms to the federal Tax Acts in 2000 under PAYG removed the Tax Commissioner's dependency on 'employment' as the definitional trigger for the Commissioner's withholding powers. The Tax Act now uses as its primary terminology the words "payer", "payee" and other generic language. This has given a tighter structure to the Tax Act by using broader language. Using the same principle, the model OHS Act should explore releasing OHS from the dependent strictures of employment language. Given our response under question 21, the term "people" could be such a term. [Note example: The use of the word 'persons' creates difficulty and confusion because at law a corporation is also a "person", which is an extension beyond the everyday use of the word person. It is not the intention or need of OHS law to keep a 'corporation' free from harm.]

Q26 *Should the model OHS Act include duties of care for persons who are not performing work? If so what should the duties be?*

Yes. The duties should be no different from those owed to persons performing work. That is, the need is to keep people safe from harm.

'Reasonably Practicable' & Risk Management:

Q37*. Should a test of "reasonably practicable" be included in the model OHS Act?*

Yes, as a matter of utmost priority. It should be stated upfront in the duties of care as explained in our answer to Q14. It should not be diminished in importance by being only applicable as a defence—as is the case in NSW.

Consultation, Participation and Representation:

Q67. *Should a model OHS Act specifically provide for the right of workers to refuse or cease to undertake work they consider unhealthy or unsafe?*

Absolutely yes! All persons should refuse to do anything they consider unsafe and should not suffer retribution or discrimination for doing so. Refusal to do unsafe things is an ultimate safety tool. This principle has, however, been corrupted in the past by OHS being used as a pretext for industrial disputes. Such activity is at minimum immoral and, at worst, potentially criminal because it can and does lead to cultures and behaviours where genuine work safety issues are ignored. Persons who use OHS as a mask for industrial dispute activity should be subjected to significant penalty because they consciously create OHS risk.

It also has to be recognised that many people at work may not report unsafe practices because of fear of retribution, whether imagined or real. This occurs even though discrimination against someone in these circumstances is unlawful. One suggestion is that OHS authorities should consider establishing anonymous safety 'dob-in' hotlines. This is not something that may be appropriate for inclusion in a model Act, but should be considered as part of the Review's recommendations.

Regulator Functions, Powers & Accountability:

Q85. *Should the model OHS Act strengthen the role and capacity of inspectors to provide assistance and advice? If so, how?*

Yes. Refer to our earlier discussion regarding the Victorian OHS Act being used as a model in this respect.

Prosecutions:

Q104*. Should the model OHS Act provide for breaches of duties or obligations to be criminal offences, or be the subject of civil proceedings and penalties or a mixture of both?*

A mixture of both. In relation to criminal prosecutions, full rights to normal criminal justice should apply, including the presumption of innocence, potential for trial before jury, trial within a proper criminal court (not an industrial relations court) and full rights to appeal. The distinction between OHS criminality and normal criminality should function within the model OHS Act. The Victorian OHS Act in this respect should be used as a model and the NSW OHS Act should not be used.

To repeat our earlier comments:

- **Criminality:** The distinction between normal criminal law and the peculiar nature of OHS criminality is discussed in the Maxwell Report and reflected in the Victorian OHS Act. That is, under normal criminal law there must be intent and injury must occur. Under OHS law, breaches can occur even where injury has not occurred and best endeavours toward safety have been made. As a consequence, OHS prosecution can occur where injury has not happened. This means that important principles of justice must be observed, including the presumption of innocence. This is reflected in the Victorian laws under the duties of care provisions.

    No industrial manslaughter: As a consequence of recognising the distinction between normal criminal law and OHS criminality the Maxwell Report and the Victorian OHS laws reject/exclude the concept of and make no provision for OHS industrial manslaughter. Instead manslaughter prosecutions are subject to normal criminal processes with triggers through the OHS Act. ICA strongly endorses this approach which avoids the illogical and dangerous features of industrial manslaughter laws in the ACT and NSW.