

Work Health & Safety Act 2011 – Statutory Review

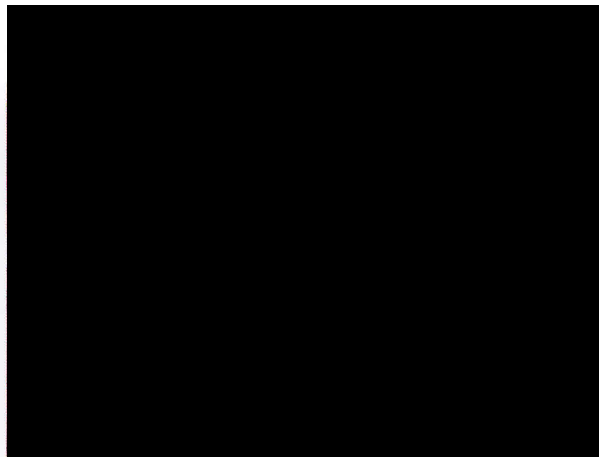
Submission

The South East Timber Association Inc.(SETA) has become aware of the statutory review of the NSW provisions of the Work Health & Safety Act 2011 (WH&S Act) in the past few days, so apologise for the late submission.

This submission will focus primarily on Objective 1 (a) of the WH&S Act and the role of WorkCover inspectors in delivering on this objective.

“Objective 1 (a) deals with protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant.”

The submission comes from the perspective of persons conducting a business or undertaking (PCBU) in forest workplaces. Thirty years of failure to enforce work health and safety obligations on certain classes of “other persons at the workplace” has resulted in obstructive and dangerous behaviours becoming normalised in forest workplaces and more recently mining workplaces.



In responding to this issue, in previous years, the relevant Minister and WorkCover stated that: *“The Occupational Health and Safety Act 2000 does not place obligations on persons trespassing onto a place of work.”*

While the legal advice, behind the above statement has not been made available, alternate legal advice regarding trespass by direct action protestors, obtained from specialist lawyers stated in part: *“It is apparent that WorkCover has shown no interest in exercising its powers to ensure workplace safety in your circumstances. WorkCover's only response to your complaints is to say that these people are trespassers and Occupational Health and Safety Act does not apply to trespassers.”*

We don't share that view. The primary object of the OHS Act is to secure and promote the health, safety and welfare of people at work.

It is clear that the conduct of the protestors creates significant risks in the workplace and that the conduct is directed at disrupting the work that is being undertaken at the site. Such action are clearly in breach of the OHS Act.



SouthEastTIMBERassociation

South East Timber Association Inc PO Box 773 Eden NSW 2551 Tel (02) 64960220

Given the differing legal views on coverage of the OH&S Act, drafting of the WH&S Act 2011 provided an opportunity for clarification on which classes of people are excluded from the provisions of the WH&S Act.

Instead, Section 29 of the WH&S Act states:

A person at a workplace (whether or not the person has another duty under this Part) must:

- (a) take reasonable care for his or her own health and safety, and*
- (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons, and*
- (c) comply, so far as the person is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person conducting the business or undertaking to comply with this Act.*

The WorkCover response under the WH&S Act has been similar to the response under the OH&S Act:

"WorkCover inspectors hold no powers to arrest or require members of the public to cooperate. WorkCover's powers are also limited in relation to persons interfering with or misusing items provided for health, safety and welfare. Incidents involving trespassers unlawfully entering a workplace and committing theft or vandalism fall outside its jurisdiction."

The fundamental issue is not theft or vandalism. The issue is that direct action protestors deliberately endanger their lives and at times the lives of PCBU employees in the work place and consequently are in breach of Section 29 of the Act. To underline the dangers posed to themselves, at least three protestors have been injured to varying degrees, after falling from tripods, since direct action protests commenced on the NSW south coast in the late 1980s.

Only one of these incidents has been recorded in writing. A police officer noted *"On 14 January, 2002 at the latest protest where a protestor was seriously injured having fallen from one of their structures."*

The words of the injured protestor give some indication of the ongoing health issues resulting from him being injured, as a result of being put in a dangerous position, without adequate safety precautions. Eight months after the incident noted above, the injured protestor posted: *"As some may know my year to date has been pretty shit (indeed, I had surgery over the weekend on my elbow - as it was still dislocated 8 months after my fall)"*

Fortunately, unlike the US, there have been no reported fatalities resulting from protestors falling from tree sits in Australia. Unfortunately, a forestry worker was tragically killed when struck by a branch while on duty at the scene of a direct action protest on the NSW north coast in October 2013. Part of the coroner's report noted:

"Having made the formal findings, I make the following comments in respect of the matter.

The necessity of the deceased being on the site at all related directly and solely to the presence of unlawful protesters. The logging contractor was acting lawfully pursuant to licences to fell timber on the property. The protesters were conducting guerrilla tactics part of which involved an activity described as a "black wallaby". This action placed the protesters in the vicinity of trees being felled thereby endangering their lives."

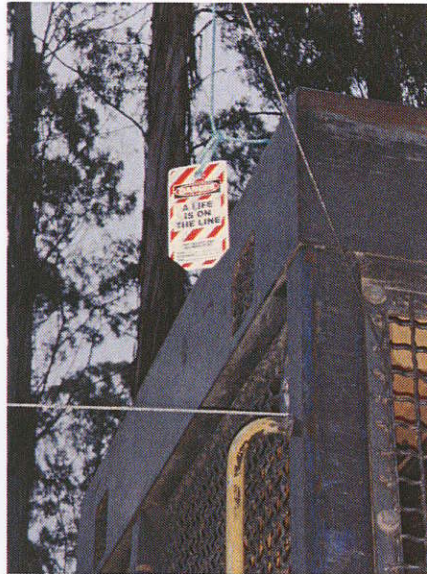


SouthEastTIMBERassociation

South East Timber Association Inc PO Box 773 Eden NSW 2551 Tel (02) 64960220

Why the coroner was satisfied that an inquest would not take the matter any further was never explained.

Some direct action protestors are fully aware that they are endangering their lives. Tags, as shown in the photo below, stating "A life is on the line," clearly illustrate their deliberate intent.



Perhaps the best documented example of a protestor articulating that he was deliberately endangering his life, to deter search and rescue officers from removing him from a forest workplace, is at the link below. The segment is from the TV series, *The Force*. At the four minute mark of the video, the protestor deliberately endangers his life by undoing the safety ropes securing his tree sit.

<https://www.youtube.com/watch?v=-LVJipWRmrU>

At the 2 minute 54 second mark in the video below, two protestors attempt to exchange places, to stand in a tripod, approximately 6 metres above ground level. Neither have a safety harness, as one slides down the tripod leg and the other protestor attempts to climb up another leg of the tripod.

<https://www.youtube.com/watch?v=Ttf0eqXf9LI>

The above information and many other instances clearly demonstrate that protestors create work health and safety risks beyond the control of any PCBU. SETA agrees that police support is needed to assist the PCBU manage criminal offences, including vandalism and theft.

However, given the provisions of Section 29 of the WH&S Act 2011, WorkCover cannot be administratively excused from assisting both the PCBU and the police manage the risks posed. WorkCover must also take steps to provide a high level of deterrence to unsafe conduct in the workplace.

Common charges laid by police against anyone arrested at a forest protest, include trespass and obstruction. Penalties applied by the courts range from no penalty or conviction



SouthEastTIMBERassociation

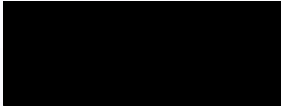
South East Timber Association Inc PO Box 773 Eden NSW 2551 Tel (02) 64960220

(Section 10 for first time offenders), to \$100 to \$200 and conviction for a second offence and perhaps \$300 to \$400 for someone who offends more than twice.

On the other hand, the maximum penalty for a person convicted of a Category 3 offence under the WH&S Act is \$50,000. A fine of ten percent of the maximum (\$5,000) would be a significant deterrent to any trespasser entering a forest or mining workplace.

Recommendation

It is recommended that the Minister direct WorkCover to enforce the relevant provisions of the WH&S Act against protestors who enter any workplace and deliberately place the health and safety of themselves or others in the workplace at risk.



Stephen Pope

President

South East Timber Association Inc.

