

Review of NSW WHS Act 2011 and Regulation 2011

Thank you for the opportunity to comment on the model WHS Act and in particular areas specific to NSW, including the NSW WHS Regulation.

I would like to raise three critical areas that require attention:

Union right to prosecute under Section 230(1)(c) Prosecutions

We have recently seen the ETU cause a construction site in western Sydney to stop work activities in the basement areas of a building site, because of questionable concerns with safety requirements.

The specific concern was that the changed requirements for Emergency lighting under the amendment of AS3012:2010 was not being met.

The problem with the union right to prosecute in the construction industry is that builders can be asked to either take action (such as stop work) or face the threat of union initiated prosecution. Where there are badly crafted legislative requirements, the unions can use them as an industrial weapon. The unions can identify and hold such requirements as silent industrial weapons until they have a reason to cause maximum disruption and economic impact across the industry.

In 2009, the CFMEU and ETU caused most construction sites across NSW to shut down until the medium duty flexible conduit used to protect temporary construction wiring was replaced with heavy duty (orange) conduit. Wholesalers ran out of product due to the high demand and it took WorkCover several weeks to work through the process of issuing a position paper to say that medium duty conduit was acceptable.

2015 Amendment to AS3012:2010

Despite several objections at the time of draft review in 2015, Standards Australia amended various clauses in AS/NZS3012:2010, which is called up as a duty in model WHS Regulation 163 – those amendments are now WHS law. The particular concern at this point is Clause 2.7.3 *Emergency lighting*. The title has been changed from *Emergency Evacuation Lighting*, the intent or objective has in effect been removed and the requirements are phrased as deemed-to-comply options, which are technically difficult to achieve.

The fundamental problem with a deemed-to-comply legislative requirement is that it must be sufficient to cover the worst possible case scenario. In this case the level or brightness of emergency lighting must be adequate for the worst of possible egress (and access) terrains; possibly over or around rubble and water and other obstacles, say on a demolition site, excavation or in the early stages of construction. This might well be the case and it must be addressed when it exists, but is usually for a small portion of project time. Most excavation paths are well defined and usually with clear stairs and corridors, where these minimum permissible light levels are unnecessarily high.

Section 18 (reasonably practicable) may apply, but the objective of the new clause appears to have been made deliberately vague and seem to put equal weight on facilitate emergency access as well as evacuation, which in itself has serious safety implications and somewhat off the mark.

We have prepared a submission on this specific matter and referred it to the relevant division of SafeWork NSW and we hope it will soon be covered by a fact sheet or other form of position paper.

Our concern is that AS3012 takes control of important legislative requirements away from the legislators and NSW should address this; the ultimate solution might be with a new Code of Practice.

Review of NSW WHS Regulation 2011

Part 4.7 General electrical safety in workplaces and energised electrical work

Part 4.7 of the Regulation follows the line of the model WHS Regulations. In so doing it is in conflict with the Home Building Act 1989 (or more specifically 2014) and the Electricity (Consumer Safety) Act 2004.

Of particular concern is WHS Regulation 146, which includes testing as part of the meaning of “electrical work” and reads like licensing requirements and certainly dictates what persons are permitted to do. With this regard, electrical licensing is the responsibility of NSW Fair Trading.

A “competent person” is called for in WHS Regulations 150, 155, 158, 161 and 165. Reference to the definition of a competent person in Clause 5 states:

- (a) for electrical work on energised electrical equipment or energised electrical installations (other than testing referred to in clauses 150 and 165)—a person who is authorised under the [Home Building Act 1989](#) to do electrical wiring work.

This is most restrictive and bordering on industrial. There are many circumstances where persons other than electricians must do electrical work (as defined) as part of their normal work activities, such as undertake testing. Electrical testing is not part of the definition of “electrical wiring work” and this is for a very good reason. Three examples follow:

1. Sophisticated power electronics

Examples of some conflicts in legislation include: highly qualified and trained engineers and technicians undertake commissioning, trouble shooting and fault finding on sophisticated electrical equipment such as variable speed drives and other systems involving power system electronics. Only about 10% of electricians have such competencies, yet according to WHS legislation they are all competent and nobody else is: no matter what their qualifications and experience are.

You have engineers that design and develop this sort of equipment and yet they are not sufficiently competent to work on this equipment unless they have an electrician’s license. Most electricians are not trained in such specialised areas and unless appropriately qualified should not presume competency.

2. Network linesmen working on installation wiring

A further example relates to the work of qualified and trained linesmen (not licensed electricians) who work on the distribution network and make connections to customer installations for full range of services from residential and commercial to major factories and plant. So far so good as there is an exception to Division 4 under Clause 152 for work carried out on supply equipment. By necessity part of their work activities includes testing at the customer’s metering and switchboard to ensure correct polarity, etc. The meter and switchboard are part of the electrical installation and not network supply equipment. This testing and associated work is permitted by licensing legislation (under Fair Trading), but under WHS legislation these people are working under the exception identified in C.152. Many of these persons do not have an electrician’s license and by the WHS definition are not competent.

The definition of competency for electrical work should be removed in NSW WHS legislation and use the standard tried and proven definition.

3. Private High Voltage installations

Yet a further example is work relating to private HV installations. Most electricians would not dare touch such equipment, because they are not adequately trained, knowledgeable, qualified or experienced with such equipment (ie not competent). Again the PCBU could read the definition for competency and legitimately ask them to do HV work.

These are just some examples where the legislation is not right for NSW and should be corrected.

Thank you for the opportunity to comment on these critical issues and I would certainly be willing to provide any further comment or clarification.

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19 December 2016