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WORK HEALTH AND SAFETY BILL 2011 OCCUPATIONAL HEALTH AND SAFETY AMENDMENT BILL 2011

Bills introduced on motion by Mr Andrew Stoner.

Agreement in Principle

Mr ANDREW STONER (Oxley—Deputy Premier, Minister for Trade and Investment, and Minister for Regional Infrastructure and Services) [11.34 a.m.]: I move:

That these bills be agreed to in principle.

I am pleased to introduce the Health and Safety Bill 2011 and the Occupational Health and Safety Amendment Bill 2011. The Work Health and Safety Bill 2011 represents the commitment of the Government of New South Wales to full participation in a nationally harmonised system of occupational health and safety. The bill enacts the nationally agreed model, the Work Health and Safety Act, with appropriate jurisdictional modifications. The Work Health and Safety Bill will be supplemented by model regulations and model codes of practice that are currently the subject of public consultation. It is proposed that this work health and safety legislation will be commenced by all Australian jurisdictions on 1 January 2012.

The Occupational Health and Safety Amendment Bill 2011 implements three key reforms that are contained in the Work Health and Safety Bill 2011 so that the important aspects of the law of New South Wales are consistent with the nationally agreed position on work health and safety with immediate effect. These aspects are: removing the reverse onus of proof in work health and safety prosecutions by requiring the prosecution to prove the "reasonably practicable" steps a defendant could have taken to avoid breaching the general duties to maintain a safe and healthy workplace and requiring duty holders in complying with the proposed Act to ensure health and safety "so far as is reasonably practicable"; replacing the existing provision that deems directors and managers of a corporation to be guilty of offences committed by the corporation with a positive duty that officers of the corporation should exercise due diligence to ensure compliance by the corporation with health, safety and welfare duties; and removing the right of unions to bring proceedings for an offence under the Occupational Health and Safety Act.

The DEPUTY-SPEAKER: Order! There is too much audible conversation in the Chamber.

Mr ANDREW STONER: It is proposed that the reforms contained in the Occupational Health and Safety Amendment Bill 2011 will operate from the date of assent, although the removal of the union right to prosecute will date effectively from the introduction of the bill. On 3 July 2008 New South Wales and the other States and Territories entered into the Intergovernmental Agreement for Regulatory Reform in Occupational Health and Safety. The development of the model laws followed a comprehensive review of Australia's occupational health and safety laws by a review panel of independent occupational health and safety experts. The panel was chaired by Mr Robin Stewart-Compton, former Chief Executive Officer of the National Health and Safety Commission, and included Mr Barry Sheriff, then a partner of national law firm Freehills, and Ms Stephanie Mayman, Commissioner of the Western Australian Industrial Relations Commission and Chairperson of the Occupational Health and Safety Tribunal of Western Australia.

The national review into occupational health and safety laws consulted widely with business, employer and union groups. It took submissions from the public and made a number of detailed recommendations. Following this review and its endorsement by Ministers, Safe Work Australia commenced the development of the model Work Health and Safety Act. The resulting national consultation process concluded with the finalisation of the national model Work Health and Safety Act, which was endorsed by the Workplace Relations Ministerial Council. The Work Health and Safety Bill will enact the national model Work Health and Safety Act—developed by Safe Work Australia and agreed to by the Workplace Relations Ministerial Council—in New South Wales well ahead of the agreed national start date of 1 January 2012.

The national review into model occupational health and safety laws noted that while all Australian governments have taken a broadly similar approach to regulating for safer workplaces, substantial

differences existed between jurisdictions. These differences were particularly noticeable in relation to duty holders and their duties, defence mechanisms and compliance regimes, including penalties. These differences generate compliance costs to business, which cannot be justified in a modern national economy.

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Harmonisation of work health and safety laws will bring many benefits to businesses, employers, workers and unions through the creation of a nationally consistent and modernised legislative regime. In reporting on the costs and benefits of proposed model laws, Access Economics noted that the most significant cost to business from the existing occupational health and safety system arises from the duplication required to comply with regulatory differences across multiple jurisdictions. With the implementation of a nationally harmonised system this duplication will be removed and there will be consistent regulation across the country.

Business will benefit from a national system through reduced complexity and red tape. Employers will also benefit from greater certainty and a simplified system of legislation. Workers will benefit from the enhanced protection provided by modernised laws and rights that are easier to understand and apply. For example, the bill recognises the changing face of the workplace and does not rely on the traditional concepts of employer and employee. This means greater fairness, as all workers will have access to the same rigorous system of workplace health and safety regulation wherever they are in Australia and irrespective of whether they are employees, labour hire workers or contractors. The new system will improve transferability of permits, licences and training qualifications across State and territory borders.

Mr John Williams: Hear, hear!

Mr ANDREW STONER: "Hear, hear!" says the member for Murray-Darling—one of the cross-border electorates that we have right around regional New South Wales. This is an important issue. Provisions in the bill mean that workers' safety-related qualifications and training will be recognised wherever they work in Australia.

Mr John Williams: About time.

Mr ANDREW STONER: About time indeed. These provisions will assist in the mobility of individual workers and the Australian workforce as a whole. I have already mentioned that the Work Health and Safety Bill will make three key changes to work health and safety laws in New South Wales. The Occupational Health and Safety Amendment Bill 2011 brings forward these three key planks of the national model Work Health and Safety Bill for immediate implementation in New South Wales.

The first key change is the duty to ensure health and safety only insofar as is reasonably practicable. In New South Wales the onus under the Occupational Health and Safety Act has been on a defendant to demonstrate that it was not reasonably practicable to comply with an occupational health and safety duty. This has long been a concern for stakeholders, who believed it was unfair for a defendant to have to bear such an onus in a prosecution, and that the onus of proving it was not reasonably practicable to comply with a duty should be on the prosecution, in line with mainstream criminal laws.

The report of the review panel that conducted the national review of occupational health and safety laws did not support the current position in New South Wales. The review panel recommended that the general work health and safety duties apply only insofar as is reasonably practicable. Accordingly, the Work Health and Safety Bill provides for a person conducting a business or undertaking to ensure health and safety only insofar as is reasonably practicable. The Work Health and Safety Bill explains what is reasonably practicable, to provide guidance to duty holders. The bill provides that reasonably practicable means that which was reasonably able to be done, taking into account and weighing up relevant matters, including the likelihood of the risk of hazard occurring and the degree of harm it might cause; what the person with the duty knows, or should know, about the risk and how to eliminate or minimise the availability and suitability of ways to eliminate the risk; and the costs of eliminating or minimising the risk, including whether the cost is disproportionate to the risk.

The Occupational Health and Safety Bill makes amendments to the provisions of the Occupational Health and Safety Act dealing with the general duties of employers; controllers of premises, plant or substances; and designers, manufacturers and suppliers of plant, to provide that the duty is to ensure health and safety only insofar as is reasonably practicable. These changes are consistent with the approach of the Work Health and Safety Bill and have the effect of moving the onus from the defendant to the prosecution to demonstrate whether it is reasonably practicable in a particular

case to ensure health and safety. This change brings New South Wales into line with every other Australian jurisdiction except Queensland and it implements a key recommendation of the report of the review panel.

The second change from the current law in New South Wales recommended by the review panel and to be implemented by the Work Health and Safety Bill concerns the duties of directors of corporations. The Occupational Health and Safety Act currently provides for a director of a corporation to be liable for breaches of the Occupational Health and Safety Act committed by the corporation. This provision has long been of concern to stakeholders. Again, the inclusion of such a provision was not supported by the review panel which conducted the national review of occupational health and safety laws. Instead, the review panel recommended a new duty of due diligence for directors and other officers of corporations. This provision has been included in the Work Health and Safety Bill and the Occupational Health and Safety Amendment Bill and will ensure a consistent approach through the insertion of a corresponding provision in the Occupational Health and Safety Act.

The new approach in the Work Health and Safety Bill requires officers or a person conducting a business or undertaking to exercise due diligence to ensure that the person with the duty complies with the duty or obligation. The new provision provides guidance for officers by providing that "due diligence" includes taking reasonable steps to acquire and keep up-to-date knowledge of work health and safety matters; to gain an understanding of the business and of the hazards and risks of the business; to ensure that the person conducting the business or undertaking has resources and processes to eliminate or minimise risks to health and safety; to ensure that the person conducting the business or undertaking has information systems for incident reporting and response; and to ensure that the person conducting the business or undertaking has and implements processes for complying with any duty or obligation of the person. That is not an exhaustive list. The Work Health and Safety Bill and the Occupational Health and Safety Amendment Bill make that clear. But this list will assist officers of corporations and other entities that have work health and safety duties to comply with their obligations to ensure health and safety so far as is reasonably practicable, and it will assist the courts to interpret their new duties.

Volunteer officers are immune from prosecution for offences committed in their capacity as an officer. This is an important protection for those performing socially valuable work in the community: it enables them to undertake that work in good faith, without fear of prosecution. The third key change to be implemented by the Work Health and Safety Bill is the removal of the automatic right of unions to prosecute for breaches of the work health and safety law. The Occupational Health and Safety Amendment Bill removes this right from the law of New South Wales, effective from the date of introduction of the bill into Parliament. The ability as of right of industrial organisations to bring proceedings for an offence under the work health and safety laws is not permitted in the majority of other Australian jurisdictions. Removal of this right to prosecute is consistent with harmonisation of these laws across all jurisdictions. In addition, I am satisfied that removal of this right will not result in any weakening of enforcement. In the five years from 2005 to 2011, fewer than 50 prosecutions were made by employee representatives. By way of comparison, WorkCover NSW undertook 693 successful prosecutions in the four-year period between 2006-07 and 2009-10.

Mr Michael Daley: What are you talking about?

Mr ANDREW STONER: This has come from Federal Labor. Why the member complaining about it? Does he want New South Wales to remain the dinosaur State with that lot over there in the pocket of the unions? He should talk to the Prime Minister. These are nationally consistent laws; he should stop his bleating. The Government believes that WorkCover—a well-resourced and experienced enforcement agency—is best placed to enforce safety standards, including, where necessary, by prosecution. Transitional provisions in the Occupational Health and Safety Amendment Bill provide that the repeal of the right of unions to bring a prosecution will not affect any current proceedings. In addition, any proceedings that may be instituted by a union after the date of the introduction of the bill will be terminated.

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Commencement of the three fundamental reforms in the Occupational Health and Safety Amendment Bill ahead of the national reforms to take effect on 1 January 2012 demonstrates the O'Farrell-Stoner Government's commitment to rectify at the beginning of its term long-held criticisms of particular elements of the occupational health and safety laws in this State. The changes in the Occupational Health and Safety Amendment Bill are also consistent with the procedural changes that have been required in New South Wales as a result of the High Court's decision in *Kirk v WorkCover NSW & Ors*. In *Kirk*, the High Court overturned previously

established law that it was not necessary for the prosecutor to tell defendants what they should have done to prevent an offence in pleadings filed in court.

The High Court ruled that it is necessary for the prosecutor of offences under the Occupational Health and Safety Act to identify the risk to health and safety and the measures that should have been taken to prevent the risk. This was in order that the defendant should be able to conduct a defence of what is reasonably practicable. Changing the nature of the duties owed in the Occupational Health and Safety Amendment Bill to require the prosecutor to prove what is reasonably practicable simply supports and gives effect to the practical outcomes of the Kirk decision and moves New South Wales to a harmonised position in relation to major duty holders under the legislation.

I now turn to other key reforms to be made by the Work Health and Safety Bill. The Work Health and Safety Bill defines a worker widely to provide protection to people who may be engaged on a site under the direction of a duty holder but who is not directly engaged by that duty holder. The bill also imposes duties on persons who manage or control workplaces; persons who manage or control fixtures, fittings or plant at workplaces; persons who design, manufacture, import or supply plant, substances or structures; and persons who install, construct or commission plant of structures. The Work Health and Safety Bill defines the primary duty holder as a person conducting a business or undertaking.

Under this more comprehensive definition, a person holding a duty includes a body corporate, an unincorporated body or a partnership. The definition applies to activities whether they are conducted alone or together with others for profit or not for profit and with or without the engagement of workers. This provision will cover a broad range of work relationships and business structures. It does not extend to a person's private or domestic activities or to volunteer associations as they are defined in the bill. The concept of a person conducting a business or undertaking will provide greater certainty about workplace duties by removing the ambiguity that may arise, for example, between a principal contractor and subcontractors.

The Government is committed to harmonious workplaces built on good communication and consultation. There is no doubt that when workers and employers cooperate they can achieve safer and more productive workplaces. The bill requires a person conducting a business or undertaking to consult with workers as far as is reasonably practicable. Guidance is provided to businesses, workers and employers through a definition of what consultation is as well as how and when it should be undertaken. The Work Health and Safety Bill provides for the election of health and safety representatives who will replace occupational health and safety representatives under the Occupational Health and Safety Act. Health and safety representatives will represent workers in work groups on work health and safety matters. When appropriately trained, health and safety representatives will be able to take action for the health and safety of those around them by issuing provisional improvement notices.

The bill provides for issue resolution by inspectors of WorkCover or the Department of Primary Industries and for provisional improvement notices to be reviewed by inspectors at the request of a person conducting a business or undertaking or the person to whom the notice was issued. The bill provides for a limited right of entry by union officials for the purposes of investigating a suspected contravention similar to existing provisions in New South Wales and to provisions under the Federal Fair Work Act 2009. Union officials must hold permits to exercise right of entry issued by the Industrial Relations Commission, and in most cases Fair Work Australia under the Fair Work Act, and must be a fit and proper person to hold a permit.

The Industrial Relations Commission will be empowered as the authorising authority to issue entry permits under the Work Health and Safety Bill. The commission will ensure that only those officials entitled to a permit are issued with one, and it will be empowered to suspend or revoke such a permit in the case of abuse by a work health and safety entry permit holder. The commission will also have power to disqualify a health and safety representative who misuses their powers under the proposed Act. The bill also introduces new and innovative approaches to enforcement and tougher penalties to allow Government to enforce compliance and punish those who threaten the health and safety of others at work.

The concept of enforceable undertakings or work health and safety undertakings is one such innovation. Enforceable undertakings offer flexibility to the regulator to deal with breaches of the provisions of the bill without compromising the health and safety of our workplaces. Enforceable undertakings enable a person conducting a business or undertaking to enter into a work health and safety undertaking with the agreement of the regulator in connection with a contravention or alleged contravention of the Work Health and Safety Act. A work health and safety undertaking will

comprise an agreement between a regulator and the person who is alleged to have contravened the Act to address a specific work health and safety issue within an agreed timeframe. I assure members that a work health and safety undertaking is not a soft option. A work health and safety undertaking will not simply provide that the duty holder will comply with the work health and safety laws.

An undertaking will require the duty holder to do something more to demonstrate their commitment to work health and safety and to remedy the systems or circumstances that contributed to the alleged contravention. A work health and safety undertaking is capable of enforcement in court and a breach of an undertaking attracts severe penalties. This innovation provides a regulator and a duty holder with an additional tool to remedy a contravention of the work health and safety law in a productive manner without the need for costly and time-consuming litigation. Enforceable undertakings have been used with positive effect in other jurisdictions, such as Queensland. A recent study by a Griffith University research team confirmed the effectiveness of this innovative measure and their introduction gives WorkCover the option of using them here. However, work health and safety undertakings will not be available for the most serious category of offences. Serious breaches of the Act involving reckless conduct that risks health and safety will continue to be prosecuted and punished.

The bill imposes strong penalties for a breach or contravention of the work health and safety law. Three categories of penalty are introduced based on the degree of culpability, risk and harm. Category 1 offences, involving proven recklessness, attract a maximum fine of \$3 million for bodies corporate and for individuals a maximum fine of \$300,000 or a maximum of five years' imprisonment or both. Many of the penalties contained in the bill are higher than those currently in place in New South Wales and demonstrate the Government's commitment to promote compliance. The severity of the penalties reflects the strength of this legislation as a deterrent to conduct that endangers health and safety.

Another significant change to be brought in to New South Wales by the Work Health and Safety Bill is a shift to the mainstream criminal courts for the enforcement of breaches of work health and safety laws. Currently, the more serious breaches of the Occupational Health and Safety Act are dealt with by the Industrial Court. Under the bill, offences for the most serious offences, category 1 offences, will be dealt with on indictment in the Supreme Court. Other offences will be dealt with by summary proceedings in either the District Court or Local Court. These changes will better integrate breaches of work health and safety legislation with the general criminal law and provide clear avenues of appeal.

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The Work Health and Safety Bill contains a number of provisions relating to mines and coalmines which are also regulated by the Mine Health and Safety Act 2004 and the Coal Mine Health and Safety Act 2002. These replicate as far as possible the current mine work health and safety framework existing under the Occupational Health and Safety Act, which is administered by two regulators, WorkCover in relation to workplaces generally and the Department of Primary Industries in relation to mining workplaces. However, due to work progressing under the national mine safety framework there may be a need for amendments to be made to the bill before its commencement. Similarly, because of ongoing amendments to the model Work Health and Safety Act and to the need to consult more fully with other segments of government on consequential amendments, it is contemplated that schedule 5 to the bill will be substantially amended by a further bill before it commences. Nevertheless, it is appropriate for the bill to be brought forward in its current form to ensure that all stakeholders have a clear idea of the work health and safety laws that will apply from 1 January 2012, and can take steps to prepare for their implementation from that date.

The heads of workplace safety authorities comprising the leaders of each State and Territory workplace safety regulator, including WorkCover, have established a number of national project groups to coordinate a nationally consistent approach to the implementation of the new national laws. To complement this WorkCover will also deliver an externally focused implementation and communication strategy to inform key parties in New South Wales of the impact of the new, nationally harmonised system of laws, regulations and codes of practice.

The bill will ensure less complexity and red tape for business, more certainty for employers and those who engage workers and, through this, provide enhanced protection for workers wherever they work. The bill will ensure greater mobility of the Australian workforce and less duplication of regulation between States and Territories. Through the inclusion of many policy innovations, the bill strengthens the capacity of regulators to work with businesses and workers to improve health and safety and reduce the tragedy of workplace death and injury. The Work Health and Safety Bill, complemented by the Occupational Health and Safety Amendment Bill, will firmly establish New

South Wales participation in a nationally consistent system of work health and safety regulation.

In conclusion, the Work Health and Safety bill, coupled with the amendments to the Occupational Health and Safety Act, will maintain our strong work health and safety framework, keep businesses accountable, reduce red tape for employers and will mean that no matter where you work or do business in Australia the same laws will apply. I commend the bills to the House.

Debate adjourned on motion by Mr Michael Daley and set down as an order of the day for a future day.