Second Reading

The Hon. GREG PEARCE (Minister for Finance and Services, and Minister for the Illawarra) [4.00 p.m.]: I move:

> That these bills be now read a second time.

I am pleased to introduce the Work Health and Safety Bill 2011 and the Occupational Health and Safety Amendment Bill 2011. The bills deliver on another commitment made by the then Coalition before the last election to harmonise occupational health and safety laws in line with the Council of Australian Governments [COAG] agreement, which New South Wales had signed up to with the Federal Government and most other State Labor governments. The O'Farrell-Stoner Government can understand the frustration of the Federal Labor Government when the former State Labor Government reversed its promise to pass harmonised laws before the last election. It gave New South Wales a bad reputation. At the time Prime Minister Gillard said:

> I never thought that in the twenty-first century I would hear a New South Wales Premier deny that a deal is a deal and a signature means you agree.

The O'Farrell-Stoner Government agrees with the Prime Minister and shares her passion to see major improvements to work, health and safety in New South Wales and around the nation. The Work Health and Safety Bill 2011 illustrates the commitment of the New South Wales Government to participate fully in a nationally harmonised system of occupational health and safety. The bill enacts the nationally agreed Model Work Health and Safety Act, with appropriate jurisdictional modifications. The bill will be supplemented by model regulations and model codes of practice, which are currently the subject of public consultation. The bill is proposed to be commenced on 1 January 2012.

The Occupational Health and Safety Amendment Bill 2011 implements three key reforms in the Work Health and Safety Bill 2011: it removes the reverse onus of proof in work health and safety prosecutions by requiring the prosecution to prove what "reasonably practicable" steps a defendant could have taken to avoid breaching the general duties to maintain a safe and healthy workplace; it replaces 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 it removes the right of unions to bring proceedings for an offence under the Occupational Health and Safety Act.

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 panel of independent occupational health and safety experts. The national review into occupational health and safety laws consulted widely with business, employer and union groups, and took submissions from the public and made a number of detailed recommendations. Following this review, 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 model Act, which was endorsed by the Workplace Relations Ministerial Council on 11 December 2009. From memory, the Hon. Joe Tripodi represented the former Labor Government at that meeting.

The Work Health and Safety Bill 2011 will enact the model Act developed by Safe Work Australia—and as agreed by the Workplace Relations Ministerial Council—in New South Wales to enable this State to meet 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, there were substantial differences between jurisdictions. These differences were particularly noticeable in regard to duty holders and duties, defence mechanisms and compliance regimes including penalties. 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. This means that workers' safety-related qualifications and training will be recognised wherever they work in Australia. This will assist in the mobility of individual workers and the Australian workforce as a whole.

The major changes in New South Wales work health and safety laws arising from the Work Health and Safety Bill 2011 are those that have been brought forward in the Occupational Health and Safety Amendment Bill 2011. As I have indicated, these relate to the ability of unions to bring prosecutions for breaches of the legislation. They also qualify the general duties obligations by introducing the concept of what is reasonably practicable for a duty holder to do, and both bills will establish a positive duty on officers of a corporation to exercise due diligence. Transitional provisions in the Occupational Health and Safety Amendment Bill 2011 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 have been be instituted by a union after the date of the introduction of the bill will be terminated.

Another significant change to be brought into New South Wales by the Work Health and Safety Bill 2011 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 occupational health and safety are dealt with by the Industrial Relations Commission in court session. Under the bill, category one offences, which carry maximum fines of up to $3 million for a corporation and up to five years imprisonment for an individual, 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 the 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. Decisions of the District Court and Supreme Court can be appealed to the Court of Appeal, and eventually to the High Court, without having to seek equitable writs.

As the national review of occupational health and safety laws made clear, it is desirable that there should be a clear path for appeals. Furthermore, the laws will include provisions in the most serious cases where courts can deprive people of their liberty, with maximum penalties of up to five years. The transfer to the mainstream courts will mean that these serious cases are dealt with by a judge and jury. At the moment the Industrial Relations Court deals with matters summarily, with no provision for juries; I also note that there will be a role for the Local Court, as there has been for a significant time. The Industrial Relations Commission will retain an important role under the bill, such as hearing matters to determine applications to disqualify health and safety representatives who misuse their powers; issuing work health and safety entry permits to union officials, and suspending or revoking those permits where appropriate; determining disputes about right of entry; and conducting an external review of decisions made by WorkCover inspectors and WorkCover.

Clause 223 of the bill sets out a list of 13 such reviewable decisions, including decisions in relation to workplace consultation, provisional improvement notices and notices issued by inspectors. The Industrial Relations Commission also retains jurisdiction for terms and conditions of employment of State and local government employees. The Industrial Relations Commission exercises jurisdiction in relation to making or varying awards; making or varying enterprise agreements; promoting equal opportunity in employment; civil matters and prosecutions, for example, underpayment of award entitlements and superannuation appeals; resolving industrial disputes through conciliation and arbitration; registration and regulation of employer and employee organisations; proceedings for unfair dismissal; and proceedings for unfair, harsh or unjust contracts. The Industrial Relations Commission also has an appellate jurisdiction for matters dealt with by a single member of the commission, the Chief Industrial Magistrate and the Registrar.

The ability of industrial organisations to bring proceedings for an offence of the work health and safety laws is not consistent with the majority of jurisdictions. Removal of this right to prosecute is consistent with the 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 12-year period between 1987 and 2009 WorkCover undertook 1,866 successful prosecutions, while only 10 were made by employee associations. The Government believes that WorkCover, a well-resourced and experienced enforcement agency, is best placed to enforce safety standards, including, where necessary, by prosecution.

Prosecutions should be the preserve of an expert entity. Currently, unions are able to bring prosecutions and gain a financial benefit by way of a moiety of up to 50 per cent of the fine imposed. This creates a clear incentive for unions to pursue prosecutions for financial benefit. I have referred in question time to cases such as *Ferguson v Nelmac*, where the fine awarded was $100,000, and *Johnson v State of New South Wales*, with a fine of $220,000. I also mention prosecutions against the ANZ bank, where fines totalled $638,500. Moieties of up to half the fine were awarded in most of these cases. How can anyone argue that there is no conflict of interest when unions have a clear financial incentive to pursue prosecutions? Moreover, there is the potential for unions to use the prosecution as a way to advance their industrial interests in the context of industrial conflict.

In some cases unions have commenced proceedings only to discontinue them, and WorkCover has pursued the prosecutions later. In 2005 unions discontinued four prosecutions against Australind Holdings, JB Metal Roofing and two individuals following a fatality. These cases were later pursued by WorkCover and successfully prosecuted, with fines totalling in excess of $400,000. This illustrates two points: WorkCover is the expert

prosecutor in such cases; and having a union right to prosecute potentially opens employers to having to defend themselves against prosecutions brought by multiple prosecutors. In the case of the prosecutions by WorkCover the full $400,000 in fines went to consolidated revenue and was available to be spent by the Government on programs for the people of New South Wales. It did not go into the coffers of a single union.

I can inform the House that unions still will have an important role to play, as they always have, in occupational health and safety. Unions have a strong voice in WorkCover's decision-making, with five members of WorkCover's advisory council nominated by Unions NSW. The secretary of Unions NSW is a member of the WorkCover board. The workers compensation legislation that establishes WorkCover specifically provides for WorkCover to oversee industry reference groups, which comprise representatives of unions, employers and WorkCover. WorkCover staff meet regularly with individual unions, and additional processes have been put in place for the implementation of the Work Health and Safety Bill 2011. About 35 meetings with various groups, including union representatives, have taken place in recent months. In the 2010 calendar year 14,620 complaints were received, of which 69 were referred by unions.

The bill introduces new rights for unions. The bill provides enhanced powers, including being able to enter a workplace for the purpose of consulting with and advising workers on work health and safety matters. This new provision does not currently exist in New South Wales occupational health and safety legislation, which restricts entry by union officials where there is a suspected breach of the Occupational Health and Safety Act. So the bill introduces more rights for unions. Clause 231 of the Work Health and Safety Bill 2011 allows a person to make a written request for a prosecution to be brought in a matter where there appears to have been a serious breach of the workplace health and safety laws at any time up to six months following the alleged breach. If WorkCover has not investigated and commenced proceedings, under clause 231 the bill provides the right for a person to request prosecution. As I have already said in the House, I am not aware of anyone putting a good case as to why, in the public interest, unions should have an additional right to prosecution. We have heard a frenzied defence of the unions' right to prosecution. I would like someone to justify unions having an additional right, given the history and statistics I have mentioned.

Commencement of the three fundamental reforms in the Occupational Health and Safety Amendment Bill 2011 prior to the national reforms, which will take effect on 1 January 2012, demonstrates this Government's commitment to rectify at the beginning of its term long-held criticisms of elements of the occupational health and safety laws in this State. The changes in the Occupational Health and Safety Amendment Bill 2011 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. In that case 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. The High Court ruling said 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 how that risk should have been prevented. This High Court ruling accepted that a defendant should be able to conduct a defence of what is reasonably practicable. Changing the nature of the duties in the Occupational Health and Safety Amendment Bill 2011 to require the prosecutor to prove what is reasonably practicable 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.

The Work Health and Safety Bill 2011 requires officers of duty-holding organisations to exercise due diligence to ensure that their organisations comply with their duties. This

requirement is consistent with the duty of officers under current New South Wales law. Volunteers are immune from prosecution for offences committed in their capacity as an officer. This is an important protection to those performing socially valuable work in the community and enables them to undertake that work in good faith, without fear of prosecution. The Work Health and Safety Bill 2011 provides for the election of health and safety representatives. 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. Provisional improvement notices will be required to be confirmed by the regulator to ensure greater accountability and oversight.

The bill encourages the productive involvement of workers and employers in ensuring health and safety by the establishment of health and safety committees. 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 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 who is suspected of a breach to enter into an undertaking with the agreement of the regulator. The undertaking is capable of enforcement in court and a breach of an undertaking attracts severe penalties.

This innovation provides a regulator with an additional tool to enforce compliance 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 its legislation gives WorkCover the option of using such measures in Queensland. 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. Three categories of penalty are introduced based on the degree of culpability, risk and harm. The highest category of offence, involving proven recklessness, attracts 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. The penalties are higher than those currently in place in South Australia and demonstrate the Government's commitment to punish the very small minority of employers and businesses that disregard the health and safety of their workforce. The severity of the penalties reflects the strength of this legislation as a deterrent to reckless conduct that endangers health and safety.

The bills establish a primary duty to ensure, as far as reasonably practicable, the health and safety of workers. The test of reasonable practicability is important as it places that duty in the context of what a reasonable person could have foreseen as a risk to the health and safety of a worker and it encompasses reasonable action by a person to mitigate that risk. It allows the duty holder to demonstrate that he or she did all that could reasonably have been done to avoid any risk to the health and safety of a worker.

The Work Health and Safety Bill 2011 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 or structures. In this regard the bill is

consistent with the duties established under current New South Wales occupational health and safety laws.

The Work Health and Safety Bill 2011 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 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 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 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.

The Work Health and Safety Bill 2011 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. 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 clearer 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 bills will ensure less complexity and red tape for business and more certainty for employers and those who engage workers and, through this, the bills will provide enhanced protection for workers, wherever they work. The bills 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 bills strengthen 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 bills will establish New South Wales's participation in a nationally consistent system of work health and safety regulation. Safety should be paramount in the minds of all employers

throughout New South Wales and Australia. Safety in the workplace is an issue of great importance to this Government and that is why these bills have been one of the first priorities of this Government. The importance of safety legislation is even more strongly emphasised when one considers the fatalities that are still being suffered in workplaces in New South Wales and across Australia. Everyone, regardless of their political views, is keen to reduce those statistics. I look forward to seeing these health and safety laws implemented throughout Australia and to seeing improvements in safety as a result. I commend the bills to the House.