

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Occupational Health and Safety Act 2000*, and related Acts, following the 5-year statutory review of that Act.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent (except for the provisions that are specified to commence on a day or days to be appointed by proclamation).

Clause 3 is a formal provision that gives effect to the amendments to the *Occupational Health and Safety Act 2000* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the *Workplace Injury Management and Workers Compensation Act 1998* set out in Schedule 2.

Clause 5 is a formal provision that gives effect to the amendments to the *Industrial Relations Act 1996* set out in Schedule 3.

Clause 6 is a formal provision that gives effect to the amendments to the *Crimes (Sentencing Procedure) Act 1999* set out in Schedule 4.

Clause 7 is a formal provision that gives effect to the amendments to the *Fines Act 1996* set out in Schedule 5.

Clause 8 is a formal provision that gives effect to the amendments to the mine safety legislation specified in Schedule 6 as set out in that Schedule.

Clause 9 is a formal provision that gives effect to the amendments to the *Occupational Health and Safety Regulation 2001* set out in Schedule 7.

Clause 10 provides for the repeal of the proposed Act on the day following the day on which all of the provisions of the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Schedule 1 Amendment of Occupational Health and Safety Act 2000

Schedule 1 [1] makes it clear that it is an object of the *Occupational Health and Safety Act 2000* to encourage employers, employees and others to take an active role to protect themselves and other people in the workplace against risks to health or safety.

Schedule 1 [3] inserts a note to indicate that the role and functions of WorkCover in securing the objectives of the *Occupational Health and Safety Act 2000* are set out in sections 22 and 23 of the *Workplace Injury Management and Workers Compensation Act 1998*.

Section 10 (3) (b) of the *Occupational Health and Safety Act 2000* excludes private dwellings (and plant or substances used in such dwellings) from the duty imposed on a person who has control of premises used by people as a place of work to ensure that the premises are safe and without risks to health. **Schedule 1 [9]** amends this paragraph so that the exclusion extends to common property that no resident has an exclusive right to occupy.

Schedule 1 [11] clarifies that the consultation process that employers are required to undertake under the *Occupational Health and Safety Act 2000* is to be carried out only so far as is reasonably practicable.

Schedule 1 [12] inserts proposed section 17A into the *Occupational Health and Safety Act 2000*. Proposed section 17A provides for an inspector to determine any disagreement between employers and employees with respect to consultation arrangements on the request of either party.

Schedule 1 [14] imposes a duty on employees to take reasonable care for their own health and safety while at work (with a maximum penalty for a contravention of this

duty being 45 penalty units in the case of a previous offender or 30 penalty units in any other case).

Schedule 1 [19] inserts proposed section 23A into the *Occupational Health and Safety Act 2000*. Section 23 of that Act provides that it is an offence for an employer to, among other things, dismiss an employee because the employee makes a complaint about a workplace matter that the employee considers is not safe or is a risk to health, or because the employee is a member of an OHS committee or is an OHS representative. Proposed section 23A makes it clear that an employee who is dismissed because of one of those reasons may apply to the Industrial Court of NSW for an order for reinstatement or re-employment. **Schedule 1 [17]** makes a consequential amendment.

Section 26 of the *Occupational Health and Safety Act 2000* currently provides that a director or person concerned in the management of a company is liable for the contravention of the Act or regulations by the corporation unless that person used all due diligence to prevent the contravention by the corporation or was not in a position to influence the conduct of the corporation in relation to its contravention of the provision. **Schedule 1 [20]** substitutes section 26, replacing the current provision with a new provision that is more consistent with the *Corporations Act 2001* of the Commonwealth and captures a wider range of persons involved in a corporation. The proposed new provision provides that an officer of a corporation (within the meaning of the Commonwealth Act) is liable for a contravention of the Act or regulations by the corporation if the contravention is attributable to that officer's failing to take reasonable care. The proposed new provision sets out the matters that must be taken into account in determining whether a contravention is attributable to an officer's failure to take reasonable care and provides that an officer who is a volunteer is not liable for such a contravention. **Schedule 1 [6] and [23]** make consequential amendments.

Schedule 1 [21] enables the regulations to extend the operation of section 8 (Duties of employers), Division 2 (Duty to consult) of Part 2, section 20 (Duties of employees), section 23 (Unlawful dismissal or other victimisation of employee) and any other prescribed provision of the *Occupational Health and Safety Act 2000* to clothing outworkers and employees of clothing outworkers.

Where appropriate, the offence provisions in the *Occupational Health and Safety Act 2000* have been amended to include, as an element of the offence, "reasonably practicable", "reasonably necessary" or "without reasonable excuse" (for example, the duty to ensure health and safety so far as is reasonably practicable) (see **Schedule 1 [5], [7], [8], [10], [15], [16], [32], [38], [39], [42] and [49]**). **Schedule 1 [4]** inserts proposed section 7A into the *Occupational Health and Safety Act 2000*. Proposed section 7A clarifies that a duty imposed to ensure health and safety so far as is reasonably practicable requires the elimination of risks so far as is reasonably practicable and the reduction of these risks to the lowest level reasonably practicable (if elimination is not reasonably practicable). The matters that are relevant in determining what is reasonably practicable in relation to ensuring health and safety are also set out in proposed section 7A. **Schedule 1 [22]** omits the current defence in section 28 of the Act as a consequence of these amendments. **Schedule 1 [2] and [6]** also make consequential amendments.

Schedule 1 [25] makes an amendment consequential on the amendment to the *Industrial Relations Act 1996* in Schedule 3 [3].

Schedule 1 [29] inserts Division 2 (proposed sections 46A–46D) and Division 3 (proposed sections 46E–46G) into Part 4 of the *Occupational Health and Safety Act 2000*. Proposed Division 2 makes provision for WorkCover to make guidelines with respect to the application of certain provisions of the Act and how it may exercise a discretion under the Act or regulations. The process for making, amending and revoking the guidelines is provided for in the Division. Proposed Division 3 allows

WorkCover to provide advice to a person who has a duty under the Act or regulations about complying with that duty. Any written advice must also be given to an OHS employee representative. **Schedule 1 [26]–[28] and [46]–[48]** make consequential amendments.

Schedule 1 [30] clarifies that where a person is required to give evidence in writing or orally to an inspector under section 62 of the *Occupational Health and Safety Act 2000*, that person can do so by answering questions or otherwise furnishing information. **Schedule 1 [31]** makes provision for the recording of any such oral evidence.

Schedule 1 [33] provides that section 101 (Service of notices) of the *Occupational Health and Safety Act 2000* applies to the service of notices under Division 2 (Powers of inspectors) of Part 5 of the Act.

Section 77 of the *Occupational Health and Safety Act 2000* gives an authorised representative of an industrial organisation the power to enter premises for the purpose of investigating any suspected breach of the occupational health and safety legislation. **Schedule 1 [35]** provides for any dispute about the entitlement of an authorised representative to enter the premises to be referred to the Industrial Relations Commission if WorkCover is unable to resolve the dispute.

Schedule 1 [36] makes it an offence for an authorised representative, who enters premises for the purposes of investigating a suspected breach, to deliberately hinder or obstruct the occupier of the premises (maximum penalty: 100 penalty units).

Schedule 1 [37] makes provision for an authorised representative of an industrial organisation of employees to enter a place of work to discuss matters relating to occupational health and safety with a member, or person eligible to be a member, of that organisation. The discussion may only take place while the person is on a work break and the authorised representative must give the occupier of the place of work 24 hours notice before entering the premises. **Schedule 1 [34]** makes a consequential amendment.

Schedule 1 [40] and [41] require an inspector who issues an improvement or prohibition notice to give a copy of the notice to the chairperson of the OHS committee or a specified OHS representative (where a committee does not exist).

Schedule 1 [43] inserts Division 5 (proposed sections 103A–103E) into Part 6 of the *Occupational Health and Safety Act 2000*. The proposed Division provides WorkCover with an additional enforcement option in respect of a contravention or alleged contravention of the Act or the regulations by allowing WorkCover to accept a written undertaking by a person to remedy a contravention or prevent any further contravention. The Division does not apply to a contravention of section 32A (Reckless conduct causing death at workplace by person with OHS duties) of the Act. While an undertaking is in force, proceedings may not be instituted against the person in respect of the contravention to which the undertaking relates. Procedures for the acceptance, withdrawal and enforcement of undertakings are set out in the proposed Division. Proposed section 103E makes provision with respect to the admissibility of evidence concerning an undertaking. **Schedule 1 [46]** makes a consequential amendment.

Schedule 1 [44] inserts Part 6A (proposed sections 103F—103L) into the *Occupational Health and Safety Act 2000*. Proposed section 103G makes provision for the issue of safety recommendation notices by employee safety representatives (being a chairperson of an OHS committee or an OHS representative) if the employee safety representative believes that an employer is contravening the Act or regulations or is likely to repeat or continue a past contravention. The safety recommendation notice cannot be issued until the employee safety representative has consulted with the employer. The notice may require the employer to remedy the contravention within a specified time period and may include recommendations as to the measures to be taken to remedy the contravention. Once such a notice has been issued, the

employer must comply with the notice within 7 days unless the employer requests WorkCover to arrange for an inspector to attend the workplace and inquire into the matter. The employee safety representative may also request the attendance of an inspector if the employer has not fully complied with the notice within 7 days. The inspector is required to make a determination in respect of whether or not the requirements of the notice are to be confirmed. If confirmed, the inspector must issue an improvement or prohibition notice. The notice is withdrawn if the inspector fails to confirm it. Proposed section 103I provides for the review of a determination of an inspector to withdraw the notice. The review is conducted by WorkCover and WorkCover's decision may then be appealed to the Local Court in certain circumstances. Proposed section 103J makes it an offence for an employee safety representative to misuse his or her powers with respect to safety recommendation notices (maximum penalty: 45 penalty units in the case of a previous offender and 30 penalty units in any other case).

Schedule 1 [13], [18] and [46] make consequential amendments.

Schedule 1 [45] provides that proceedings for an offence against the *Occupational Health and Safety Act 2000* or the regulations may be instituted by WorkCover (rather than an inspector as currently provided for in the Act). **Schedule 1 [24] and [46]** make consequential amendments.

Schedule 1 [50] inserts proposed sections 136A and 136B into the *Occupational Health and Safety Act 2000*.

Proposed section 136A (1) makes it an offence for a person to obtain or attempt to obtain, by deception, any financial advantage (for himself or herself or any other person) in connection with any authority conferred by or under the Act on the person (or other person) if the person knows or has reason to believe that the person (or other person) did not have that authority (maximum penalty: 500 penalty units or imprisonment for 2 years, or both). Proposed section 136A (2) makes it an offence for a person to hold himself or herself out as having an accreditation, licence or other authorisation conferred by or under the Act if the person doesn't have (and is aware that he or she doesn't have) that authorisation (maximum penalty: 70 penalty units). Proposed section 136B makes provision for WorkCover to communicate certain information to an officer or authority engaged in administering or executing a law of another Australian jurisdiction relating to occupational health and safety. **Schedule 1 [46]** makes a consequential amendment.

Schedule 1 [51] enables the making of regulations of a savings or transitional nature consequent on the enactment of the proposed Act.

Schedule 2 Amendment of Workplace Injury Management and Workers Compensation Act 1998

Schedule 2 [1] and [2]

Schedule 2 [1] and [2] amend the provisions of the *Workplace Injury Management and Workers Compensation Act 1998* that set out the general and specific functions of WorkCover so that the advisory and educational functions of WorkCover are noted in those provisions. WorkCover's role in assisting employers, workers and others to comply with occupational health and safety legislation and eliminate or reduce risks to health and safety is also noted.

Schedule 3 Amendment of Industrial Relations Act 1996

Schedule 3 [1] and [2] amend section 196 of the *Industrial Relations Act 1996* to provide for a right of appeal to the Full Bench of the Industrial Court against an interlocutory judgment or order given or made by a member of that Court (in the same terms as the appeal that lies to the Court of Criminal Appeal from a Supreme Court judge in indictable proceedings).

Schedule 3 [3] omits section 197A of the *Industrial Relations Act 1996* to remove the right of appeal by WorkCover, the Department of Primary Industries or the

Director of Public Prosecutions to the Full Bench of the Industrial Court against a decision of the Industrial Court or a Local Court constituted by an Industrial or other Magistrate to acquit a person of an offence under certain occupational health and safety legislation.

Schedule 4 Amendment of Crimes (Sentencing Procedure) Act 1999

Schedule 4 amends section 27 of the *Crimes (Sentencing Procedure) Act 1999* so that a victim impact statement may be tendered to the Industrial Court in relation to offences under the *Occupational Health and Safety Act 2000* involving reckless conduct causing death. Currently, victim impact statements in relation to OHS offences being dealt with by the Industrial Court can only be tendered with respect to general duties offences involving a fatality or actual physical bodily harm.

Schedule 5 Amendment of Fines Act 1996

Schedule 5 [1] and [2] make provision for information about whether or not a fine, that was imposed for an offence against the *Occupational Health and Safety Act 2000*, has been paid to be disclosed to the next of kin of any person that was killed as a result of the commission of the offence.

Schedule 6 Amendment of mine safety legislation

Schedule 6.1 [2] omits section 150 (Bringing concerns regarding health, safety or welfare to the attention of operators) of the *Coal Mine Health and Safety Act 2002* as a consequence of the amendment to the *Occupational Health and Safety Act 2000* in **Schedule 1 [29]** (the introduction of WorkCover guidelines and compliance advice).

Schedule 6.2 [2] makes a similar consequential amendment to section 131 (Bringing concerns regarding health, safety or welfare to the attention of operators) of the *Mine Health and Safety Act 2004*.

Schedule 6.1 [1] and 6.2 [1] make amendments by way of statute law revision.

Schedule 7 Amendment of Occupational Health and Safety Regulation 2001

Schedule 7 [2] provides that any duty in the *Occupational Health and Safety Regulation 2001* to take or refrain from taking any action for the protection of health or safety applies only so far as it is reasonably practicable to take or refrain from taking that action. **Schedule 7 [1]** makes a consequential amendment.

Schedule 7 [3] makes a statute law revision amendment.

Schedule 7 [4] amends clause 358 of the *Occupational Health and Safety Regulation 2001* so that a reference in any of the following provisions of the Act to WorkCover, in connection with the application of a provision to a mine, is taken to be a reference to the Department of Primary Industries: sections 17A, 77 (2), 106 (c) and 136B, Division 5 (Undertakings) of Part 6 and Part 6A.