

1 The model Work Health and Safety Act and telework

One of the significant regulatory advances made by the model Work Health and Safety Act was to recognise that the standard employment model – of employers employing employees under contracts of employment to carry out work at the employer's place of work – is no longer the overwhelming norm in Australia. Since the late 1970s there has been a relative decline in full-time, continuing work, accompanied by an increase in part-time and temporary work, and increased incidence of home-based work, self-employment, diverse forms of subcontracting and an increase in the use of supply chain and franchising arrangements. The model Work Health and Safety Act recognised these changes, and the need to protect workers from the wide-ranging tradition, and new and emerging, hazards that arise from the wide variety of work arrangements, by focusing the principal duties of the model Act (particularly in sections 19 and 47) on 'persons conducting a business or undertaking' (PCBUs) and 'workers', rather than 'employers' and 'employees'. Just as significant was the policy move away from focusing on 'workplaces' – none of the principal duties explicitly refers to workers at a fixed workplace.

The model Work Health and Safety Regulations and the model Codes of Practice, unfortunately, do not follow through on these policy developments. Despite the model Act, in sections 20-26, providing more specific duties for PCBUs who are also upstream duty holders, nowhere in the Regulations are there provisions which outline specific provisions for PCBUs and workers who engage in labour hire, supply chains, home-based work, telework, and the other forms of work re-emerging from the 1980s. More important, from the perspective of this submission, is that there have been no approved codes of practice providing clear and specific guidance to PCBUs and workers engaging in the wide variety of work arrangements envisaged by the National OHS Review Panel.

The central focus of this submission is on the unintended consequences of the policy failure to fully implement the key duties in the model Act as they apply to different kinds of work arrangements. More particularly, we submit that the model Act did not factor the advent of telework for low risk occupations into its provisions. The key difficulty experienced by persons seeking to engage in telework is that PCBUs tend to draw on old OHS regulatory concepts in their interpretation of the primary duty of care in section 19 and assume that the teleworker must have a fixed place of work, and that the PCBU must always audit that workplace to ensure that it does not pose risks to the health and safety of the teleworker before the teleworker can be engaged.

While we do not in any way challenge the importance of the model Act in protecting workers from all types of hazards arising from all types of work arrangements, we submit that PCBUs' misinterpretation of their duties under the Act has made it very difficult for some teleworkers to get telework from PCBUs because of PCBUs' perception of the high compliance costs of telework. These misconceptions have locked many teleworkers out of the labour market. We strongly argue that this unintended consequence of the model Act leads to significant injustices, and significantly underutilises the talents and capabilities of Australian teleworkers. Our submission is that this problem can be addressed very simply by the development of an approved code of practice for telework that provides practical guidance to PCBUs

seeking to engage teleworkers, and that ensures that PCBU's do not overestimate the measures they need to take to comply with the model Act, its regulations and approved codes of practice. Amongst its provisions, the code of practice should specifically address telework that poses minimal risks to teleworkers and does not require the teleworker to work in a specified place, so that PCBU's can be confident that they engage these kinds of teleworkers with minimal compliance costs.

2. The problem

In support of this submission, here is the experience of one individual, Owen Thomas, with direct experience of the impediments created by the existing legislation.

"I tried to fashion a career for myself starting in 1989 when I was 15. I seemed to have a bit of a brain, and I found I could use this brain to get computers to do things I thought were above me. I also liked the promise that software development was one career where the aspirant didn't seem to need to be ensconced within the physical proximity of others. I'd thought I'd found the answer: be productively engaged in an effort with other people while keeping myself in an environment where I could control sensory stimulus - work from a place of my own choosing yet be in contact with others to no greater a degree than would maximise my productivity.

Over the next 20 years, I managed (with some difficulty) to furnish myself with a degree in Computer Science from Wollongong University. I managed to find myself no less than seven major, mainly full-time employment engagements; the New South Wales Police Service, IBM, Accenture, even my alma mater as a part-timer. But for my engagement with the police, which lasted nearly 6 years, I couldn't hold a job for more than 15 months. None of my employers would let me try telework even though there was growing technology infrastructure to support this way of working.

In 2009, at the age of 35, I saw a psychiatrist. I had two questions. 1: Why couldn't I keep my jobs? 2: Why does society not support telework? Five minutes in the first appointment, my psychiatrist asked me a question. Did I ever bump my head?

In 1986, when I was 12, I came off my bicycle. I hit my head hard on the road and spent about three months in hospital recovering from an inoperable bleed on my brain and bruising on the surface of my brain where the impact with the road had slammed my brain against my skull. In 2009, my psychiatrist arranged tests and diagnosed me with a neuropsychological condition consequent to this injury. Apparently, I also have Asperger's syndrome, but the consensus seems to be that the acquired brain injury has magnified these symptoms. For 23 years, this condition had informed me about how best I could get on with my life.

I didn't know society wasn't supportive of telework as a boy of 15 years; I was just trying to find myself a niche within society that would allow me to contribute and even perhaps reward me financially much the same as anyone else aspires. In time and with the advent of better technology, I expected opportunities to open up that would allow me to pursue my ambitions.

From what I observe of the world today, I find that the technology has improved as I thought it would. That is a great thing. However, as I continually apply for work, I am finding that Work Health and Safety legislation seems to be used by potential employers to obstruct the possibility of people like myself from exploring telework as a means of creating a productive working life. I don't want to be dependent on the welfare system for my home and living as a middle-aged man who is otherwise fit and capable. I would like access to the opportunities available today to earn an income through contributing my skills to society.

However, in my experience of negotiating with employers, telework is not an option. I am told that the WHS law makes the proposition of telework a logistic and risk management cost which can only be properly managed by collocation. I cannot argue to the employer to make a reasonable adjustment in accordance with the Commonwealth's Disability Discrimination Act and forget about WHS law because the employer cannot disregard a law to make a reasonable adjustment.

I left my last job in July 2008. It seems to me that traditional office-based employment needs me to interact constantly with other people, to work longer hours than my health permits, to spend long periods travelling, and to even perhaps pack up and move from one place to another. There is no accommodation of the consequences of my neuropsychological condition, and the impact on my ability to cope with sensory input, which has rendered my hard-earned skills incompatible in a traditional office setting.

The collocated office environment introduces distractions (sights, sounds, smells and the like which are a consequence of collocation). Although these distractions have nothing to do with the work I do, I must work within this environment. I cannot control these distractions; hence this environment becomes a barrier. I am rendered incapable of contributing and building myself a life as a result.

I broached the subject of working a proportion of my time from home with each of my previous employers. Each request was refused. It seems that they don't wish to cater for someone with a 'disability' as misdirected regulation forces employers to consider that telework could impact their bottom line. Even the university felt that it was too much of a risk and inconvenience. I have tried to persuade politicians to help me but they don't want to listen to me.

I have had to fight hard to avoid the underside of a bridge or perhaps even the front of a train. I feel despairing and angry that I am being prevented from becoming a productive contributor to society in such a way as I envisaged when I was 15. I have the skills and experience. I now need these proposed changes to the legislation to open up a path back to employment".

3. The recommended solution.

We submit that:

- (a) There be approved codes of practice addressing issues specific to the wide array of work arrangements in Australia.
- (b) These new approved codes of practice should include an approved code of practice on telework, in which:
 - (i) Telework should be defined using the accepted contemporary definition: work performed through the medium of telecommunications. The definition should specifically note that telework can be conducted anywhere outside a centralised organisational work place – the worker does not necessarily have to work at home, but can work at other places, such as coffee shops, public libraries and so on. For some kinds of low risk telework, teleworkers are able to choose their place of work.
 - (ii) The code of practice should specify that where work clearly entails low levels of risk, the PCBU can discharge its obligations under section 19 by reviewing and accepting a documented risk assessment provided by the worker, a non-government organisation (such as SANE), or the WHS inspectorate. The documented risk assessment must identify all potential hazards arising from the work rather than the workplace, assess the level of risk for those hazards using approved codes of practice, guidance material, or Australian Standards, and clearly documenting proposed controls.
 - (iii) If the PCBU does not require the worker to work at a place designated by PCBU, and the teleworker's proposed work, and places of work, do not require the worker to work with or near hazardous substances or dangerous machinery, or to be exposed to any other hazard which is specifically addressed in the regulations or an approved code of practice, then the work is presumed to be low risk work.
 - (iv) Where telework is clearly low risk work, the code of practice for managing the work environment and facilities will not apply to the work.
 - (v) The PCBU is responsible for giving the teleworker best practice advice on performing the tasks of the teleworker's job, and for keeping the teleworker advised of changes to this advice as soon as the PCBU becomes aware of any changes. Maintenance records or incident logs pertaining to the health and safe use of employer-provided devices must be kept by PCBU to comply with this code of practice.
 - (vi) The teleworker is responsible for the maintenance of devices they **own and use** in the performance of their work related duties. However, the PCBU is responsible for giving the teleworker best practice advice on performing the tasks of the teleworker's job, and for keeping the teleworker advised of changes to this advice as soon as the PCBU becomes aware of any changes.