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Australian Institute of Architects

The Honourable Gordon Rich-Phillips
Assistant Treasurer,
Government of Victoria

Delivery by email : gordon.rich-phillips@parliament.vic.gov.au

Dear Assistant Treasurer

Occupational health and safety national model laws

We write in response to the Premier's letters to the Institute's CEO, Mr David Parken and to Ms Alison Cleary, the Institute's Manager Victorian Chapter.

The Premier attached, and invited our comments on, the PWC report of 4 April 2012 and the document "OHS harmonization and you". He also requested that our response be directed to you.

You may be aware that in December 2011 the Institute met with representatives of the Office of the Premier to express the Institute's serious concerns about both general and specific aspects of the model WHS Act.

We also provided written comment at the last stages of the preparation of PWC's review, although we are not listed as an organization consulted.

While we are not able to contribute quantitatively to the calculation of cost to Victorian business, having now sighted these documents, we can provide specific comment about matters the documents raise in relation to the construction industry and architectural practice in particular.

Each of these comments centres on the uncertainty inbuilt into the model Act.

1 Uncertainty spans across the question of who or what is or is not a PCBU, the extent of a partner/director/principal's duties and obligations and ultimately, what liability really applies to architects (as designers). For the principals/directors of construction practices, including architects, the uncertainty is likely to have cost implications in preparation for new roles, new ongoing responsibilities, and potential legal expenses in exploring the extent of liability.

2 We agree that as noted in the PWC review[1], imposition of new obligations at the same time as the inherent uncertainty of the catch-all role that underpins the model Act, has potential to negate any improvement in OHS outcomes. We come to this view primarily from our knowledge of the construction industry, but as an Institute operating in the broader business environment, we are also aware of confusion for landlords and other businesses.

3 In relation to construction the most important issue is the Model Act's extension of designers' duties to actual construction of the building or structure. Victoria, as elsewhere, has specialists in

[1] Page 9-10, Price Waterhouse Coopers Australia "Impact of the proposed national Model Work Health and Safety Laws in Victoria"

construction (builders/building contractors/building subcontractors) who know, or ought to, how to fabricate buildings safely, using methods under which they are responsible for safety of workers and others.

Designers, including architects, have, and ought to have, expertise in the safety aspects of the completed construction – the environment in which Victorians will operate when the construction is completed as designed.

In Victoria and elsewhere, designers are not trained nor are they usually expert in safe construction methods. Legislation making architects jointly responsible for site safety is, in the Institute's view, more likely to cause confused responsibilities and worse, greater avoidance of responsibility by those currently responsible, on the assumption more diffuse joint responsibility reduces the risk of, or magnitude of, liability.

The Institute firmly believes the Model Act's imposition of construction safety duties on designers is misplaced, and based on a misunderstanding of the proper role of those who design structures compared to those who construct them.

Safety on a building site ought to be the responsibility of the 'constructor' , the person who controls the organization, methods, and sequencing of construction. In Australia, (and arguably elsewhere) this person is not the designer of the completed building or structure.

4 The prosecution process itself under the Model Act is inherently uncertain where every PCBU is potentially liable save only to the extent to which what they could have done was not reasonably practicable. Universal and concurrent duties, instead of the Robens principles of control, coupled with the deliberate uncertainty of Codes, mean apportionment of liability can ultimately be decided only by the Courts.

That conceptual framework of the Act encourages prosecuting authorities to apply a "scattergun" approach in prosecuting anyone and everyone involved in an OHS incident, even though exoneration under the reasonably practicable test is possible for all of them. Unless and until a considerably body of law arises from litigation that applies the model act in like circumstances and provides guidance, the cost of prosecution to the community will be high, and this includes the legal defence costs incurred by those ultimately exonerated.

5 Even within OHS agencies the effect of the Model Act's uncertainty is already manifest. The following illustrates the inherent problem with the model WHS Act – that Regulations/Guidelines/Codes are not definitive of any obligations, responsibilities or liabilities if a Court decides otherwise. Work Health and Safety Queensland, (WHSQ), published (guideline) advice on its website (recently removed) and the reasoning behind it, to the effect that a "mum and dad" (with no business activity) would be a PCBU for the purpose of hiring a babysitter – with all the attendant consequences of hiring a contractor (baby sitter). However, WHSQ also recently decided (and continue to advise) that a "mum and dad" commissioning a house to be built on their land are not a PCBU under the Act despite having commissioned contractors (builder, architect/designer, etc). Both contradictory interpretations spring from reasoned application of the Act. However, even if WHSQ guideline opinion was formulated in a Code, by the nature of the Act under which Codes and the like have no ultimate authority, no firm conclusions can be drawn.

6 The Institute agrees with the Government's paper on page 7, that the change from code based certainty in Victoria to the model WHS Act will cause uncertainty, and may have immediate cost for a PCBU seeking certainty (which is ultimately elusive) and then have possible additional cost implications as PCBUs take measures which at worst may be unnecessary and/or provide no improvement in safety, simply in order to mitigate against this uncertainty. In the example of

commissioning a house above, irrespective of WHSQ's *current* opinion which cannot be relied upon to prevent prosecution, the uncertainty may lead to the production of "design reports" in every circumstance including "mum and dad" home projects (at a cost unlikely to be recompensed).

7 Our concern about confused roles and responsibilities also extends to the proposed joint responsibilities of the owner of the site for construction by, and to, those who are contracted to the owner. We note that to further confuse definition of who is or is not responsible for safety during construction, the model Act prevents account being taken of contractual allocation of responsibilities[2] under the reasonable practicality test of liability.
To illustrate the problems this may cause, the architect is not always contractually engaged for construction site work/contract administration. If contractual arrangements are no barrier where the Act places joint responsibility, must the architect in those circumstances weigh up whether in hindsight it might be considered reasonably practicable for the designer to be involved in construction safety arrangements at its own expense? After all, Safe Work Australia in its interpretative guideline for reasonable practicality states:

"The WHS Act makes it clear, however, that a duty-holder cannot avoid responsibility by a contract giving control to someone else and through that attempting to contract out of their obligations."

8 The Institute is also concerned about the imposition of obligations about demolition on designers, including architects, without the model Act sensibly clarifying what the obligation is. At present it is unclear whether the architect's obligations extend indefinitely, to the extent that they apply beyond lifetimes, where demolition methods are likely to have changed, and alterations to the structure may well have occurred without the original designer's knowledge. Sensibly, any obligation in relation to demolition should only apply where the designer is engaged at the time of demolition, where demolition is a requisite part of a project.

In summary , the Institute does not support introduction of the model Act in Victoria without significant amendment of modification.

We trust the brief notes above assist in reinforcing the concerns the Victorian Government already has with the model Act, in relation to the building construction industry generally, and building design specifically.

We would be pleased to meet with you or your officers to further explain or clarify our position.

Yours sincerely

David Parken LFRAIA

CEO

Cc Ted Bailieu MLA, Premier of Victoria
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[2] Sections14, 272, (Model) Work Health & Safety Act 2011