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NATIONAL SAFETY COUNCIL OF AUSTRALIA

OCCUPATIONAL HEALTH AND SAFETY SEMINAR

CANBERRA, FRIDAY 27 JULY 1984

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July 1984

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The Hon Justice MD Kirby CMG *
Chairman of the Australian Law Reform Commission

SOCIAL ACCOUNTING

This seminar coincides with the timely publication of a book by Neil Gunningham 'Safeguarding the Worker'.[1] Actually, I shall be 'launching' this book at 12.30 pm today. Anyone who can bear a second speech in the lowest form of public oratory — book launching — is welcome to turn up.

Gunningham starts with the well known fact that Australia's statistics on work-related injury — like the statistics on the criminal justice system and so much other social data in our country — are appalling. We just do not know the precise nature and causes of the problem. Until we do, it is difficult to shape any systematic approach to the problem's solutions.

However, even on the basis of the grossly inadequate data available to us in Australia it is clear that Australia's record in occupational health and safety is poor. Mr Hayden has called it 'shocking'.[2] Mr Ian Macphee has described it as 'deplorable'.[3] Leave aside entirely the human tragedy and the individual pain and suffering. Simply in economic terms the problem is manifestly a serious one. It seems clear that:

- a million working days a year are lost because of accidents at work;
- almost half a million people suffer incapacitating work injuries in such accidents;
- over 300 die from work-related injuries and this is almost certainly an under-estimate when it is remembered that probably a third of all cancer cases are work-related, directly or indirectly;
- the overall cost of industrial accidents in Australia has been estimated at about $6.5 billion a year;

- in most years, the numbers of days lost from occupational injury and disease is almost twice the number lost as a result of strike action — which captures so much media, political and public attention;
- for every Australian injured on the roads, about five are injured at work.[4]

Even allowing for the fact that modern life can sometimes be inescapably dangerous, these figures are a rebuke to our society. They clearly go beyond non-preventable levels. Yet the figures are often stated. The result has generally been a deafening silence of resignation, apathy and even indifference.

The basic problem is that, in a free society such as Australia, we fail to do social accounting. We fail to look at opportunity costs. We fail to calculate the costs to society as a whole of tackling large and complex problems involving many participants : the costs of hospitals for the injured, courtrooms for their disputes and so on. In social terms, it would clearly reward our society many times over to spend funds on occupational health and safety. But because responsibility for the costs of doing so cannot easily be brought home to those primarily involved, nothing tends to be done. We drift along with a framework of laws and policies, many of them developed in earlier, laissez faire times. Yet as Gunningham points out, our current laws and policies are clearly not operating effectively. Otherwise we would have a better record than we have.

As a result of a number of initiatives taken in the last two years, it now appears that we are on the brink of a new approach to occupational health and safety in Australia. It is not before time. The first active moves towards a more national approach to the problem were foreshadowed when Ian Macphee was Minister for Industrial Relations. In part, his initiative grew out of the appreciable growth of interest in the trade union movement since the mid 1970s in occupational health and safety issues. The AMWSU led the way with two full-time safety officers and several other unions have followed this lead.[5] The State Governments, following detailed inquiries, began to introduce reforming legislation. Like a wave, this legislation influenced developments in other States, so that reforms have been introduced, or are in the process of introduction, in New South Wales, South Australia, Western Australia, Tasmania and Victoria.

In July 1982 the Australian Labor Party at its National Conference adopted a comprehensive health and safety policy. It committed itself to give a Federal lead on safety issues and to reform serious shortcomings in current health and safety programs.[6] The Economic Accord between the Australian Labor Party and the ACTU repeated this commitment. Specifically, it promised the setting up of an Interim National Health and Safety Commission as the first step to the implementation of a Federal policy.

The National Economic Summit held in April 1983, after the change of government comprised leading participants from government, industry and the trade union movement. It united in urging that 'the nation must give occupational health and safety a greater priority'.[7] The Interim National Commission was then established. Commendably, it received strong bipartisan support, voiced by Ian Macphee. With speed and thoroughness, the Interim Commission published its report in May 1984. That report, with its specific recommendation for a national strategy on occupational health and safety, is the focus of this seminar.

According to media accounts following the tabling of the report of the Interim Commission, the Federal Government is expected to act quickly on the recommendations contained in it, so far as these urge the development of national occupational health and safety standards. Mr Willis has committed the government to the early establishment of a permanent national tripartite body which will be responsible for drafting new guidelines governing safety in the workplace. This body will replace the Interim Commission. The report, conscious of the impediments to action that can arise in the Byzantine world of Canberra bureaucracy, specifically recommended that one Minister should be responsible for all occupational health and safety matters at the Federal level and that this Minister should be the Minister for Employment and Industrial Relations.[8] This proposal was in conflict with the platform of the ALP. That platform had divided occupational health and safety responsibilities between three portfolios — Industrial Relations, Health and Environment. To clear away this 'contradiction' and to remove one of the last remaining impediments to Federal legislation, Mr Willis secured a resolution from the recent meeting of the ALP National Conference. The Conference carried the resolution giving the government a free hand in determining the administrative arrangements for implementation of its policies on occupational health and safety. The Minister gave the assurance that the resolution was intended to avoid 'an extremely messy process' in a way that 'will not in any way diminish the thrust of our policy'. So the stage is now set for action.

I was present at a dinner in Melbourne last Saturday when Professor Manning Clark — with characteristic evangelical fervour — reminded the Ministers and other public leaders present of the nature of the public stage. It is a 'revolving stage' he asserted. The public figures upon it are there for a brief time. All too soon they are replaced by new actors, centre stage, as the stage of public life, with all its drama, turns. Let us hope that the current actors seize the opportunity now presented to them and make the most of the spotlight that is currently upon them. The present Prime Minister, Mr Hawke, is uniquely well placed to do this. Opportunities such as this rarely recur.

NEW LAWS : THE ISSUES

Non legal action. No-one nowadays pretends that passing new laws is the simple and universal solution for curing the world's ills. Setting up a National Safety Commission, arming it with an appropriate executive, providing for a research institute and so on will not of themselves remove Australia's problems of occupational health and safety. By the same token, old laws, inadequate laws, ill-focused laws or absence of law can sometimes contribute to an incompetent social response to large social problems. I am sure that this is the case with occupational health and safety.

Earlier this year I had the task of addressing, and later summing up, a conference on these issues in Perth.[9] The conference brought home to me the fact that law can sometimes reinforce work safety. But other initiatives are needed:

- the design of VDUs, of chairs and office equipment in such a way as to reduce work-related disabilities, particularly the growing problem of tenosynovitis;
- the improvement of the investigation of injuries in order to isolate causes and to prevent recurrences;
- the better instruction of new employees, as they commence work, so that health and safety procedures are understood by them from the very outset, including, where necessary, in their own languages;
- the provision of readily available safety consultation on matters such as protective equipment, noise control and so on.

Detailed legislation on subjects such as this cannot be expected — or cannot be expected in the short run. Motivating, informing and sensitsing people at the workface is much more important.

Points in common. Analysing the various contributions to the Perth debate, it was instructive to see the large measure of common ground that seems to exist in Australia about new occupational health and safety legislation. The report of the Interim Commission, published since the meeting in Perth, reinforces this impression. The agreements include:

- the need to enact new and more comprehensive legislation, including legislation which states goals and establishes new machinery under fresh and highly motivated personnel;
- the need to establish tripartite commissions or other such bodies to provide a new focus for developing legislation, administrative policies, research and education;

- the need to establish specialist advisory committees or other bodies to tackle contentious, difficult or sensitive topics that need specific attention — whether the special problems of migrant workers in high-risk areas, the special needs of women workers, the special hazards of chemical industries, the asbestos worker and so on;
- the need to enhance the numbers and powers of inspectors charged with monitoring supervising and enforcing the law, so that something better than criminal remedies and puny fines are available to them to add to their armoury in tackling injury prevention;
- the imposition of new duties on employees and employers alike;
- the establishment of systems of safety representation including, in appropriate cases, the creation of on-site committees to permit a constant dialogue about safety improvement;
- the devotion of more funds to safety education, training and research;
- the provision of new attention to accident compensation laws, so that these are more closely addressed to the problem of rehabilitation — replacing the 'pot of gold' philosophy which has, until now, largely motivated our compensation system.

Points of difference. By the same token, it is no use ignoring the points of difference that exist, as new occupational health and safety legislation is enacted throughout Australia. These points of difference include:

- whether it is timely and useful to sweep away the old framework of highly specific State legislation, replacing it by general legislation or whether some interaction between the old and the new is needed;
- whether safety committees should have coercive powers at the work site and whether such powers would be effective anyway in the current economic situation;
- whether the clear evidence of the high risk of ethnic workers with language difficulties and in risky occupations warrants priority special attention to their needs;[10]
- whether there should be a legally recognised and enforceable right of workers to stop work, without economic or industrial penalty, in circumstances that they contend that the work conditions are unsafe or inescapably dangerous to health;
- whether the new legislation should impose an onus on employers to prove safety or, instead, adhere to the old approach of requiring those who assert unsafe conditions to prove it;
- whether licensing, with its generally costly bureaucracy, is an appropriate response to all or at least some specially hazardous industries in order to uphold the highest standards of safety where workers are specially at risk;

. whether we should spend more on research and statistics in the hope of converting this information into a more effective social policy which will provide sanctions that are more carefully designed and so, more effective. It is perhaps in this respect that Mr Gunningham's book is most interesting. He points out that criminal sanctions which have been used to enforce industrial safety legislation in the past are notoriously inept and incompetent. Most defendants are corporations and you cannot put corporations in prison — the ultimate criminal sanction. Furthermore, most fines are puny by comparison to the profits of the corporation, representing a 'flea bite' and simply a small cost factor in the operation which does not amount to an effective incentive to change old-established but unsafe working conditions. The best chapter in Mr Gunningham's book is that on The Way Ahead. It is here that he explores alternative sanctions, more sensitive to the nature of the behaviour to be controlled.[11] It is a chapter that should be carefully read by all — particularly by the incoming Safety Commission. It mentions the facilities for preventative orders, the licensing of certain work places and hazardous work processes in some circumstances, licensing of toxic substances which are specially dangerous, provision of criminal sanctions against individuals, by lifting the veil of the corporation, the enforcement of written, pre-distributed safety policies and better administration of safety laws and procedures. All of these new ideas deserve close attention.

THE FEDERAL ROLE

By far the most controversial issue in Perth is one which remains following the report of the Interim Commission. I refer to the Federal role in occupational health and safety in Australia. The Interim Commission report recommended:

. a comprehensive scheme for occupational health and safety of Federal employment;
. the removal of any dichotomy between public and private sectors in areas of Federal jurisdiction;
. development of priority legislation for Federal jurisdiction;
. establishment of appropriate mechanisms to facilitate co-operation between interests in Federal employment in the ACT and the external Territories;
. urgent revision and updating of ACT ordinances.

However, the report stops short of recommending national legislation enforcing standards throughout Australia. Although it is understood that this approach

was supported by some members of the ACTU who were sceptical about voluntary standards which might be developed under the umbrella of the proposed Commission, the idea of legislation incorporating enforceable safe standards was rejected by the Interim Commission. It stressed that the Commonwealth should co-ordinate a national approach through consultation with the States instead of imposing uniform laws in this area. The report recommended instead the path of consultation and uniform laws along a 'co-ordinated approach' to legislation by Federal and State authorites. It suggests the drafting of model laws so that the proposed National Commission will develop model legislation which could then be accepted by State Governments and Parliaments.

This emphasis on consensus is also highlighted by the recommendation that the proposed Commission should aim to operate by unanimous decision of its members, including in the development of national occupational health and safety standards. Where unanimity is not possible, the Interim Commission report recommends that affirmative votes be decided by at least 12 of the Commission's proposed 16 members. The proposed Commission will be a large body comprising a full-time Chairman, three nominees from the ACTU and the Confederation of Australian Industry, two Federal Government nominees and one representative from each of the States and the Northern Territory. This vote of 12 out of these 16 represents a higher proportion even than the two-thirds vote imposed by the American founding fathers on critical advice and consent provisions involving the Senate in the Congress.

We are in the early days of moves towards a national approach to occupational health and safety in Australia. I fully recognise a number of factors that inhibit any sudden shift to a national approach, even though such a national approach is what, essentially, has happened in the other comparable English-speaking federations, the United States and Canada in recent years:

- The area of occupational health and safety has traditionally been a State area of legislative and administrative concern. There are State bureaucracies, State officials, State laws. Where so many careers and interests are involved, it can be disturbing to shift the focus quickly to a national approach.
- Furthermore, for the likely future, it is probable that the enforcement of laws will continue to have to rely upon State officials. The Commonwealth would simply not have the resources to provide adequate officials in the whole variety of small towns across the continent where problems of occupational health and safety arise.
- As well, decentralisation of administration is generally a good thing in our vast country with its scattered centres of population.

- Additionally, the experience of recent years teaches that some measure of experimentation in differing jurisdictions can have a positive and stimulating effect upon reform. Good ideas can be tried in one jurisdiction, say South Australia. When the heavens do not fall in, those good ideas can then be adopted in other States.
- As well, where a shift in constitutional responsibility is envisaged, the lesson of Australian history is that it can sometimes be achieved more effectively if it is taken in stages.

For all these reasons, it may be appropriate to start with the approach suggested by the Interim Commission and apparently to be adopted by the government.

However, I take this opportunity to voice two words of caution. They arise from my experience over the past ten years in law reform. The first relates to the difficulty of securing uniform laws and the advantage, where there is constitutional power, in decisive action by the Commonwealth Parliament, where decisive action is clearly needed. The second relates to the danger which consensus bodies may face of opting for the lowest common denominator, particularly if they are under the necessity of a 75 per cent affirmative vote. I believe that, at least in part, caution about these proposals is the lesson of the efforts of law reform in the field of defamation -- also a sensitive area of law reform where there are powerful and opinionated interest groups. The Law Reform Commission proposed a reformed law in 1979. It suggested that this reformed law could be achieved either through national Federal legislation (covering most of the field) or through uniform laws by agreements with the States and the Northern Territory. The then Federal Government chose the latter course. The result has been, over a series of languid meetings of the Standing Committee of Attorneys-General in places as far apart and congenial as Cooktown, Perth and Queenstown, New Zealand, the preparation of compromise legislation which apparently pleases no-one. The attempt has not yet been abandoned. I do not wish to say anything that will cripple it further. But the lesson of Australian Federation is that it is extremely difficult to get agreement even on innocuous matters. We cannot even agree on the time of day. The prospect of securing agreement on the radical and far-reaching reforms that may be necessary for a new and spirited and even partly radical attack on occupational health and safety does not seem to me to be enhanced by the institutional framework proposed by the Interim report.

There is further reason for saying this. Since the original move towards a national strategy on occupational health and safety, a most important and relevant decision has been handed down by the High Court of Australia in the Tasmanian Dams case.[12] This decision has made much more clear than in the past the constitutional power of the Federal Parliament to legislate, in respect of corporations and pursuant to obligations assumed under international conventions. There are a number of international conventions of the International Labour Organisation (ILO) which, with perfect propriety, the Australian Government could ratify, thereby providing a basis for the establishment of minimal conditions of employment throughout the Commonwealth. For example, the Occupational Safety and Health Convention 1981 of the ILO (No 155) is one of the international instruments which could be called in aid, as a result of the Tasmanian Dams case, to ground appropriate Federal legislation.

I realise that there is sensitivity in some quarters about the decision in that case, and about pressing forward unilaterally with Federal legislation and disturbing the status quo in the distribution of powers in our Federation. I also realise that Federal legislation for its own sake is not a valid objective, though it must be said that business increasingly looks to the political process in Australia to provide national standards for operations throughout the country. I also realise that institutional impediments may stand in the way of prompt action. For all this, I do believe that thought should be given before too long to the possibility of Federal legislation for minimum standards in occupational health and safety throughout Australia. My reasons are four:

- the difficulty of securing agreement on appropriate uniform standards where so many bodies and so many differing and even conflicting interests must concur and where the history and traditions of our Federation are so discouraging;
- the concern of the 'flight of capital'[13] by which differentials in safety standards may be played upon by particular States or jurisdictions to attract investment in business and industry in a way that discourages the setting of appropriate and just standards that defend health and safety at work;
- the concern that having to get agreement of so many people in such a large body might sometimes become a formula for inaction, delay, prevarication and timidity when what is needed is action, swift and speedy, bold resolution and firm decisions;
- finally, there is the national interest. It is surely not in the national interest that there should be <u>significant</u> differentials in the laws that protect and safeguard the worker health and safety in different parts of our contry. Although it is true that a

wave of relevant legislation is passing through some of the States, much of it similar, no action is contemplated in other parts of the Commonwealth. This differential treatment of workers, their health and safety in different parts of the nation is difficult to justify at least when a proper constitutional basis appears to exist for substantial uniform laws enacted by the Federal Parliament.

Too many people are too apologetic about the Tasmanian Dams decision. I see no reason to be so. It is a decision of our highest court. It states the fundamental law of our Constitution. True it is it changes, in some ways, things previously understood. But that is not at all unusual in a Federation, including in the Australian Federation. I think we should reflect positively upon the Tasmanian Dams decision. Far from being a matter of constitutional embarrassment and political caution, it could be seen as a decision which, at a critical moment, allows Australia to join in appropriate cases the gradual world action towards international laws, guidelines and standards. The corollary of such moves is the facility in the Federal Parliament to play its part, on behalf of Australia, in participating in worldwide activity toward worldwide standards. This should not be a source of apology. It is simply a statement that Australia, as a nation, is part of a world community in which more and more is being achieved at an international level. Technology forces us into an international framework for looking at certain questions. It is so with nuclear technology. It is so with biotechnology. It is so with information technology which nowadays so pervades the world. I believe it is also true of at least the minimal standards to be applied for occupational health and safety.

Given the urgency of tackling the tasks before our country in occupational health and safety and the general desirability of a national approach which is fresh and vigorous, I would hope that attention will be given to the proper means of achieving national laws, where appropriate, through Federal legislation. This will especially become necessary if, as I ruefully suspect, the proposed National Commission is locked into the normal snail-like pace and cautious approaches of other Federal/State co-operative ventures in our country. In short, if co-operation fails or succeeds tepidly, I would hope that those who are watching will reflect upon the perfectly legitimate constitutional right and duty of the Commonwealth to safeguard working people by enacting Federal minimum standards enforceable wherever the work may be done throughout the nation.

I have now strayed beyond the time allotted for me. Brevity is not a famous quality of Her Majesty's judges. I must depart from this meeting. But I will watch closely the results of your deliberations and the institution, procedures, laws and personnel that are to follow.

FOOTNOTES

* Views expressed are personal view only.

1. N Gunningham, Safeguarding the Worker, Law Book Company, Sydney, 1984.

2. Keynote Address to ALP Seminar, 'Occupational Health & Safety. A National Perspective', Uni of WA, Perth, 24 October 1982, mimeo, cited Gunningham, 3.

3. Melbourne Age, 5 August 1982.

4. These figures are set out in Gunningham, 2.

5. id, 369.

6. Australian Labor Party, 1982 Platform, Constitution and Rules, ALP National Secretariat, Canberra, 1982, s 14D.

7. National Economic Summit Conference, Canberra, 11—14 April 1983, Documents and Proceedings, para 47.

8. Australia, Interim National Occupational Health and Safety Commission, Report, AGPS, Canberra, 1984, Recommendation 4 (para 2.15).

9. MD Kirby, 'Industrial Safety and Law Reform', Paper for the First National Conference on Industrial Safety, Sydney, 16 November 1982, mimeo (74/82); MD Kirby, 'Work, Health and Safety : The Key Issues', Address for the Industrial Foundation for Accident Prevention, February 1984 (7/84).

10. Federation of Ethnic Communities' Councils of Australia, Response to the Discussion Paper 'Towards Implementing a National Occupational Health and Safety Strategy', Policy Paper No 7, 1984.

11. Gunningham, 325.

12. Commonwealth v Tasmania (1983) 46 ALR 625. Cf Iain Ross, 'A Federal Code of Minimum Conditions of Employment?', Paper presented to the Australasian Law Students Association 1984 Annual Conference, Sydney, 19-27 May 1984.

13. On the so-called 'flight of capital' see the comments by Gunningham, 364.