OCCUPATIONAL HEALTH AND SAFETY ACT REVIEW

March 2004

Chris Maxwell

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ABBREVIATIONS

ACA	*Accident Compensation Act* 1985 (Vic)
ACCI	Australian Chamber of Commerce and Industry
ACT Act	*Occupational Health and Safety Act* 1989 (ACT)
ALRC	Australian Law Reform Commission
Authority	Victorian WorkCover Authority
COAG	Council of Australian Governments
Compensation Act	*Accident Compensation Act* 1985 (Vic)
Cth Act	*Occupational Health and Safety (Commonwealth Employment)* Act 1991 (Cth)
DGA	*Dangerous Goods Act* 1985 (Vic)
DPP	Director of Public Prosecutions (Vic)
DTF	Department of Treasury and Finance
DWG	designated work group
EP Act	*Environment Protection Act* 1970 (Vic)
EPSA	*Equipment (Public Safety) Act* 1994 (Vic)
ESA	*Electrical Safety Act* 1998 (Vic)
Falls RIS	Regulatory impact statement for the Occupational Health and Safety (Prevention of Falls) Regulations
HSC	Health and safety committee
HSE	Health and Safety Executive (UK)
HSR	health and safety representative
HSWG	Health and Safety Working Group
MHAC	Major Hazards Advisory Committee
MHF (Regulations)	Major Hazard Facilities (Regulations)
MSD	musculo-skeletal disorder
National Commission, NOHSC	National Occupational Health and Safety Commission
NSW Act	*Occupational Health and Safety Act* 2000 (NSW)
OCEI	Office of the Chief Electrical Inspector
OGS	Office of Gas Safety
OHS	occupational health and safety

OHSA, the Act	*Occupational Health and Safety Act* 1985 (Vic)
PIN	provisional improvement notice
Qld Act	*Workplace Health and Safety Act* 1995 (Qld)
Reference Group	Reference Group established by the Minister to oversee the review (see Chapter 1)
Review	The present review of OHSA
RIS	Regulatory impact statement
RTDGA	*Road Transport (Dangerous Goods) Act* 1995 (Vic)
SA Act	*Occupational Health, Safety and Welfare Act* 1986 (SA)
SDF	Safety Development Fund
SME	Small to medium-sized enterprise
Tas Act	*Workplace Health and Safety Act* (Tas)
THC, VTHC	Victorian Trades Hall Council
VCEA	Victorian Council of Employers Associations
VPLRC	Victorian Parliamentary Law Reform Committee
VWA	Victorian WorkCover Authority
WA Act	*Occupational Health, Safety and Welfare Act* 1984 (WA)
WAC	WorkCover Advisory Committee
WorkSafe	Victorian WorkCover Authority in its capacity as administrator of OHSA and related legislation

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- Peter Nicholas, counsel assisting;
- Annie Hunter Block, research assistant (seconded from VWA);
- Dave McQueen, research assistant (seconded from VWA);
- Marlene Preston, administrative manager;
- Georgina Hawkins, administrative assistant.

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I wish also to record my appreciation to the following people for their support and assistance:

- James MacKenzie (Chair of the Authority and Chair of the Reference Group);
- Greg Tweedly (Chief Executive of the Authority);
- John Merritt (Executive Director of WorkSafe);
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- Adrian Nye (Department of Treasury and Finance); and
- Llewellyn Prain (Executive Assistant to the Chair of the Authority).

Chris Maxwell
Melbourne

EXECUTIVE SUMMARY

There is a clear consensus in the Victorian community about workplace health and safety. Its paramount importance is acknowledged on all sides.

As described in Chapter 2, there is universal condemnation of the notion that exposure to the risk of injury or death in the workplace is simply "the price you pay for having a job". On the contrary, it is agreed that if the job cannot be done safely, it cannot be done.

There is also consensus that the *Occupational Health and Safety Act* 1985 – and the legislative framework of which it is the centrepiece – are structurally sound. What is required is for the legislative scheme to be made to work better.

Part 2 of the Report examines the regulatory structure, in particular the position of WorkSafe as a division of a statutory authority which also administers the worker's compensation scheme. No change to that structure is recommended.

Recognising the importance of tripartite involvement in policy-making (employers, unions and the Authority), Chapter 7 recommends the establishment of a new OHS advisory committee. Chapter 22 looks at other ways in which the Authority can engage stakeholder groups in the formulation and implementation of OHS standards.

The Report recommends an overhaul of Part II of the OHS Act, so that it embodies all of the Authority's objectives, functions and powers in relation to OHS (most of which are currently to be found in the Accident Compensation Act). This change will emphasise that the Authority's OHS functions are just as important as its compensation functions.

Making the legislative scheme work better means ensuring that the scheme operates effectively, accountably, transparently and fairly. This in turn means making clear the principles which drive OHS legislation and enforcement, and at the same time attending to the details of enforcement mechanisms and processes.

Two basic assumptions underpin the Terms of Reference - and this Report. First, the safety duties imposed by the Act and the regulations must be clearly defined and properly targeted. Secondly, they must be complied with.

Clarity and certainty: defining the safety duties

The OHS legislation must have adequate coverage, so that it applies to all risks to health and safety arising from workplace activity, and must impose appropriate duties on those who are in a position to eliminate or control those risks. These are the concerns of Parts 1, 3 and 4 of the Report.

Part 1 deals with the changing nature of work relationships, and with new and emerging risks such as stress and bullying, the so-called psychosocial hazards. These hazards are covered by the general language of the Act, in that they are "risks to health", but the Act should be

amended to embrace the right to a healthy physical and psychosocial work environment (Chapter 4).

The changing nature of work and work relationships means that there will often be more than one employer, or supplier of labour, in respect of a single workplace. The relationship between the overlapping safety duties needs to be clarified, by reference to the respective degrees of control over the workplace (Chapter 11).

(Changes are also required to procedures for workplace consultation and representation to take account of the move to widespread casualisation, part-time work and mobility – see Part 5).

Part 3 of the Report examines the scope and limits of the general safety duties imposed by OHSA. Critical to determining what employers are required to do is the test of "practicability". Each employer has a duty to make the workplace safe "so far as is practicable". Yet the factors which determine what is and is not "practicable" are ill-defined and poorly-understood. The relevant factors are: the severity of the risk; the state of knowledge about the risk and the means of eliminating it; and the cost of doing so.

Clarifying the test of "practicability," and providing guidance on each of the factors, will mean greater certainty for all workplace parties and for the Authority. The test should be what is "reasonably practicable" in the circumstances. This change would bring the Act into line with existing practice, and with the position in most other jurisdictions.

"Control" should be added as a factor to be considered in determining what is practicable. This will enable the law to differentiate between the safety duties of, for example, a labour hire provider and a host employer, according to their respective capacities to control risk (Chapter 11).

The relationship between cost and risk also needs to be clarified. When OHSA was enacted in 1985, the intention was that cost should not be given undue emphasis. In practice, the opposite has occurred. Claims that safety measures are too expensive constitute the single biggest obstacle to improving workplace safety.

The Act at present gives no guidance as to how the balance between cost and risk is to be struck. The Report recommends (Chapter 12) that the "cost" factor be clarified so that, once a risk has been identified and its severity assessed (likely outcome, and probability of occurrence), the employer would be obliged to take risk prevention measures unless the cost of doing so was "grossly disproportionate" to the risk.

The adoption of the "gross disproportion" test accords with the original intention of the legislation, and will ensure a "transparent bias" in favour of safety.

Moreover, questions of cost should be determined objectively. Since 1989, it has been the law in Victoria that the "practicability" factors in the Act (including cost) are to be applied objectively, not by reference to the subjective circumstances of the particular employer. In the

case of knowledge, this means that the duty to remove a risk exists regardless of the particular employer's ignorance of the risk, if he/she ought reasonably to have been aware of it.

Likewise with cost. Whether the cost of a risk prevention measure is "grossly disproportionate" to the particular risk is to be determined objectively, regardless of the particular financial circumstances of the employer in question. Any other approach would create the intolerable situation where two workers in the same industry would receive different levels of safety protection merely because one worked for a prosperous employer and the other for a struggling employer.

Part 4 of the Report concerns new or expanded "upstream" safety duties, aimed in particular at safe design. As the National OHS Commission has said, designing out potential OHS hazards before they enter the workplace can be the most effective strategy to eliminate hazards at their source. This is the highest level of safety protection which is achievable.

A commitment to eliminate hazards at the design stage is one of five national OHS priorities endorsed by the Council of Australian Workplace Relations Ministers in 2002. Accordingly, Chapter 18 recommends the imposition of a safety duty on workplace designers, along the lines of existing provisions in three other States.

As with other duties, the scope of this duty will be limited to those matters which are under the designer's control. It is also recommended that a general safety duty be imposed on owners, managers and controllers of buildings that are used as workplaces.

Chapter 19 recommends clarification of the existing upstream duties on manufacturers, designers and suppliers of plant and substances (s.24), and extension of these duties to designers of packaging and suppliers of services.

At present, the Act imposes duties on companies as employers, and on their employees, but does not impose duties on company officers. The role of officers is dealt with only in the context of their (very limited) liability under s.52 when the company breaches the Act.

Chapter 17 recommends that the role of company officers in ensuring workplace safety, like the role of employees, be recognised by a clear definition of their responsibilities. The Act should impose on officers an obligation - equivalent to that imposed on employees - to take reasonable care, within the limits of their ability to exercise control, to ensure that the company complies with the Act.

An officer will not be expected to do more than is reasonable in the circumstances. The scope of the officer's duty will be limited by what he/she knows (or ought reasonably to know) and his/her ability to influence the relevant safety decisions. Thus, an officer could not be held liable for a safety breach which he/she could not reasonably have been expected to know about, or over which he/she had no control. Moreover, unlike the position in NSW and Queensland, there would be no reverse onus. It would be for the prosecution to show that the duty was breached.

As there is for employees, so there should be for officers a separate, more serious, category of offence, where an officer "wilfully or recklessly" places at risk the health or safety of any person at the workplace.

Knowledge and compliance

It is axiomatic that the extent of compliance with OHSA is dependent on the degree of awareness in Victorian workplaces of what the Act requires. Most employers and employees are generally aware that they have safety duties, but few know what is required of them in order to discharge those duties. Even in the best-informed workplace, the question continually arises: what constitutes compliance?

Throughout the consultations, employers have expressed their frustration at the refusal of WorkSafe inspectors to provide guidance or advice as to how they should go about complying with the Act. Chapter 25 recommends that inspectors should be authorised, and equipped, to give advice (though not to act as consultants). Not only is advice conducive to prompt compliance, but it establishes a relationship between WorkSafe and dutyholders which is founded on the common purpose of achieving compliance.

Chapter 26 calls for an upgrading of the Authority's role in educating and informing employers, employees and other dutyholders about their duties and rights. Particular attention needs to be paid to the needs of small business, in particular by the provision of localised expertise, information and support.

Chapter 27 recommends that the Authority publish "safety rulings" setting out its interpretations of the legislation as it applies in different fact situations. This will both increase public awareness and enhance consistency of enforcement.

Chapter 23 argues that the Government as a whole can promote compliance, by being an exemplar of OHS best practice. The public sector is a very large employer in Victoria and it should lead the way in OHS.

Critical to both awareness and compliance is the need to maximise the participation of employees and employers, through suitable mechanisms for consultation and representation. These issues are addressed in Part 5.

Consultation, participation and representation

There is universal agreement that employee participation is a necessary condition of the effective regulation of workplace safety. This means that everyone who works at a workplace – not just the "employees" of the "employer" – must be able to participate in and be consulted about health and safety matters at that workplace. Chapter 13 recommends introducing the concept of "worker" to ensure that both the benefits of the safety duties, and the right to participate, are enjoyed by every person who is at work at a workplace, whatever the basis of his/her engagement.

Chapter 20 recommends that the miscellaneous provisions which at present require employers to consult workers on particular matters be replaced – as in New South Wales – by a general duty of consultation. An employer should, for example, be required to consult whenever it –

- identifies hazards or assesses risks at the workplace;
- makes decisions about measures to eliminate or control risk.

The Act provides for representation of employees by elected health and safety representatives (HSRs), who represent members of "designated work groups". But the majority of Victorian workplaces do not have HSRs.

The lack of workplace representation is the major failure of the OHS legislation over the last 18 years. It calls for special measures. Two such measures are proposed: roving health and safety representatives, and a limited right of entry for OHS-qualified union officials.

Chapter 20 recommends that there be increased flexibility for employers and employees to work out arrangements for consultation and representation which suit the needs of the particular workplace(s). The concept of the designated workgroup should be abolished. It inhibits flexibility, and has the potential to reduce safety protection in particular circumstances.

As part of this flexible model, there should be an option to have roving or regional safety representatives, whose functions will not be tied to a specific workplace. Roving representatives are particularly relevant to remote workplaces, to multi-site employers and to industries (such as clothing and textiles) which have a multiplicity of very small workplaces.

Such arrangements could only be established by agreement. There are already several working examples in Victoria, which appear to be operating for the benefit of employer and employees alike.

Chapter 21 deals with right of entry. Unions already have rights of entry, under both Commonwealth and State law, to deal with specific workplace issues, as follows:

- at the Commonwealth level, under the *Workplace Relations Act*;
- in Victoria, under the 2003 outworkers legislation;
- in New South Wales, under the OHS and industrial relations legislation.

Against that setting, the Report recommends a limited right of entry, exercisable only by union officials who have been trained in OHS and who carry an entry permit issued by the Magistrates' Court. Except in an emergency, advance notice of entry will have to be given.

The trained official will only be able to enter if there is a suspected breach of the OHS legislation, and will have no enforcement power. Any enforcement issue will have to be referred to WorkSafe. Any misuse of the power would be a ground for revocation of the official's permit.

Experience in New South Wales has shown that the union right of entry for OHS purposes has been exercised conservatively, and effectively. Life-threatening situations have been averted where an accredited union official, with the requisite expertise, has been able to identify the risks.

There should be greater protection for HSRs against action by employers which discriminates against them because of their OHS work. Chapter 20 recommends that s.54 of the Act be amended accordingly. Conversely, an HSR who acts with the intention of damaging the employer's business should be liable to disqualification.

Encouraging compliance

Compliance has a positive and a negative dimension. The positive dimension involves encouraging, facilitating and rewarding compliance or – more importantly – best practice in OHS. The negative dimension involves inspecting for compliance, and enforcing non-compliance. Enforcement, in turn, subdivides into administrative and criminal enforcement.

The Report's recommendations directed at clarifying the law and making it more certain, and at making advice and guidance more readily available through the Authority, are intended to facilitate compliance. For similar reasons, it is recommended in Chapter 33 that compliance with a Code of Practice be deemed to constitute compliance with the law.

Best practice in OHS requires a proactive and vigilant approach to eliminating and minimising risk. Dutyholders must be engaged in a process of continuous improvement in health and safety. This cannot be achieved solely by the threat of punishment.

Chapter 24 examines the question of incentives for compliance, ranging from premium discounts to awards and public recognition. Employers, large and small, agree that there should be recognition of, and reward for, advances which they make towards the elimination of risks in the workplace.

The Report concludes that there are enormous potential OHS benefits from implementing a system of incentives and rewards. Incentives may be able to encourage or engender a compliance culture, or safety culture, which is vital to the success of the scheme.

Acceptable criteria will need to be developed for measuring performance, giving particular recognition to the adoption of a systematic approach to OHS (Chapter 14), as will the associated audit skills needed to carry out the task of measurement.

Enforcing compliance: administrative enforcement

In Victoria as in every other jurisdiction, administrative enforcement is, first and foremost, the responsibility of the inspectors, who visit workplaces every day and have to decide what does, and what does not, constitute compliance.

Inspectors must be both independent and accountable. They must be independent in the sense that they exercise their powers impartially, without bias or favouritism. At the same

time, they must be accountable to the Authority and to the public for the discharge of their functions.

The Report recommends that the Act be amended –

- to make clear that the inspectors are officers of the Authority, and exercise their powers on its behalf (Chapter 27);
- to set out the role, functions, qualifications and immunities of inspectors, and the purposes for which their powers are to be exercised (Chapter 28).

To enhance accountability, a transparent, accessible process should be established to enable speedy internal review of inspectors' decisions (Chapter 38). Following (and subject to) internal review, inspectors' decisions will be reviewable on the merits in the Victorian Civil and Administrative Tribunal. VCAT should be the exclusive forum for administrative review of decisions (Chapter 39).

Chapter 28 makes recommendations concerning the powers of inspectors. The Act should be amended -

- to confer a power to enter places other than workplaces, but only by warrant;
- to identify clearly which powers may be exercised generally and which are exercisable only on entry to premises;
- to clarify the power to require the production of documents and answer questions, and to confirm the availability of the privilege against self-incrimination and legal professional privilege;
- to confer a power to give directions to ensure safety;
- to confer a power to issue an "investigation notice", enabling preservation of the scene of an incident while investigations are undertaken.

Chapter 29 makes recommendations concerning improvement notices and prohibition notices respectively. The Act should deal specifically with the issue of risk control in the period between the issue of an improvement notice and the date specified for compliance. The Act should also be amended to empower inspectors to include in an improvement notice a direction that an activity shall cease if the required remedial action is not taken within a specified time. The power to issue a prohibition notice should be amended to allow inspectors to prohibit the carrying on of an activity in a particular way.

It is obviously undesirable for the already-difficult job of an inspector to be unduly complicated by technical requirements for the content of notices. The essential requirements should be simplified, and the Act should be amended to safeguard notices against challenge on the grounds of technical (as opposed to substantive) non-compliance.

The legislation at present provides for regulations to be made allowing for the issue of infringement notices. No such regulations have ever been made. The Report recommends

(Chapter 30) that a regime for the issue of infringement notices should be introduced without delay. These notices would only be available for use in relation to low-level offences – typically, those arising from non-compliance with specific, positive obligations under the regulations.

Chapter 31 recommends giving the Authority power to accept an enforceable undertaking from an alleged offender as an alternative to prosecution. This mechanism is provided for in the Tasmanian and Queensland OHS legislation, and has for some years been available to the ACCC and ASIC. An enforceable undertaking enables a tangible, forward-looking outcome to be achieved, such as the implementation of an appropriate health and safety management system.

Enforcing compliance – criminal enforcement

Breach of duty under the OHS legislation is a criminal offence, triable on indictment. But in important respects an OHS offence differs from a breach of the general criminal law.

First, the offence is committed whether or not harm is caused. It is the failure to provide a safe working environment which constitutes the breach. Secondly, proof of a breach of duty does not depend upon proof of a relevant state of knowledge or intent.

An employer will be in breach of s.21(1) of OHSA if it fails to provide and maintain so far as is practicable –

"a working environment that is safe and without risks to health."

It was submitted to the Review that a defendant employer should bear the onus of showing that it was not "reasonably practicable" for the employer to take the necessary safety precautions. This is the position in New South Wales and Queensland.

The Report rejects this proposal, recommending that the prosecution should continue to bear the onus of proving all of the elements of an offence under the OHS legislation (Chapter 33).

It was also submitted that WorkSafe should no longer have the exclusive right to bring prosecutions for OHS offences, and that the right to bring proceedings should be extended to unions, as is the case in New South Wales.

The Report rejects this proposal, recommending that WorkSafe should retain the exclusive right to prosecute for breaches of OHSA. The prosecution of persons for criminal offences is a matter of the utmost seriousness and is properly the exclusive function of the State (Chapter 34).

The Report concludes that there is no justification for conferring on any other party a statutory right to bring a prosecution. At the same time, the Report recommends that there be greater transparency and accountability in respect of decisions by WorkSafe not to prosecute.

It also follows from the nature of OHS offences that no question of industrial manslaughter can arise under the OHS legislation. An employer may be in breach of its safety duties under the OHS legislation irrespective of whether death or injury results. It is the breach of duty,

not the causing of a death, which gives rise to the offence. With manslaughter, on the other hand, it is the causing of a death which constitutes the offence, and that properly remains within the province of the general criminal law.

The penalties for OHS breaches in Victoria are still well below the levels recommended by the Industry Commission as long ago as 1995, and are considerably lower than those currently applicable in New South Wales and Queensland. There are also unjustified disparities between the maximum penalties under the OHS legislation and those which attach to breaches of comparable provisions in other Victorian regulatory legislation.

The community in general – and employers and unions in particular – regard a culpable failure to provide a safe working environment as a matter of the utmost seriousness. Accordingly, the Report recommends (Chapter 35) that the Act be amended to provide for a substantial increase in the maximum monetary penalties for breach. The Report does not, however, seek to set the maximum fine for any particular offence or group of offences. This should be determined by Government.

At present, custodial sentences can be imposed for non-compliance with a prohibition notice, for interference with an inspector, and for repeat offenders who breach their safety duties. The Report recommends that custodial sentences should also be available for first offenders, where the breach of duty involves high-level culpability.

The review has found that the threat of prosecution, and the size of the potential penalties, are significant factors in promoting compliance. But employers who attend to their OHS obligations have nothing to fear from the proposed increase in penalties. Rather, the higher penalties are directed at those who refuse to play their part in keeping Victoria's workers safe.

The Report recommends that there be a statutory time limit for the commencement of prosecutions. This is designed to limit the hardship and uncertainty created by lengthy investigations, especially in cases when a person has been seriously injured or killed.

Chapter 35 also recommends that alternative sentencing dispositions be made available: health and safety undertakings, adverse publicity orders and community service orders.

The Report (Chapter 36) recommends against the adoption of special sentencing guidelines for OHS offences, noting that the Court of Appeal will from July 2004 be able to give guideline judgments on sentencing. In order to enhance the consistency of decision-making in OHS prosecutions, the Report recommends that there be a panel of magistrates trained in OHS law and practice.

The Act should be amended to make clear that the Crown has no immunity from prosecution. Public sector employers should be treated no differently from private sector employers (Chapter 37).

INTRODUCTION

Chapter 1: A consultative inquiry

1. On 6 September 2003, I was commissioned by the Victorian Government to review and update the *Occupational Health and Safety Act* 1985 and associated legislation. The terms of reference of the review are set out in Appendix 1 to this report.

2. This is a timely review. It concerns matters of great significance to the community:

- safety in the workplace is vitally important. Most people spend the majority of their waking lives at work;
- the *Occupational Health and Safety Act* is now more than 18 years old. It has been amended several times but its effectiveness has never been reviewed;
- since the Act came in in 1985, there have been major changes in the nature of work. The model of long-term full-time employment with one or two employers has given way to widespread casualisation, part-time work and mobility. Entire workforces are now supplied by labour hire companies;
- in the years since 1985, OHS regulators have had to recognise major new work-related risks to health and safety. The whole methodology of OHS enforcement is having to change, so that traditional approaches to measurable physical hazards are augmented by more sophisticated methods to deal with psycho-social issues, such as stress and bullying.

A consultative approach

3. The Review process has been founded on consultation. All public inquiries in modern times are, of course, characterised by extensive consultation. Participatory democracy demands nothing less.

4. But in this case, the need for consultative input was particularly acute, for two reasons. First, I came to the terms of reference as an outsider, with no affiliation to any of the stakeholders. Secondly, the terms of reference were comprehensive and – quite properly – I had been given no instruction by the Government as to which particular matters I should consider.

5. What I needed to know was what should be on the agenda for review. As I said at almost every consultation meeting:

> *"You need to tell me what the issues are which I must be sure not to overlook."*

6. From mid-September until Christmas Eve, I was in conversation with the people who really know OHS, hearing their answers to that question. I spoke to workers and

employers, in both the private and public sectors, to unions and employer associations, to the management and staff of WorkSafe, to non-Government experts on health and safety, and to senior public officials.

7. I quickly found that face-to-face contact was the most fruitful form of consultation. It provided an invaluable opportunity for a dynamic exchange of views, for interaction between participants and for me to seek clarification or explanation of particular points. I made over 1,000 pages of handwritten notes in the course of those discussions, and they have proved to be a rich store of ideas and challenging questions.

8. On 17 October 2003, I published a Discussion Paper, one of the chief purposes of which was to identify as many as possible of the hundreds of issues raised to that point, so as to inform interested parties of the range of matters already on the agenda. In response to the Discussion Paper, I have received a total of 199 written submissions.

9. Each submission has been carefully reviewed, and the views expressed carefully considered. The fact that the Report itself contains rather few direct references to the submissions is a reflection only of the exigencies of time and of the sheer breadth and complexity of the issues, as illustrated by the length of this Report.

Passionate engagement

10. In the Discussion Paper, I commented that the response up to that point had been, without exception, vigorous and enthusiastic. The Victorian community, I said, was embracing the opportunity which the inquiry offered. I made particular reference to the frankness of the discussions which had taken place, and to the benefits which such candour brought to the review.

11. The same features have characterised the subsequent months of the Review. The approach of all parties who have participated in this Review is best described as one of passionate engagement. As a newcomer to the field, I have been struck, time and again, by the strength and depth of the concerns expressed about occupational health and safety, and by the sense of urgency about getting it right for the sake of all concerned. This passion is shared by unions and employers alike.

12. If this Report helps to improve health and safety in Victorian workplaces, the credit will largely belong to those who have taken the time to engage with the Review. I have sought, as far as possible, to shape my recommendations in a way which addresses the concerns and fulfils the expectations expressed to me in the consultations.

The Reference Group

13. One of the keys to the success of the Review process has been the Reference Group initiated by the Minister in September 2003. The purpose of establishing the group was, as the name suggests, to give me a point of reference, a sounding-board, for discussion of major issues of principle. The leaders of the major employer organisations, senior union officials and senior government representatives would be in a position to comment and question and challenge – in short, to make sure that I did not go off the rails or down too many blind alleys.

14. The concept worked brilliantly. Particularly since the issue of the Discussion Paper, it has been invaluable to be able to discuss issues and options with the members of the Group. We have often had to meet at 7.30 am, and the attendance has been consistently high. I am very appreciative both of the quality of the contributions made and of the commitment shown to this process.

15. The Reference Group was chaired by Mr James MacKenzie, the Chair of the Authority. Its members were:

- Mr Neil Coulson – Chief Executive Officer, Victorian Employers' Chamber of Commerce and Industry;
- Ms Michele O'Neil – President of the Victorian Trades Hall Council;
- Mr Martin Kingham – State Secretary, Construction, Forestry, Mining and Energy Union;
- Mr Timothy Piper – Chief Executive Officer, Australian Industry Group – Victoria;
- Mr Bill Shorten – National Secretary, Australian Workers Union;
- Ms Helen Silver – Deputy Secretary, Department of Treasury and Finance (Economic and Financial Policy);
- Ms Cathy Butcher – OHS Policy Co-ordinator, Victorian Trades Hall Council;
- Ms Tracey Browne – OHS Policy Co-ordinator, Australian Industry Group;
- Mr David Gregory – Workplace Relations Manager, Victorian Employers' Chamber of Commerce and Industry;
- Dr Yossi Berger – OHS Co-ordinator, Australian Workers Union;
- Mr Pat Preston – OHS Manager, Construction, Forestry, Mining and Energy Union; and
- Mr Brad Crofts – Assistant Director of Insurance and Superannuation Policy, Department of Treasury and Finance.

16. The key to the Group's effectiveness was, once again, the character of the engagement: passionate and constructive. It was also critically important that the membership combined seniority with OHS expertise. That is an ideal combination, and I have recommended in Chapter 7 that it be a model for the proposed new OHS advisory committee.

Not a performance review of WorkSafe

17. The terms of reference are concerned with whether and to what extent the legislative scheme needs to be modified. That question cannot be answered without a full appreciation of how the scheme has been administered, interpreted and applied by those on whom responsibilities are imposed. Inevitably, I have received a great many submissions directed at these operational issues, often associated with a suggestion that a particular provision requires amendment of some kind or another.

18. Obviously, it has not been my function to do a performance review of WorkSafe or of the inspectorate. Even if the terms of reference had permitted this, there would simply not have been the time available. But I have nevertheless examined the assessments put forward of the regulator's performance, to be able to assess whether the scheme can be improved and, if so, whether this needs to be done by legislative amendment.

Full co-operation from the Authority

19. It is, I imagine, rather uncomfortable to have an outsider lurking in your building, asking difficult questions and rummaging through your documents. That is what the management and staff of WorkSafe have had to put up with during the period of my Review.

20. It is very important to say that I have, from the first moment, received the fullest co-operation from John Merritt, the Executive Director of WorkSafe, and from management and staff. No question has been left unanswered, no information requested left unsupplied. Responses have been candid, and characterised by a readiness to acknowledge shortcomings where they exist.

21. Like other stakeholders, WorkSafe – meaning the Board, the Executive Director and all staff - is passionately committed to improving occupational health and safety. I hope that this Review, and the recommendations in this report, will help strengthen the Authority's capacity and confidence to carry on its vital work.

An integrated Report

22. Occupational health and safety is a subject with many facets, all interconnected in one way or another. The same is true of this Report. The Report has been structured in Parts, so as to identify separately the major clusters of issues and, in the individual Chapters, specific topics for consideration. But, as the text makes clear, every part of

the report relates to every other part. Everything relates ultimately to the subject-matter of what I have called the safety consensus, that is, the protection of persons at work against risks to their health or safety.

23. The recommendations should, therefore, be read and considered as an integrated whole. No part of the Report is more important than any other. Some parts of the discussion are at a high level of generality while others descend to matters of technical detail.

24. It is the combination of the general and the detailed which will make the legislative scheme work better. "Getting it right" means understanding and making clear the principles which drive OHS legislation and enforcement, and at the same time attending to the details of enforcement mechanisms and procedures, so that the scheme operates effectively, accountably, transparently and fairly.

Chapter 2: The safety consensus

25. One thing has been unmistakably clear throughout the review process. It is that there is a consensus across all interested groups and "stakeholders" that the fundamental assumptions on which the legislative scheme is based are sound.

26. The paramount importance of health and safety in the workplace is acknowledged on all sides. There is, as I have indicated, a great deal of debate about the machinery of the scheme – the processes of enforcement and consultation in particular – but no-one has suggested that the objectives of the scheme are unsound.

27. The following are typical comments from the consultations:

> *"We'd love to have an industry free of injuries"* (employer association).
>
> *"A safe workplace is the first industrial relations issue you'd like to get right"* (employer).

28. That there is such a strong safety consensus is unsurprising. It is a reflection of the broader community view that "one workplace death is one too many". There is universal condemnation of the notion that exposure to the risk of injury or death in the workplace is simply "the price you pay for having a job".

29. These are, moreover, matters of longstanding international consensus. The Universal Declaration of Human Rights 1948 states that –

> *"everyone has the right to just and favourable conditions of work".*

The International Covenant on Economic, Cultural and Social Rights (ICECSR)[1] interprets this right as encompassing "safe and healthy working conditions".[2] Under Article 12 of ICECSR, moreover, States Parties recognise –

> *"the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".*

To this end, States Parties are obliged to take steps necessary for –

> *"the improvement of all aspects of environmental and industrial hygiene"*[3].

The objects of the Act

30. Section 6 of the Act defines what its objects are. This provision has stood unchanged – and unchallenged - since the Act was introduced in 1985. The objects are:

(a) to secure the health, safety and welfare of persons at work;

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1 ICECSR entered into force for Australia on 10 March 1976.

2 ICECSR Article 7.

3 ICESCR Article 12(2)(b).

(b) to protect persons at work against risks to health or safety;

(c) to assist in securing safe and healthy work environments;

(d) to eliminate, at the source, risks to the health, safety and welfare of persons at work; and

(e) to provide for the involvement of employees and employers and associations representing employees and employers in the formulation and implementation of health and safety standards.

31. Obviously, there is a large degree of overlap between the first four objects. They are, on one view, different ways of saying the same thing. But that would hardly be a reason for amending them. The fact that the paramount objective is repeated in four different ways only serves to emphasise its importance.

32. The fifth object is of a different kind. It directs attention to one of the fundamental issues which arises under the terms of reference, namely, how best to involve employees and employers, and their respective representative organisations, in both formulating and implementing health and safety standards.

33. The one obvious gap in s.6 concerns the protection of the public at large against risks created by the activities conducted at a workplace. Section 22 of the Act expresses a clear policy that persons other than workers should not be exposed to risks to their health or safety arising from the conduct of the undertaking. I recommend that s.6 be amended to include as an additional object the protection of the public against risks created by workplace activities.

The Act is sound

34. Associated with the general consensus about the paramountcy of workplace health and safety is a consensus that the basic structure of OHSA is sound. In none of the many discussions in which I have participated has anyone argued for wholesale change or radical surgery.

35. Many requests and suggestions have been made in the consultations and in the written submissions for amendments to different parts of OHSA. But these proposals - many of which I have adopted in this Report - are directed at modifying the legislation so as to make the existing scheme work better, rather than at any major restructuring.

36. Of the changes I am recommending, those in Chapter 20 may appear quite significant. I there recommend that there be a statutory duty on employers to consult and, at the same time, that there be much greater flexibility in arrangements for representation and consultation.

37. On examination, however, it will be seen that these are not radical changes. On the contrary, the inclusion of a statutory obligation to consult is no more than a declaration of what is implicit in the Act already, and a consolidation of the individual consultation obligations which have hitherto been scattered through the Act.

38. The move to allow greater flexibility in representative structures, including by the abolition of the "designated workgroup" concept, is a matter of machinery, rather than of principle. It does not change – indeed my recommendations are intended to reinforce - the central importance of consultation and participation, concepts which are already embedded in the Act in Part IV.

A statement of principles in the Act?

39. One of the examples of comparable regulatory legislation which I have examined for the purposes of this Review is the *Environment Protection Act* 1970 (Vic). The Environment Protection Authority is, of course, the statutory regulator responsible for environmental protection in Victoria. I have had the benefit of discussions with senior officers of the Authority on issues of common concern to EPA and WorkSafe.

40. In 2001, the *Environment Protection Act* was amended to insert 12 new sections. Section 1A now states that –

> *"the purpose of this Act is to create a legislative framework for the protection of the environment in Victoria having regard to the principles of environment protection".*

41. Sections 1B to 1L then set out 11 principles of environment protection, including –

- the precautionary principle;
- the principle of intergenerational equity;
- the principle of conservation of biological diversity and ecological integrity;
- the principle of shared responsibility;
- the principle of enforcement; and
- the principle of accountability.

42. The principle of accountability is of particular interest. Section 1L states that –

> *"The aspirations of the people of Victoria for environmental quality should drive environmental improvement."*

43. That language could readily be adapted to establish a principle of accountability for OHSA, as follows –

> *"The aspirations of the people of Victoria for workplace health and safety should drive improvements in the protection of persons at work against risks to health or*

> *safety, and in the securing of safe and healthy work environments."*

44. In my view, OHSA should be amended by the inclusion, at the beginning of the Act, of a comparable series of "principles of workplace safety'. Apart from the principle of accountability, several other of the environment protection principles could be reformulated appropriately for OHSA – for example, the precautionary principle, the principle of enforcement and the principle of shared responsibility.

45. Other principles with a more specific OHS focus which should be enshrined include:

- the principle of paramountcy, that is, the principle that if an activity cannot be carried on safely, it should not be carried on at all;
- the principle of consultation, representation and participation;
- the principle of elimination of risk at source; and
- the principle of systematic management of risk in the workplace. (This concept is considered at length in Chapter 14).

46. The environment protection principles were introduced after an independent review which recommended that principles or objectives be included in the EP Act to provide some guidance about its general purpose. As the responsible Minister said when introducing the amending Bill –

> *"The Environment Protection Act was written in 1970. In keeping with the legislative drafting style of the time, no principles or objectives were put into the original act. Nowadays, most pieces of modern legislation include principles or objectives as a way of articulating what an act is seeking to achieve. While principles are, by their nature, expressed in general terms, they can assist people to understand an act and provide some real guidance to decision makers as to how it should be administered."*

47. Those comments, and sentiments, apply with equal force to OHSA. I recommend that a statement of principles be included.

PART 1: NEW CHALLENGES FOR OHS

Chapter 3: The changing labour market

The "new" economy

48. Australian society has undergone major economic, political and social change since 1985. Many of these changes have implications for workplace health, safety and welfare.

49. The catch-cry of the new economy is "flexibility" – based on capital mobility, decentralised operations, flexible work forces and responsive production processes and technologies. The dismantling of tariffs and the deregulation of financial markets have integrated the domestic economy into global markets.

50. These structural changes have significantly affected the local industrial mix. Manufacturing and primary production sectors have declined, while knowledge-intensive, service-based industries have proliferated. At the same time, new communication technologies have given rise to novel forms of business and work practices.

51. Australia's industrial relations landscape has also undergone a profound transformation, as a result of the decentralisation of bargaining arrangements in the 1990s. Some have argued that productivity gains arising from enterprise level negotiation may simultaneously deliver improved OHS outcomes. Others believe that the changes in industrial relations legislation have left workers exposed to occupational risks, such as those associated with work intensification and extended hours.[4]

52. The level of union membership among Australian employees declined from 42% in August 1988[5] to 23.1% in August 2002.[6] In 2002, union membership was higher among:

- public sector employees (47%) than private sector employees (18%);
- full time employees (26%) than part-time employees (17%); and

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4 Quinlan, M., "Flexible Work and Organisational Arrangements – Regulatory Problems and Responses", Paper presented at the conference *Australian OHS Regulation for the 21st Century,* National Research Centre for Occupational Health and Safety Regulation & National Occupational Health and Safety Commission, July 20 – 22, 2003, http://www.ohs.anu.edu.au/publications/index.html; Heiler, K., *Is Enterprise Bargaining Good for Your Health?,* Australian Centre for Research, Training and Information Services on the World of Work, Monograph, No. 14, University of Sydney, 1996.

5 ABS, "Earnings increase, more workers in casual jobs and decline in trade union memberships continues", media release, (cat. no. 6310.0), 16 January 1998.

6 ABS, "Employee Earnings, Benefits and Trade Union Membership" (cat. no. 6310.0), ABS, August, 2002.

- employees with leave entitlements (28.5%) than those without leave entitlements (8.7%)[7].

53. Victorian statistics are consistent with these national trends and it is therefore clear that union visibility in Victorian workplaces has declined.

54. Patterns of employment have undergone fundamental change, in both the public and private sectors. Employers have sought to reduce output costs per unit, by aiming for improved productivity. This drive for greater productivity has led to "vertical disintegration" of large organisations into smaller units, each functionally resembling a small enterprise. "Downsizing" and "lean production" have been recurrent themes.

55. The employment share of small to medium-sized enterprises (SMEs) has grown, as have the number of self-employed people running "micro-businesses".[8]

56. There has been a rapid increase in flexible and insecure forms of employment. This has occurred in almost all OECD countries, but particularly in Australia. These work arrangements are referred to generically as "precarious", "contingent" or "flexible" employment.

57. Although the definitional boundaries of these terms are the subject of debate, most agree that the term "precarious employment" is properly applied to-

- self-employed subcontractors (who may be mobile or home-based workers);
- temporary and on-call workers; and
- labour hire (also referred to as "on-hire") or fixed-term contract workers.

58. There is less consensus about the inclusion of micro-small-business workers and permanent part-time workers.[9] In some circumstances, part-time jobs may offer real advantages to workers, assisting them to balance work and family commitments or to maintain an attachment to the labour force while children are small. However, there is a dearth of *quality* part-time work for workers with parenting responsibilities.[10]

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7 ABS, "Employee Earnings, Benefits and Trade Union Membership" (cat. no. 6310.0), ABS, August, 2002.

8 The ABS includes the following in its "small business" category: (i) non-employing businesses (sole proprietorships & partnerships w/o employees); (ii) micro-businesses (employing fewer than 5 people); and (iii) other small businesses (employing more than 5 but fewer than 20 people). "Medium-sized businesses are those employing 20 or more people, but fewer than 200 people.

9 Quinlan, M., "Flexible Work and Organisational Arrangements – Regulatory Problems and Responses", paper presented and the conference *Australian OHS Regulations for the 21st Century,* National Research Centre for Occupational Health and Safety Regulations and the National Occupational Health and Safety Commission, Gold Coast, July 20 – 22, 2003, p.2-3.

10 Watson, I., Campbell, I., & Briggs, C., *Fragmented Futures: New Challenges in Working Life,* ACIRRT, Federation Press, NSW, 2003, p.49.

59. It has been estimated that 85% of net employment growth is in "precarious employment" categories.[11] Most of the job losses in the period from 1985 to 2001 were associated with industries which had traditionally provided full-time, permanent employment.[12] By 2002 employees with paid leave entitlements made up only 58% of the Australian workforce.[13]

60. In the late 1980s, a new labour hire industry emerged. The advantages of labour hire were seen to lie not only in enabling employers to cover permanent staff absences and peak demands, or to buy in specialist skills, but in providing access to a more compliant (because less secure) labour force and in reducing the on-costs associated with engagement of permanent employees.[14]

61. Between 1990 and 1995 the proportion of Australian workplaces using labour hire increased from 14% to 21% overall. In large workplaces (with more than 500 workers), the proportion soared from 16% to 55%.[15]

62. These changes have given rise to the phenomenon of "job churning", as workers "cycle through phases of insecure, short-term employment, underemployment and unemployment".[16] There has been a "hollowing out" of middle-income jobs, and a concomitant polarisation between highly-paid professionals and those engaged in low-status, precarious employment.[17]

Changing demographics

Increased female participation

63. Between 1980 and 2001 female participation in the workforce rose from 47% to 60%. The number of households with children relying upon the income generated by a single (usually male) breadwinner declined from 51% in 1981 to 31% in 2000.[18]

64. The number of Australian women aged 25 to 54 participating in the paid workforce has increased from 47% in 1980 to 62% in 2001.[19]

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11 Quinlan, M. & Mayhew, C., "Evidence versus ideology: Lifting the blindfold on OHS in precarious employment", School of Industrial Relations and Organisational Behaviour, University of New South Wales, Working Paper Series 138, May 2001, pp 3 – 4.

12 Watson, I., Buchanan, J., Campbell, I. & Briggs, C., *Fragmented Futures: New Challenges in Working Life,* ACIRRT, Federation Press, Sydney, 2003, pp.46 – 54.

13 Australian Bureau of Statistics, *Forms of Employment Survey,* Cat No. 6359.0, September 2002. Note however that this survey only sought information about respondents' main job in paid employment.

14 Hall, R., "Labour Hire in Australia: Motivation, Dynamics and Prospects", Working Paper 76, ACIRRT, University of Sydney, April 2002, pp.8 – 9.

15 Watson *et al*, 2003.

16 Watson *et al,* 2003.

17 Watson *et al*, 2003.

18 Watson *et al*, 2003: p.18.

19 Watson *et al,* 2003, p.136.

65. A recent Victorian Government research report examining work/family balance issues found that although more women than ever are participating in the labour market, they continue to take primary responsibility in caring for dependent children and other family members.

66. Women tend to reconcile conflicts between work and family demands through part-time or intermittent participation in paid work.[20] Although women have been entering the workforce at twice the rate of men since the late 1980s, most have entered low-skill and/or precarious jobs, predominantly in sales and personal services.[21] Two thirds (63%) of women work in a part-time capacity and one-fifth of all women with dependent children work on a casual basis.

An ageing workforce

67. As in most Western nations, the Australian workforce is ageing. It is estimated that people aged 45 and over may account for more than 80% of growth in Australia's labour force in the years 1999 to 2016.[22]

68. Automatic retirement at age 65 can no longer be taken for granted. Some workers retire earlier, while others remain in the workforce in a part-time capacity. In 1979 the average age of teachers in Victorian schools was 29 years; in 2003 it was 48.5 years.

69. The OHS implications of an ageing workforce are still unclear. Some experts caution against generalising about the abilities of older workers and are critical of the "deficit model", which assumes the gradual loss of all occupation-relevant skills as people grow older – particularly the decline of individual sensory functions and physical powers.

70. They advocate early interventions to ensure prevention of gradual onset injuries (such as musculoskeletal disorders) and long latency diseases. Nevertheless, it is recognised that older workers need specific support to adjust to changing organisational practices and new technologies, and are more prone to fatigue associated with shiftwork.[23]

New technologies

71. Since 1985 there has been an exponential expansion in information and communication technologies, as well as the computerisation of a vast range of plant used in workplaces. New technology of this kind has significantly reduced some OHS risks in the construction, mining, manufacturing and transport industries. For

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20 The State of Working Victoria Project, *The Challenge of Balancing Work and Family Responsibilities,* Research Report No. 1, Victorian Government, Melbourne, Sept. 2003, p. 20.

21 Watson *et al*, 2003, p.59.

22 ABS, "Labour force ageing, growth likely to slow", Media release, 1 September 1999, (cat. no. 3222.0).

23 European Agency for Safety and Health at Work, 2002(a), "The Changing World of Work: Trends and implications for occupational safety and health in the European Union", *Forum,* no. 5, p.6, www.osha.eu.int/publications/forum/5/en.

example, many risks associated with the operation of plant have been “engineered out” via automation. Furthermore, it is now possible to maintain permanent contact with isolated workers at remote sites, ensuring that their work can be monitored and supervised. But these new technologies also introduce new, or exacerbate existing, risks, particularly health risks associated with a sedentary lifestyle and musculoskeletal disorders associated with the extensive use of display screen equipment.

Chapter 4: New and emerging risks

Precarious employment

72. Evidence suggests that the trend toward precarious employment (see Chapter 3) has resulted in a worsening of OHS outcomes. Of 159 studies included in a recent review of the academic literature, 88.6% found a clear adverse association between precarious employment and work-related injury and disease.[24]

73. The risks associated with precarious employment are predominantly psychosocial or, in more generally accepted parlance, are related to the work environment (see below).

74. Equally, workers in precarious employment have greater exposure to physical hazards such as hazardous manual handling (particularly painful work positions and repetitive, monotonous tasks), hazardous substances, and excessive noise.[25] Furthermore, where workers hold multiple jobs or undertake serial contracts, it is difficult to assess the cumulative exposure to risks.

75. The OHS risks associated with precarious employment have particular relevance to women, who are over-represented in this category of employment. Plant and tools are typically designed to suit the biomechanics of the average male. As a result, women using this equipment may be exposed to a greater risk of developing a work-related musculoskeletal disease.

76. Research indicates that moves to replace permanent employees with contract labour and to introduce "multi-skilling" under enterprise bargaining agreements have led to a serious erosion of expertise. This is particularly so in highly-skilled areas, such as manufacturing maintenance. The loss of expertise is likely to mean an increased risk of plant-related injuries.[26]

77. Smaller businesses tend to have a poor knowledge of regulatory requirements and safe work practices, as well as limited resources to invest in preventive measures.[27] Whilst this is not a new issue, the increase in the number and employment share of SMEs is significant.

78. Intense competition for contract-based work tends to result in "lowest common denominator" OHS outcomes, the "normalisation" of injury ("well, a bloke might

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24 Quinlan, M., Mayhew, C. & Bohle, P., "The Global Expansion of Precarious Employment, Work Disorganisation, and Consequences for Occupational Health: A Review of Recent Research", *International Journal of Health Services,* vol. 31, no. 2, 2001, pp 335 – 414; Quinlan, M., "Flexible Work and Organisational Arrangements – Regulatory Problems and Responses", paper presented and the conference *Australian OHS Regulations for the 21st Century,* National Research Centre for Occupational Health and Safety Regulations and the National Occupational Health and Safety Commission, Gold Coast, July 20 – 22, 2003, pp.3 – 5.

25 European Agency for Safety and Health at Work, *Research on the Changing World of Work*, Luxembourg, Office for Official Publications of the European Communities, 2002(b), pp.6 – 7.

26 Hall, R., 2002, p.7; Buchanan (2000) and Cully (2002) cited in Watson *et al,* 2003, p.57.

27 Frick, K., & Walters, D., "Worker representation on health and safety in small enterprises: Lessons from a Swedish approach", in *International Labour Review,* vol. 137, no. 3, 1998, p.1.

occasionally lose a finger, but that is just part of it") and high levels of under-reporting of occupational injuries.[28]

79. Studies in Australia, Europe and North America have identified a clear link between high levels of subcontracting and elevated levels of injury and ill-health. For example, Francois and Lievin found that temporary agency (labour hire) and fixed-term contract workers in 85 French enterprises experienced both a higher incidence and a greater severity of injury than employees in permanent employment.

80. One of the most striking findings of this study was that temporary and contract workers were far more likely to be injured within their first month at work than permanent employees (48% of the former, compared to none of the latter) and much more likely to be under the age of 25 (53% compared to 13% of permanent employees). In Belgium, Storrie found that labour hire workers engaged in manual labour were twice as likely to sustain work-related injuries and that overall, injuries were twice as severe among labour hire workers compared to permanent workers.[29]

81. Notwithstanding the limitations of using WorkCover claims data to evaluate actual levels of occupational injury and ill-health, an analysis of Victorian claims data by Underhill indicates that in 2000 – 2001, labour hire workers accounted for 0.53 claims per $one million remuneration, compared to 0.46 claims for direct hire employees. Her research also pointed towards a shift in the occupational distribution of labour hire employees to higher risk occupations, such as store persons, forklift drivers and construction labourers.

82. Consistent with the study by Francois and Lievin, Underhill found that 18% of labour hire claimants were less than 25 years of age, compared to only 10% of direct hire claimants. Labour hire claimants appeared much less likely to make minor claims involving fewer than ten days lost (33% of labour hire employee claims compared to 50% of permanent employee claims) but were over-represented in longer-term claims. Labour hire workers appear to sustain more serious injuries or are less willing to lodge minor claims.[30]

83. It is said that labour hire workers are unlikely to speak out against breaches of OHS law because of their –

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28 A study of small-scale & self-employed Queensland builders revealed high levels of under-reporting of occupational injuries. "In all, 45% of [...those recently injured...] did not report their injury to anyone; 38% discussed it with their spouse; 23% with a fellow worker; 5% notified a manager; 2% a private insurer; 0.9% the Workers Compensation Board of Queensland; and 1% told some "other" person or organisation" (Mayhew, C. & Gibson, G., "Self-employed builders: factors which influence the probability of work-related injury and illness", *Journal of Occupational Health & Safety in Australia & New Zealand*, 1996, vol.12, no.1, p.64).

29 Francois & Lievin (1995) and Storrie (2002) cited in Underhill, E., "Changing Work and OHS: The Challenge of Labour Hire Employment", 2002, www.actu.asn.au/public/ohs/reactivatecampaign/1064475108_26370.html.

30 Underhill, E., 2002.

> *"general vulnerability and dependency on their labour hire employer for future assignments. These realities greatly affect the enforceability of any conditions and protections even where these have been won".*[31]

84. Workers under labour hire contracts have limited access to training and few opportunities for skills development. The decline in employer investment in training is evident in the statistics: in Australia between 1989 and 2001, "median hours of training per year decreased from 32 to 22 hours for male employees and from 21 to 16 hours for female employees".[32]

85. Precarious work arrangements can create enclaves of workers who are effectively excluded from OHS systems within workplaces. These workers are more likely to find themselves in socially-isolated and poorly-planned work settings, and to be subjected to more authoritarian, less consultative forms of management.

86. Labour hire employees may be ostracised by permanent staff, as demonstrated by the following remarks of a Victorian labour-hire worker in the manufacturing industry:

> *"People that work in the factories, full-timers, resent you because you're taking away their overtime [...so...] they don't want to train you, they don't want to have anything to do with you. It's like you go stand in the corner, leave us alone."*[33]

87. In sum, relative to permanent employees, a "typical" precariously employed worker is likely to be young, female, less skilled, engaged in higher risk jobs, and socially isolated and unrepresented.

Psychosocial hazards

88. One of the key features of the new economy is the increasing prevalence, and recognition, of "psychosocial" or "work environment" hazards, defined as –

> *"those aspects of work design and the organisation and management of work, and their social and environmental contexts, which have the potential for causing psychological, social or physical harm".*[34]

89. Psychosocial hazards include stress, fatigue, bullying and occupational violence.

90. Many psychosocial hazards are of an insidious and/or cumulative nature. The Authority's *Guidance Note on the Prevention of Bullying and Violence at Work*

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31 Hall, R., "Labour Hire in Australia: Motivation, Dynamics and Prospects", ACIRRT Working Paper, University of Sydney, NSW, April 2002, p.6.

32 Watson *et al*, 2003.

33 Watson *et al*, 2003, p.75.

34 European Agency for Safety and Health at Work, *Research on Work-related Stress*, Office for Official Publications of the European Communities, Luxembourg, 2000.

defines bullying as "*repeated* unreasonable behaviour directed toward an employee, or group of employees, that creates a risk".[35]

91. To complicate the issue, psychosocial factors (such as stress or fatigue) may interact with – and compound the impact of – biomechanical risk factors (such as the exertion of high force or repetitive movements). Risk factors for stress and MSDs overlap significantly.

92. Moreover, the symptoms of stress and some MSDs may be similar[36]. In blue collar industries, a diagnosis of an "MSD" may be preferred; in white collar industries, a diagnosis of "stress" may be more acceptable.[37]

93. Some commentators draw a distinction between "good" stress (stimulating and challenging work that carries little or no risk) and "bad" stress (excessive demands that cause harm). But attempts to draw the dividing line inevitably become bound up in debates about individual resilience. Similarly, discussions about fatigue often seek to separate "normal fatigue" (ordinary tiredness resulting from a good day's work) from "excessive fatigue" (impaired physical & cognitive performance that poses risk to self and others).

94. There is often overlap between work-related stress and "rest-of-life" stresses, such as family breakdown or drug addiction. Similarly, fatigue may be work-related (e.g. extended shifts and poor rostering) or non-work-related (e.g. sleep disorders, family commitments or excessive socializing). Not surprisingly, employers baulk at being held responsible for management of individual and broad social problems.

95. Given this complexity, it is unsurprising that workplace parties often have difficulty in recognising psychosocial hazards and risks, and in determining how to control these risks.

96. The current capacity of WorkSafe inspectors to identify breaches associated with psychosocial hazards is limited. Brief visits by inspectors with generalist training cannot be expected to result in the proper identification of these multifactorial, cumulative and subtle hazards.

97. The issue of varying individual susceptibility to psychosocial risks is a vexed one. However, there is a gathering consensus that the most effective means of addressing psychosocial risks is to focus upon the creation of safe systems of work rather than upon vulnerable individuals.

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35 Victorian WorkCover Authority, *Guidance on the Prevention of Bullying and Violence at Work*, Victorian WorkCover Authority, Feb. 2003. However, in its submission to the Review, the Equal Opportunity Commission of Victoria highlighted the discrepancy between this definition and provisions under the *Equal Opportunity Act*, which can be contravened via a single instance of bullying behaviour.

36 Caple, D. & Associates, "VWA Sprains and Strains Strategy – Investigation of Broader Prevention Strategy Project: Final Report, David Caple & Associates, East Ivanhoe, August 2002, p.20.

37 Caple, D. & Associates, 2002, p.26.

Fatigue

Extended working hours

98. Research indicates that extended hours are being worked at all levels and in all areas of industry. Half of all employees (50.7%) work overtime. 31% of those working additional hours are not paid for this work.

99. Unpaid overtime is more likely to be performed by managers and administrators (67%), professionals (59.9%) and para-professionals (45.5%).[38] New technologies facilitate the intrusion of work into home and leisure time, to the extent that some workers are perpetually "on call".[39]

100. Only 7% of employees now work all of their weekday hours between 9am and 5pm.[40]

101. Employment contracts now focus upon the performance of tasks rather than provision of time service (standard hours worked).[41] A survey of subject areas in registered enterprise agreements (1993 – 2002) found that the majority of these agreements reflected management demands for increased flexibility in working time arrangements.[42]

102. Between 1982 and 2002, the proportion of Australians actually working a "standard" 35 – 40 hour week fell from 50% to 33%. The proportion of the workforce working in excess of 45 hours per week has increased by 76% since 1981, and 31% of all full-time employed Australians work more than 48 hours per week.[43]

103. Gender and work status significantly shape working hours. Those working more that 45 hours per week are more likely to be males (77.5%) in the top 40% of earnings distribution, who have dependants.[44]

104. A recent study of shift-work in the Tasmanian mining industry examined the impact of extended hours on the health and safety of employees and on family life. The study confirmed that extended shifts and poorly-designed rosters result in fatigue, sleep disturbance and impaired physical and cognitive performance.

105. Some rosters – particularly 12-hour shifts on an uneven 56 hour roster – did not provide sufficient recovery time to work off "sleep debt". As a consequence, workers were exposed to serious risks at work, including fatigue-related errors when operating

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38 ABS (6361.0, 2000) in Watson *et al,* 2003, p.91.

39 Worldwide, G., in Watson *et al*, 2003, p.95.

40 Watson *et al* , 2003, p.86.

41 McCallum, R., "Legal Aspects of the Changing Social Contract at Work", in R. Callus & R. Lansbury (eds), *Working Futures: The Changing Nature of Work and Employment Relations in Australia*, ACIRRT, The Federation Press, Sydney, 2002, p.89.

42 Watson, I. *et al*, 2003, p.86 – 87.

43 ACTU Reasonable Hours Test Case Affiliates Information Kit, www.actu.asn.au/public/papers/affiliateskit/index-unreason.html.

44 McCallum, R., 2002, p.89.

plant (52.5% of mine workers on night shift reported "always" or "frequently" nodding off while at work).[45] Furthermore, sleep deprivation and prolonged exposure to hazards (such as hazardous substances, silica and other respirable dusts, noise and vibration)[46] were associated with latent, longer-term risks to health.[47]

106. This study also revealed how extended hours and work-related fatigue spilled over into non-work time, undermining the quality of, and time devoted to, family and other social relationships. The possible consequences of this, in terms of stress, chronic family dysfunction, social isolation and reduced community cohesion, are obvious.[48] This finding is consistent with surveys of Australian workers across the economy, which show –

> *"47% [of those with dependants] working more than 45 hours per week say that work leaves them with little time and energy to be the kind of parent they would like to be (compared with 36% for those working less than 45 hours)".*[49]

107. Excessive hours of work are a well-recognised problem in the road transport industry. A recent survey of long haul truck drivers found that:

- most drivers undertook some midnight to dawn driving (which entails a far higher risk of crashing);
- over 20% had exceeded the 72-hour limit on working hours in the previous week; and
- approximately one quarter of respondents admitted to breaking NSW driving hours regulations on every trip.[50]

108. Other research has identified -

> *"a clear and significant link between scheduling practices, unpaid waiting time, insecure rewards and access to work, and hazardous practices such as speeding, excessive hours and drug use by workers".*[51]

109. The problem has evidently been exacerbated over the last decade by the introduction of payment-by-results systems. Drivers are operating in an environment in which

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45 Heiler, K., *The Struggle for Time: A review of extended shifts in the Tasmanian mining industry – Overview report,* Report prepared for the Tasmanian Government, ACIRRT, August 2002, p.10.

46 Extended hours are not reflected in existing standards – for example, threshold limit value (TLV) calculations that underpin exposure standards assume standard eight-hour shifts over a forty-hour week.

47 Heiler, K., 2002, p.12.

48 Heiler, K., 2002, p.14.

49 Watson *et al*, 2003, p.89.

50 Quinlan, M., 2001, *Report of Inquiry ito Safety in the Long Haul Trucking Industry,* commissioned and published by the Motor Accidents Authority of NSW, Sydney, p.5. Retrieved from MAA website, September 2003: http://www.maa.nsw.gov.au/pdfs/quinlan_full_report.pdf.

51 Quinlan, 2001, p.5.

breaches of safety and other standards actually facilitate economic advantage.[52] A US specialist on the trucking industry has described Australian long-haul trucks as "sweatshops on wheels".[53]

Work intensification

110. As well as working longer hours, many people are working harder within each hour at work.[54] This phenomenon is known as "work intensification", which manifests itself in downsizing, just-in-time labour and production techniques, "hot-desking" and "management by stress" methods.[55]

111. The key elements of work intensification were identified in a recent study of nursing staff in the New South Wales hospital system. The study found that nurses were being subjected to very intense physical and mental demands as a result of changes in hospital management systems. As a result, many of them had left the profession altogether.

112. These demands were associated with:

- fewer staff;
- increased workloads;
- an escalation in the skills and responsibilities associated with new technologies and procedures;[56]
- a decline in hospital resources committed to supervision, training and induction of new graduates;[57]
- increased accountability obligations;
- the need to make critical decisions under pressure;
- greater reliance on agency staff, resulting in intensification of pressures on a small core of permanent senior nursing staff;[58]
- expansion of the range of tasks expected to be performed, as a corollary of cutbacks in ancillary staffing. In addition to patient care, nursing staff were often obliged to clean, provide meals, offer counselling to patients and their

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52 Quinlan, M., 2001, p.6.

53 Quinlan, M., 2001, p.6.

54 Watson *et al*, 2003, p.94.

55 Watson *et al,* 2003, p.94; Green, F., "It's been a hard day's night: the concentration and intensification of work in late twentieth century Britain", *British Journal of Industrial Relations,* vol. 39, no. 1, 2001, pp.53 – 80.

56 Buchanan, J. & Considine, G., *'Stop telling us to cope!': NSW nurses explain why they are leaving the profession*, an ACIRRT report commissed by the NSW Nurses' Association, May 2002, pp.ii.

57 Buchanan, J. & Considine, G., 2002, p.23.

58 Buchanan, J. & Considine, G., 2002, pp.13 – 15.

families, undertake policy and project work and, on occasion, perform security tasks;[59]

- redeployment to specialist areas for which nurses had no training;[60]
- "credential creep" – the need to keep constantly upgrading qualifications.

113. Work intensification has been associated with increased risk of work-related musculoskeletal disorders. For example, although hospitals have a "no lift" policy, nurses are still required to manoeuvre patients into hoists. Greater throughput of patients means more patients to lift.[61]

Bullying and occupational violence

114. Since the beginning of the 1990s, there has been a significant rise in the number of reports of workplace bullying in Australian workplaces. This may be attributed to an increase in bullying behaviours as well as to a greater willingness among victims to report bullying and/or take legal action against it. A number of landmark cases have awarded substantial financial compensation to employees who suffered serious injuries as a result of bullying.[62]

115. Workplace violence has also become a priority issue for the International Labour Organisation and for OHS agencies in the United States, Britain and member states of the European Union. In a recent report released by the European Agency for Safety and Health at Work, nearly all thirteen countries surveyed identified psychosocial problems – in particular, workplace violence and stress – as emerging issues.[63]

Occupational stress

116. In the popular media, occupational stress is portrayed as either a "fashionable disease" that is "all in the mind" or a costly "epidemic that is sweeping our offices".[64] Although newspaper reports generally identify the work environment as the source of stress, they focus predominantly on interventions that serve to adapt the individual worker to the job, rather than the reverse. The underlying assumption here is that coping with stress is ultimately a private matter.[65] These popular representations

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59 Buchanan, J. & Considine, G., 2002, pp.15 – 17.

60 Buchanan, J. & Considine, G., 2002, pp.17 – 18.

61 Buchanan, J. & Considine, G., 2002, p.11.

62 *K. Blenner-Hassett v Murray Goulburn Co-operative Ltd & Ors*, County Court Victoria, 2651/96 – the plaintiff was awarded $350,000.00 (currently subject to appeal), *Midwest Radio Ltd v M.A Arnold* (1999) Queensland Court of Appeal, QCA 20 – the Plaintiff on appeal had an order for $549,220.83 upheld, and *Carlisle v Council of the Shire of Kilkvan and Breitkreutz*, Queensland District Court, 12 of 1992 – the plaintiff was awarded damages totalling $270,791.98.

63 European Agency for Safety and Health at Work, *Priorities and Strategies in Occupational Safety and Health*, 1998. http://agency.osha.eu.int/publications/.

64 Sydney Morning Herald, 2 January 1996, pp.1 and 6.

65 Lewig, K.A. & Dollard, M.F., "Social construction of work stress: Australian newsprint media portrayal of stress at work, 1997 – 1998", *Work and Stress,* 15 (2), 2000, pp.179 – 190.

significantly shape the capacity of people to identify and respond to stress in their workplaces.

117. By contrast, the NIOSH definition of job stress focuses on the unsuitability of job requirements as the cause of stress. Stress means –

> *"the harmful physical and emotional responses that occur when the requirements of the job do not match the capabilities, resources, or needs of the worker. Job stress can lead to poor health and even injury".*

118. A worker's response to occupational stress may be acute or chronic. Acute stress may result from a discrete event such as a confrontation with a customer or co-worker. If the worker is exposed to a life-threatening event at work he/she may develop post-traumatic stress disorder, which is a delayed response to an acute stressful situation, such as witnessing a robbery or dealing with a road accident. The latter can usually be diagnosed clinically and the stressor identified. This is not the case for chronic stress, which can be described as a cumulative internal response to unrelenting external demands, mediated or moderated by the interaction of a multitude of variables.

119. There is a cautious consensus in the literature that the condition of chronic stress gives rise to physiological changes and psychological strain symptoms in the worker, which may in turn lead to disease. The clearest evidence for the adverse health effects of occupational stress can be found in several longitudinal studies that found an elevated risk of cardiovascular disease due to job strain.[66]

Methodological issues

120. The vast occupational stress literature is beset by a number of acknowledged methodological problems. Most importantly, there has been little success in identifying valid predictive variables for work stress, or in accounting for a reasonable degree of variance in outcomes.

121. Few studies have adequately tested the array of mediated, moderated and additive effects of variables on stress outcomes, instead focussing largely on direct relationships. Reliance on self-report measures is a major weakness in much stress research, but one that is difficult to address given the subjective nature of the experience of stress.[67]

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66 Dollard, M., "Work Stress Theory and Interventions: From Evidence to Policy – A Case Study", paper presented at the *NOHSC Symposium on the OHS Implications of Stress*, Canberra, 2001.

67 Rick, J., Briner, R., Daniels, K., Perryman, S., Guppy, A., *A Critical Review of Psychosocial Hazard Measures,* HSE Contract Research Report 356, Norwich, HSE Books, 2001 passim; Bright, J., "Individual Difference Factors and Stress: A Case Study Paper", paper presented at the *NOHSC Symposium on the OHS Implications of Stress,* NOHSC, Canberra, 2001, *passim*; Kendall, E., Murphy, P., O'Neill, V., Bursnall, S., 2000, *Occupational Stress: Factors that Contribute to its Occurrence and Effective Management,* a Report to the Workers' Compensation and Rehabilitation Commission, WorkCover Western Australia, Perth., 2000, pp.111 – 115.

122. These methodological debates are important to consider, because workplace interventions and legislative reform proposals need to be underscored by evidence-based research.

Scale of occupational stress

123. Claims data does not accurately represent the actual incidence of stress-related injury and illness. There are a number of reasons for this:

- the *Accident Compensation Act* 1985 s.82(2A) excludes claims in respect of stress associated with the "reasonable action" of an employer in relation to transfer, demotion, reclassification, leave of absence, discipline, redeployment, retrenchment or dismissal;
- some of the symptoms of occupational stress may be picked up by other injury codes (eg. coronary heart disease or eczema);
- the onset of symptoms may be gradual – meaning that it is difficult to identify the source of the injury or illness;
- due to the social stigma associated with "stress", workers will tend to take accrued sick leave, or attend work despite their symptoms ("presenteeism"). Recent Australian research indicated that, while over one in four workers had taken leave for stress, only 4% of these had claimed workers' compensation;[68]
- some workers make fraudulent claims;
- symptoms may be due to "rest-of-life" stressors rather than occupational stress.[69]

124. Nevertheless, it is clear that the number of occupational stress claims as a percentage of total claims is trending upwards. For the period July 2000 to June 2003, stress claims constituted approximately 8% of total claims. Evidence suggests that in recent years the number of claims for chronic stress conditions was rising faster than those for traumatic stress disorders.[70]

125. Qualitative research also points to increasing levels of stress among workers in a wide range of industries, as a result of the changing nature of work.

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68 Kendall, E. *et al,* 2000, p.12.

69 Heads of Workers' Compensation Authorities, Extract from "Comparison of Workers' Compensation Arrangements in Australian Jurisdictions", Paper 7 presented at the *NOHSC Symposium on the OHS Implications of Stress*, NOHSC, Canberra, July 2000.

70 Kendall, E. *et al*, 2000, p.3.

Sources of occupational stress

126. Many sources of occupational stress are identified in the literature. They include:

Personal vulnerability to stress

- personality factors;
- negative affectivity (predisposition towards pessimism and negative mood state);
- cognitive distortions (such as "catastrophising");
- lack of psychological "hardiness";
- poor or maladaptive coping strategies;
- inadequate personal or environmental resources (poor self-esteem or absence of social support);
- family-work conflict.

Interaction between Worker and Job

- poor worker-environment fit;
- lack of adequate reward or recognition for efforts expended (Siegrist's "effort-reward imbalance"[71]); and
- personal values not in keeping with corporate values.

Job Demands

- high mental and/or physical demands coupled with low levels of control over the work task (the demand-control model posited by Karasek[72]), for example, repetitive and/or monotonous machine-paced work;
- time pressure;
- performance pressure;
- role ambiguity and role conflict;
- long unsociable hours and work intensification;

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71 Siegrist contended that workers expend effort at work in expectation of rewards as part of a socially negotiated process of exchange. He assumed a relationship between an individual's work role and his or her individual self-esteem, self-efficacy and social opportunity.

72 According to the demand-control model, job strain is the result of high job demands coupled with a low level of decision latitude. A good example is machine-paced work on a factory assembly line. Although the model does not preclude the influence of individual traits or coping styles, it assumes that the root cause of occupational stress can be squarely located in the work environment. Studies based on this model do not usually attempt to measure "stress", but rather, seek to identify links between objective *stressors* in the work environment and the incidence of illness. More recently, the model has been expanded in recognition that strain effects can be exacerbated by lack of social support from supervisors or co-workers or by social isolation.

- condition of physical environment (exposure to excessive noise, high temperature, hazardous manual handling, fear of injury); and
- exposure to critical incidents (risk of post-traumatic stress disorders).

Organisational Climate

- poorly managed organisational change (for example, associated with down-sizing or restructuring);
- precarious forms of employment;
- workplace bullying, occupational violence, harassment and discrimination;
- hostile work cultures;
- "techno-stress" (dehumanisation and information overload associated with communications technology);
- absence of career opportunities; and
- lack of social support in the workplace.

Effects of occupational stress

Impact on the worker

127. The symptoms of stress include: headaches; sleep disturbance; coronary heart disease; high blood pressure; migraines; gastro-intestinal problems (such as ulcers); fatigue; musculoskeletal disorders (MSDs); eczema; shingles; muscular spasms; blackouts; reduced capacity in cognitive exercises (short-term memory loss, distraction, reduced creativity); depression; drug and alcohol dependency; and feelings of anger, indifference or helplessness.

128. In some cases, these illnesses may be unrelated, or only partly related, to occupational stress. In other cases, occupational stress may be the sole contributing factor. Although it is known that excessive job strain may directly or indirectly cause ill health, the specific illness outcome in particular individuals is difficult to predict.

129. Costs to employees are likely to include: uncompensated medical and rehabilitation costs; loss of income; loss of future earnings; loss of self esteem; social isolation; and reduced social status.

Impact upon workplaces

130. Occupational stress results in direct costs to employers through:

- decreased productivity of afflicted workers when still at work;
- decreased productivity of other workers as a result of low morale;

- absenteeism (where no claim is made and staff take prolonged sick leave or where claim falls below the ten-day threshold);
- medical costs for claims falling below this threshold;
- high turnover (staff seek less stressful work elsewhere); and
- increased incidence of injury (although the evidence for this is inconclusive).

Family and community impacts

- negative impact of worker's distress upon partner, children and other family members;
- heavier load on other family members as afflicted person is less able to perform parenting and other domestic tasks;
- financial impacts on family associated with nursing a sick family member;
- costs to community, including health and medical costs; social welfare payments; rehabilitation costs; and loss of human capital.

Interaction of occupational stress with other OHS hazards

Physical hazards

In many workplaces, poor psychosocial conditions coincide with high levels of exposure to physical hazards. For example:

- the risk factors for MSD closely overlap with risk factors for occupational stress, such as repetitive, monotonous, rapid and/or machine-paced tasks;
- excessive noise exacerbates the risk of occupational stress; and
- employees working at height or with hazardous substances without adequate risk controls may fear for their safety, thus experiencing elevated levels of stress.

Other psychosocial hazards

Fatigue, bullying and occupational violence both contribute to, and result from, work stress.

"Rest-of-life" stressors

"Non-work" stressors – such as relationship breakdowns, financial pressures or a serious illness suffered by a worker or her family members – may compound the effects of occupational stress.

Risk management strategies

The "intervention pyramid"

Interventions to manage or control occupational stress can be classified as follows:

(i) *Primary preventative interventions*, which aim to prevent the occurrence of adverse health effects by reducing workers' exposure to stressful working conditions – for example, by providing opportunities for workers to set the pace of work or participate in job design;

(ii) *Secondary interventions*, which address the early warning signs of occupational stress by providing employees with "coping strategies" – for example, stress management classes and counselling; and

(iii) *Tertiary interventions,* which aim to ameliorate the effects of stress-related illnesses or injuries once they have occurred – for example, via injury and disability management.[73]

131. Consistent with OHS principles, this intervention pyramid places the highest value on eliminating risk at its source. Hence, primary preventative interventions – targeting the physical work environment, the psychosocial work environment and organisational culture – are more effective than secondary and tertiary interventions that focus on individual behaviour or symptoms. Although interventions aimed at individuals may have positive effects, these effects are transitory if unsupported by work environment changes.[74]

132. In practice, however, the intervention pyramid is inverted. Tertiary intervention programs are the most commonly implemented and primary intervention programs the least.

133. Four factors appear to contribute to the over-emphasis on secondary and tertiary interventions in tackling occupational stress, as follows:

- company management tend to blame "personality factors and the lifestyles of employees" for absenteeism or illness reports;
- psychology-oriented stress researchers view occupational stress primarily in subjective and individual terms (and provide their services as consultants to industry);
- there is a gap between "good" social research method (longitudinal studies involving a randomised control group; use of both subjective and objective measures; and rigorous statistical analysis) and the dynamic nature of contemporary work environments (for example, flexible work arrangements; novel information technologies; or changes in organisational culture);

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73 LaMontagne, A., "Evaluation of Occupational Stress Interventions: An Overview", paper presented at the *NOHSC Symposium on the OHS Implications of Stress,* NOHSC, Canberra, 2001, pp.82–3; Caple, D. & Associates, *VWA Sprains & Strains Strategy – Investigation of Broader Prevention Strategy Project, Final Report,* David Caple and Associates, East Ivanhoe, 2002, p.78.

74 LaMontagne, A., 2001, p.85.

- the paucity of research focusing on "hard" (economic) outcome variables, such as productivity, sickness absence rates and injury data, compared to the plethora of studies on "soft" (psychological) outcome variables, such as motivation, morale, affect and health complaints. It may be difficult, therefore, to convince employers that work environment changes will deliver economic benefits.[75]

Difficulty in determining the effectiveness of interventions;

There has been little effective evaluation of intervention programs and their impact on the "hard" or "soft" variables noted above. Even Kompier *et al* acknowledge that the reduction in absenteeism in six of the ten case studies indicates a correlation rather than a direct relationship between intervention and outcome.

Factors critical to the success of intervention programs

Notwithstanding these concerns, Kompier *et al* concluded that there were five elements essential to successful intervention:

- a "stepwise" and systematic risk management approach;
- a thorough risk analysis: job redesign should not be undertaken without first undertaking adequate "diagnosis";
- "a combination of work-directed and worker-directed measures": measures to address risk at source (i.e., in the work environment) were supported by secondary measures to improve the coping capacity of workers;
- a participative approach, in which employees and middle managers were considered "the experts" with respect to their own working situation; and
- sustained commitment by senior management so that active management of psychosocial working conditions at all levels becomes a "normal" company practice.

Legislative initiatives in the European Union

134. European Union Framework Directive 89/391 displays the influence of Scandinavian legislative reforms of the 1970s to early 1990s, which mandated "internal control" of the working environment.[76] These reforms accorded with sociological theories of

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75 Kompier, M., Guerts, S., Grundemann, R., Vink, P., Smulders, P., "Cases in Stress Prevention: The Success of a Participative and Stepwise Approach", *Stress Medicine,* vol. 14, 1998, pp.156-7.

76 Walters, D., "European Strategies for Health and Safety at Work: The Impact of the European Union Framework Directive 89/391", in *Workers' Compensation Policy Review,* Jan/Feb, 2001, pp.8 – 9; Walters, D., *Regulating Health and Safety Management in the European Union: A Study in the Dynamics of Change,* Bruxelles, PIE-Peter Lang, 2002.

occupational stress focusing upon the structural features of a worker's interaction with his or her work environment.[77]

135. The implementation of the Directive within EU member states is uneven, reflecting a diverse range of legal and policy frameworks. Nevertheless, the European approach remains the most highly developed legislative articulation of the "intervention pyramid".

136. Among other things, the Framework Directive requires the employer to:

- "combat risks at source" [6(c)];
- adapt work to the worker's abilities and needs, with a view in particular to "alleviating monotonous work and work at a predetermined work-rate…" [Art. 6(d)];
- develop "a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors related to the working environment" [Art. 6(g)]; and
- give collective protective measures priority over individual protective measures [Art. 6(h)].

137. Legal provisions in Belgium, Denmark, Germany, the Netherlands, Norway and Sweden go further than the Directive, by explicitly requiring employers to protect workers against psychosocial risks. Legislation in these countries clearly draws on Karasek's demand-control (support) model, by stating that "the worker must be able to influence the rhythm of work" (Netherlands) or that the work content "must be varied and give control to the workers" (Norway). Employers are required to ensure that workers are permitted contact with other persons (Norway); social isolation must be avoided (Denmark). Swedish legislation nods at Siegrist's effort-reward imbalance model of occupational stress, in providing that "work should involve a compensation in the form of diversity of work, satisfaction, social participation, and personal development".[78]

Australian legislation

138. One of the objects of New South Wales' *OHS Act* 2000 is –

> *"to promote a safe and healthy work environment for people at work that protects them from injury and illness and that is adapted to their physiological and psychological needs" [s.3(c)].*

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77 See for example, Karasek, R.A. "Job demands, job decision latitude and mental strain: Implications for job redesign", *Administrative Science Quarterly,* 1979, vol. 24, pp.285 – 308; Karasek, R. & Theorell, T., *Healthy Work: Stress, Productivity and the Reconstruction of Working Life,* New York, Basic Books, 1999 (first ed. 1990).

78 European Foundation for the Improvement of Living and Working Conditions, "Work-related Stress and Industrial Relations", European Industrial Relations Observatory On-line, www.eiro.eurofound.eu.int/2001/11/study/TNO111109S.html, 2001.

The general employer duties do not include any specific reference to psychosocial hazards or risks.

139. The *Occupational Health and Safety (Commonwealth Employment) Act* 1991 includes among its objects: "to promote an occupational environment for …employees at work that is adapted to their needs relating to health and safety" [s.3(d)].

140. Queensland's *Workplace Health and Safety Act* 1995 does not explicitly refer to the control of psychosocial hazards and risks. Nor does the principal legislation in Western Australia, South Australia or Tasmania.

New and emerging risks: legislative implications

141. It seems clear that psychosocial hazards are covered by the general language of the Act, in that they are "risks to health". But I consider that the Act should be amended so that –

(a) the objects of the Act are expressed to include the right of all persons at work to a healthy physical and psychosocial work environment; and

(b) the term "work environment" is defined to make clear that it encompasses all workplace arrangements that affect the psychological and physical health of workers.

142. To support these changes, the Authority will need to upgrade its own role in –

(a) creating awareness of the risks;

(b) developing in-house expertise and, in particular, training inspectors to identify and assess psychosocial risks; and

(c) developing codes of practice which will help inform dutyholders of how these risks can be identified, assessed and controlled.

143. The trend towards flexible labour/precarious employment presents particular OHS challenges, in relation to –

(a) the allocation and assumption of responsibility amongst dutyholders for ensuring the safety of transient and temporary workers and other "outsiders", i.e. workers who are not permanent employees at the workplace; and

(b) making provision for the representation of, and participation by, such workers on OHS issues.

I have sought to address these issues in other chapters.

PART 2: THE REGULATORY STRUCTURE

Chapter 5: A bifurcated Authority

144. The Victorian WorkCover Authority was established in 1992 to administer the Accident Compensation Act, which regulates the compensation and rehabilitation of persons who are injured at work.[79] The Authority had no role in the regulation of occupational health and safety until 1 July 1996, when responsibility for the administration of the OHS legislation was transferred to it from the Health and Safety Organisation, part of the Department of Business and Employment.[80]

145. The result is a bifurcated Authority with two operating divisions. The first is WorkSafe Victoria, through which the Authority regulates occupational health and safety. The second is the Rehabilitation and Compensation Division, through which the Authority regulates Victoria's occupational rehabilitation and compensation system and insurance scheme. These separate operating divisions are jointly supported by six other divisions – Corporate Legal and Board Secretariat, Finance and Administration Services, Human Resources, Information Services, Marketing, and Public Affairs.

146. Naturally, the operational focus of the two divisions is quite different. The focus of the WorkSafe division is on the prevention of workplace injury and disease. The focus of the Rehabilitation and Compensation division is, as its name suggests, on the rehabilitation and compensation of persons who have suffered a work-related injury.

147. A number of those consulted have argued that the strategic direction and policy directives of the WorkSafe Division are unduly influenced by the Authority's rehabilitation and compensation imperatives. This has been a particular concern of THC's representatives on the Health and Safety Working Group (see further below).

148. That workers compensation statistics have influenced WorkSafe's priorities is quite apparent. Since 2001, WorkSafe has deliberately given priority to those areas where the number of injury claims and/or the costs of claims are high or are rising.

149. In October 2000, the Authority published a three-year plan entitled "Strategy 2000". In that Plan, WorkSafe pledged to focus its prevention activities on certain key areas, including in particular –

- the four "worst" industries;

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79 Section 18 ACA.

80 The transfer was effected by the *Accident Compensation (Occupational Health and Safety) Act* 1996.

- the 100 "worst" employers, being those which together accounted for 9% of all claim payments. (This part of the strategy is known as "Focus 100"); and
- common injury types, such as sprains and strains (which accounted for 62% of all claim payments).

A case for separation?

150. The question has therefore been raised whether the same regulator can do justice simultaneously to these separate regulatory functions, or whether the task of administering a huge, and financially complex, workers compensation scheme inevitably demands disproportionate attention. The Victorian Trades Hall Council – amongst others – has submitted that the two functions should be performed by separate bodies, and that a separate, tripartite, OHS body be established.

151. Whatever the potential for conflict, there are obvious synergies between the two functions. Pro-active and effective regulation of health and safety at a workplace (externally by the Authority, and internally by the workplace parties themselves) will reduce – if not eliminate - the risk of injury or death occurring at that workplace. Self-evidently, the lower the risk, the lower the number of workplace injuries requiring compensation and rehabilitation.

152. Unsurprisingly, therefore, it is the Compensation Act which requires the Authority to –

> *"promote the prevention of injuries and diseases at the workplace and the development of healthy and safe workplace".*[81]

153. Organisational change is highly disruptive at the best of times. It follows, in my view, that no restructuring of the Authority should be contemplated unless it were compellingly demonstrated that WorkSafe was unable properly to perform its functions as a division of an Authority which is also responsible for compensation and rehabilitation.

154. I have seen no evidence to suggest that this is so. In any case, the question of structure was exhaustively examined in 2000. The then Minister for WorkCover requested the Department of Treasury and Finance (DTF) to carry out a review, in order to provide options to Government "for ensuring a clear and distinct focus on OHS, including appropriate institutional arrangements". In particular, the Review was asked to provide expert advice to assist DTF to review the existing structure and resourcing of OHS in Victoria, and to identify the gains and limitations of the existing integrated structure.

155. After consultation with all stakeholders, and careful evaluation of the options, the Review recommended what it described as "the Single Authority" option, with

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[81] Section 20(2)(a). I recommend below that this objective should be contained in OHSA.

functional separation of the two regulatory systems within the Authority. According to the Report, this structure was –

> *"well placed to utilise synergies between the two regulatory systems while maintaining a clear identity for each. Again a strategic policy capability … would be important to properly characterise and capture the benefits of an integrated Authority.*
>
> *This is a difficult task. The achievement of the synergies is a key management task which the Board has to address."*[82]

156. The Minister accepted the recommendation of the Review. The current integrated organisational structure is the result.

Objectives, functions and powers

157. The objectives of the Authority are set out in s.19 of the Compensation Act. The first objective is to "manage the accident compensation scheme as effectively and efficiently and economically as is possible".[83] Of particular note for the purposes of this review are the Authority's objectives, which are -

(a) to administer OHSA, EPSA and DGA[84];

(b) to assist employers[85] and workers[86] in achieving healthy and safe working environments;[87] and

(c) to develop such internal management structures and procedures as will enable the Authority to perform its functions and exercise its powers effectively, efficiently and economically.[88]

158. The functions of the Authority are set out in s.20 of the Compensation Act. Most of those functions relate to its compensation and rehabilitation objectives. Some, however, relate directly to the regulation of occupational health and safety. Specifically, the Authority is charged with -

(a) fostering a co-operative consultative relationship between management and labour in relation to the health, safety and welfare of persons at work;[89] and

(b) monitoring the operation of occupational health and safety arrangements.[90]

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82 Health and Safety Review, October 2000, p.40.

83 Section 19(a).

84 Section 19(b).

85 I note that the term "employer" has a wider definition under the ACA that that provided for in OHSA.

86 See the definition of "worker" in s.5 of the ACA. I note that there is no definition of the term "employee" under the ACA.

87 Section 19 (c). See "working environment" in s.21(1) of OHSA, which imposes the basic duty on employers.

88 Section 19(g).

89 Section 20(1)(o).

90 Section 20(1)(v).

159. Section 8 of OHSA confers functions on the Authority which are additional to the functions conferred on it by s.20 of the Compensation Act. The functions set out in s.8 are the same as those which were originally conferred on the Occupational Health and Safety Commission. Unlike the Authority, however, the Commission was a tripartite body, and its functions were limited to policy development. The Commission had no responsibility for the administration or enforcement of OHSA.

The need for change

160. In my view, Part II of OHSA – headed "Functions and Powers" – needs to be radically overhauled. At present, those functions of the Authority which are relevant to its administration of OHSA are scattered across the two Acts. In the Compensation Act, the functions relevant to OHS are buried in a list of 31 functions set out in s.21(2). Of this list, the first 14 – and most of the rest – concern the workers compensation scheme.

161. Symbolically, at least, this legislative structure treats the Authority's OHS functions as secondary or ancillary to its compensation functions. The title to Part II notwithstanding, OHSA contains no statement of the Authority's powers – apart from the power conferred by s.9 (to obtain information relating to OHS). It is, again, the Compensation Act which enumerates the powers – in ss.20A and 20B.

162. Section 20A of the ACA confers on the Authority an express incidental power to –

> *"do all things necessary or convenient to be done for or in connection with the performance of its functions and to enable it to achieve its objectives".*

163. Section 20B confers power on the Authority to enter agreements of various kinds, inducing with corresponding authorities at Commonwealth and State level. The section concludes by conferring the enigmatic power –

> *"to provide related and ancillary services."*[91]

164. In my view, OHSA should contain its own comprehensive provisions identifying the objectives and functions of the Authority, and conferring its powers. It is of fundamental importance that OHSA be self-contained. The entire OHS scheme should be described and defined in a single statutory document – albeit that the subordinate instruments, such as regulations and codes of practice, will be published separately. Most importantly, this change should dispel permanently any notion that OHS regulation is secondary to the Authority's compensation function.

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[91] Section 20B(1)(e) ACA.

Power of Authority to require persons to furnish information: s.9

165. Section 9 of the Act gives the Authority a power to require a person "to furnish such information relating to occupational health and safety and welfare as [the Authority] reasonably requires for the purposes of the Act." It is obvious from the use of the broader term "furnish information", and from the location of the power in Part II of the Act, that this power is quite different in character and purpose from the power of an inspector found in s.39(1)(i).

166. The 1985 Act conferred this power to require any person to furnish information to the Occupational Health and Safety Commission, to enable it to fulfil its policy-making and advisory functions. Subsequent amendments to s.9 did not change the character of the power. The amendments merely reflected the change of name of the regulator. Thus, when the Act was amended to reflect the transfer of responsibilities to the Authority, the power under s.9 was carried over. This was so even though the Authority represented an amalgamation of the functions previously performed by the Commission with those previously performed by the Department of Labour.

167. The functions of the Authority, as set out in s.8, do not refer to the Authority's role in monitoring compliance - and enforcing non-compliance - with the Act and the regulations. The only reference to the Authority's enforcement role in the Act is s.48, which confers the power to prosecute. This is a serious omission. It should be addressed in a redrafted s.9.

168. The general power in s.9 to require persons to furnish information is not suited to the Authority's enforcement functions. In my view, the Authority should have powers under OHSA similar to those conferred on the Authority in relation to monitoring and enforcing compliance with the Compensation Act. Under s.239 ACA –

> *"(1) The Authority may, by notice in writing, require any employer or other person –*
>
> *(a) to furnish the Authority with such information as the Authority requires; or*
>
> *(b) to attend and give evidence before the Authority or before any person employed in the administration or execution of this Act and authorised by the Authority in that behalf –*
>
> *[for the purpose of enquiring into or ascertaining any liability or entitlement under the workers compensation legislation]*
>
> *and may require the employer or other person to produce all books in the custody or under the control of the employer or person relating thereto.*
>
> *(2) The Authority may require the information or evidence to be given on oath, and either orally or in writing, or to be given by statutory declaration and*

> *for that purpose the Authority or a person so authorised by the Authority may administer an oath."*

169. Section 241 of ACA makes it an offence for a person "without reasonable excuse" to refuse or fail to comply with such a requirement.

170. The secrecy provisions in s.243 of ACA should apply to information obtained by the Authority under the proposed new s.9 powers. However, the Authority should retain the right to disclose information on public interest grounds as set out in s.10 of OHSA.

Board of Management

171. The Authority has a Board of Management, which is established under s.24 of ACA. The Board may exercise all of the powers of the Authority, must give general directions as to the carrying out of the objectives and functions of the Authority, and must ensure that the Authority is managed and operated in an efficient and economic manner.[92]

172. In its report *Independent Regulators*, published in October 2003, the UK Better Regulation Taskforce recommended that every regulator should have a Board. The Taskforce reasoned as follows:

> *"All regulators who have a Board, and many who currently do not, agreed that having a Board is invaluable in managing the strategic direction of the regulator. A Board assists the regulator in being able to share responsibilities and to take a collegiate approach to the work of the regulator. Boards are seen as strengthening the overall effectiveness and efficiency of a regulator... A strongly formulated Board can provide protection against political interference and be a real impetus for driving though change".*[93]

173. As to the membership of the Board, the Taskforce said that "[i]deally the non-executive members should be independent in the sense of having no connection with the industry or activity concerned." At the same time, the Task Force acknowledged, in some specialist areas of regulation the members of the relevant Board must be able to understand the substantive issues that arise in the course of regulation. This may call for relevant technical knowledge and experience "to ensure the non-executive directors can be fully effective".[94] That qualification undoubtedly applies to OHS regulation.

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92 Section 24(1) ACA.

93 Better Regulation Taskforce (UK) (BRTF), *Independent Regulators*, BRTF Secretariat, London, 2003, p.26. Retrieved December 2003 from: http://www.brtf.gov.uk/taskforce/reports/entry%20pages/independentreg.htm

94 BRTF, 2003, p.27.

174. Under ACA, the Authority's Board consists of one full-time director (being the Chief Executive of the Authority) and not more than seven part-time directors.[95] The part-time directors of the Board are appointed by the Governor-in-Council on the recommendation of the Minister.[96] They are to be persons –

> *"who have such managerial, commercial or other qualifications or experience as the Minister considers necessary to enable the Authority to perform its functions and exercise its powers".*[97]

One of the directors is appointed by the Governor-in-Council to be the chairperson of the Board[98].

175. The Chief Executive of the Authority is appointed by the Governor-in- Council under s.25 of ACA. The Chief Executive must "manage and control" the affairs of the Authority in accordance with the policies of the Board.[99] Under s.25(3) any act, matter or thing done by the Chief Executive in the name of, or on behalf of, the Authority, is to be taken to have been done by the Authority.[100]

176. There is no provision for the appointment of the respective Executive Directors of the two operating divisions. Each is appointed by the Authority under its general power to engage staff.[101] The current Executive Director of WorkSafe is John Merritt, who was appointed in 2001.

177. In the course of this review I have had regular meetings with the Chairman of the Authority's Board, Mr James MacKenzie, who also chaired the Reference Group established by the Minister to assist me. I attended one meeting of the Board and have had an opportunity to examine Board papers.

178. Nothing has arisen in the course of the review to suggest any need for a change in the structure or functions of the Board. On the contrary, the continued existence of the Board appears to me to be fully justified by considerations of the kind identified by the Better Regulation Taskforce, as set out in paragraph 172 above.

Challenges for the Board

179. The effectiveness of OHS regulation in Victoria depends heavily on how effectively the Board performs its functions. My terms of reference were directed at identifying amendments to the legislative scheme, but the legislative framework is no more than that – a framework within which the Authority discharges its functions. I am

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95 Section 24(2) ACA.
96 Section 26(1) ACA.
97 Section 26(1) ACA.
98 Section 27(1) ACA.
99 A similar position is proposed in relation to inspectors – see Chapter 27.
100 Section 25(3) ACA.
101 Section 22(1) ACA.

confident that the fact of the Review, and the content of this Report, will encourage the Authority, and the Board in particular, to look closely at the way in which those functions are discharged.

180. The greatest challenge of all is, in my view, for the Board to ensure that it gives occupational health and safety, and the activities of the WorkSafe division, the attention they deserve. It would, I think, be simplistic to suggest that the two divisions be given "equal time" by the Board. What is crucial is that the Board recognise and reinforce the vital importance of workplace safety, and set as its own "key performance indicator" the objective of ensuring that, whatever may be the pressures or demands of the compensation and rehabilitation side, nothing interferes with or distracts attention from OHS regulation.

Chapter 6: Relations with Government

181. In this chapter I consider the relationship between the Authority and the Government. I deal with the Authority's independence from, and its accountability to, the Government in the performance of its OHS regulatory functions.

An independent regulator

182. Self-regulation by workplace parties (employers, employees, etc) is critical to OHS regulation, and is embodied in the largely performance-based OHS legislation in the form of the general duties. Dutyholders are accountable for their self-regulation: a failure to comply with a duty will, if detected by the Authority, invariably be met with some form of enforcement – either by way of an improvement notice or a prohibition notice, or by a prosecution.

183. Equally important is the role of the external regulator, which must be both independent and accountable.

184. In its report *Independent Regulators*, published in October 2003, the UK Better Regulation Taskforce defined an independent regulator as:

> *"A body which has been established by an Act of Parliament, but which operates at arm's length from Government and which has one or more of the following powers: inspection; referral; advice to a third party; licensing; accreditation; or enforcement."*

185. By this definition, the Authority undoubtedly qualifies as an independent regulator. The legislation establishing the Authority clearly intends that the Authority should operate at arm's length from Government, and it confers powers of inspection and enforcement.

186. Unlike a Department of State, which answers directly to a Minister and is part of the Executive Government, the Authority is a statutory corporation with its own Board. The staff of WorkSafe are not public servants in the conventional sense, that is, they do not report to the secretary of a department. Rather, they report (through the Executive Director) to the Board.

187. The UK Taskforce identified four areas in which the independence of a regulator can potentially be compromised – finance, personnel, operations and enforcement. I will briefly consider each of these areas as they apply to the Authority.

Financial independence

188. The UK Taskforce observed that –

> *"[t]he means by which independent regulators are funded clearly has a bearing on the nature and scope of their*

> *activities, either directly or indirectly, and on the extent of their independence".*[102]

189. The Authority has a number of revenue streams to fund its operations. It is funded predominantly from the insurance premiums that are paid by employers under the workers' compensation scheme established by ACA. In the financial year ended 30 June 2003, the premiums totalled $1.69 billion. The Authority also receives a contribution from the Consolidated Fund under s.32(3)(bc) of ACA, specifically in relation to the costs and expenses of or incidental to its administration of the OHS legislation. This contribution recognises the public safety functions which the Authority performs, in particular under EPSA, DGA and RTDGA but also under s.22 of OHSA.

190. In the financial year ended 30 June 2003, the Authority received a $4.72m contribution from the Consolidated Fund. This compares with the contribution received in 2001 ($6.225M) and 2002 ($5.013M). Another of the revenue streams is OHS licensing revenue, which accounted for $4.076M in the financial year ended 30 June 2003.

191. As was recognised by the UK Taskforce;

> *"Whilst having a mix [of income streams] may make accountability complicated, though not impossible, it may well provide the best means of combining independence with a degree of certainty. Certainty of funds is crucial to most regulators".*[103]

Personnel independence

192. The question of personnel independence turns on whether the regulator has responsibility for appointing its own staff and setting its own terms and conditions of employment and salaries. On this account, the Authority's independence is clear. Staffing issues are matters for WorkSafe management, subject always to the Board.

Operational independence

193. To be operationally independent, a regulator must have maximum operational flexibility consistent with full accountability to Parliament. Put another way, while it is for Parliament and the Minister to set the objectives for the regulator, it is for the regulator to develop the policy and delivery mechanisms for delivering those objectives.[104]

194. By this measure, too, WorkSafe is clearly independent. Operational policies and strategies are developed within WorkSafe, though always with the benefit of wide consultation, and are ultimately approved by the Board.

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102 BRTF, 2003, p.18.

103 BRTF, 2003, p.19.

104 BRTF, 2003, p.20.

Enforcement independence

195. One of the powers conferred on the Authority by OHSA is the power to bring proceedings for an offence against the Act.[105] When OHSA originally came into operation, the prosecutorial discretion was conferred on the relevant Minister.

196. Clearly, it is critical to the proper and effective administration of the OHS legislation that the Authority (being the sole prosecuting agency for offences committed under the OHS legislation) exercise its enforcement powers independently and impartially. That independence and impartiality is central to the Authority's prosecutorial function, and must not be compromised.

197. Based on my discussions with the Chairman of the Authority and the Executive Director of WorkSafe, it is clear that the principle of enforcement independence is understood and accepted both by the regulator and by Government. What the Authority does or does not do about enforcement – whether in relation to the issue of notices or in relation to the institution of prosecutions – is a matter for the Authority alone to determine. The Board approves general policy in these areas, but, naturally, decisions about whether or not to take action against a particular person are properly the responsibility of WorkSafe management.

198. What is, of course, important is that management establish and maintain comprehensive record-keeping systems, so that the Board can be kept fully informed, by the provision of aggregate (and comparative) statistics, about the nature and frequency of enforcement action.

Ministerial control

199. As the regulator of occupational health and safety in Victoria, the Authority is accountable, in a general sense, to the public at large for each decision made or action taken under the OHS legislation, particularly in relation to the enforcement of that legislation. (I deal with particular aspects of public accountability in Part 9 of this Report.)

200. Section 20C of the Compensation Act, which is headed "Accountability of the Authority", provides:

> *"(1) The Authority shall exercise its powers and perform its functions under this Act [and other Acts, including OHSA] subject to –*
>
> *(a) the general direction and control of the Minister; and*
>
> *(b) any specific written directions given by the Minister in relation to a matter or class of matter specified in the directions.*

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105 Section 48(1) OHSA. See also s.28(1) EPSA and s.40(1) DGA (which also confers a power to bring proceedings on a member of the police force).

> *(2) Where the Authority has been given a written direction under sub-section (1)(b), the Authority –*
>
> *(a) may cause that direction to be published in the Government Gazette; and*
>
> *(b) shall publish that direction in its next annual report.*"

201. On examination, s.20C is concerned not so much with accountability as with control:

> *"In a very general sense, a person is accountable if they have to give reasoned justifications for their decisions to some other person or body who has a reasonable right to require such justifications. This definition stresses accountability after the decision is taken but, for accountability to be meaningful, there has to be some awareness of the basis on which the decision was taken or the process by which it was taken".*[106]

In conferring what has been characterised as a "controlling executive power",[107] s.20C provides for Ministerial direction and control of the Authority.

202. Section 29(1) of the *Trade Practices Act* 1974 provides that the responsible Minister may give the Australian Competition and Consumer Commission directions connected with the performance of its functions or the exercise of its powers under the TPA. The power is expressly limited: the Minister must not give directions in relation to a number of Parts and sections of the Act, including the whole of Part IV, which contains prohibitions against restrictive trade practices.

203. The ACCC must comply with any direction given under s.29(1). Further, it must comply with a requirement made of it by either House of the Parliament or a committee of either House that it furnish to the House or committee any information concerning the performance of the functions of the ACCC under the TPA.

204. Although TPA s.29 refers to ministerial direction, but not ministerial control, a direction when given is a form of control by the Minister over how the ACCC is to perform its functions or exercise its powers. For example, a s.29(1) direction was given by the Minister for Customs and Consumer Affairs on 28 August 1998, for the Commission (among other things) –

(a) to initiate proceedings in actions based on alleged contraventions of the Act, for the purpose of establishing legal precedent under s.51AC on matters of specific relevance to small business;

(b) to give preference to initiating proceedings as representative proceedings on behalf of small business; and

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106 Graham, C., "Is There A Crisis In Regulatory Accountability?" in Baldwin, R., Scott, C. & Hood, C. (eds), *A Reader on Regulation*, Oxford, OUP, 1998, p.483.

107 *Waters v. Public Transport Corporation* (1992) 173 CLR 349 at 380, per Brennan J.

(c) to report quarterly on complaints received from small business and action taken on those complaints.

205. A Victorian equivalent of s.29 of the TPA is s.12M of the *Legal Aid Act* 1978. Under s.12M(1) the Attorney-General may give to the Board of Victoria Legal Aid written directions in relation to (among other things) the performance of the functions or exercise of the powers of VLA, and the policies, priorities or guidelines or VLA, including priorities in the funding of legal aid. The power conferred on the Minister is limited, in that a direction given under s.12M(1) must not relate to the grant of legal aid to any specific person.

206. In *Waters v. Public Transport Corporation,*[108] the High Court considered a provision in the *Transport Act* 1983[109] which was in similar terms to s.20C of the ACA. Mason CJ and Gaudron J said in their joint judgment:[110]

> *"Clearly enough, the section impliedly confers upon the Minister and the Director-General statutory power to give a direction to the [Public Transport] Corporation. It also requires obedience by the Corporation to any direction given in the valid exercise of that statutory power."*

As Brennan J said –

> *"A power of the kind conferred by s.31(1) of the Transport Act 1983 (and by s.20C of the ACA) is not one to 'direct a Government agency not to comply with its obligations under the general law".*[111]

207. I do not see s.20C of ACA as in any way compromising the Authority's independence as prosecutor, or regulator. As was recognised by the High Court in *Waters,* the Authority would be required to comply with a direction given by a Minister under s.20C of ACA only to the extent that the direction was given in the valid exercise of that power.

208. As far as I have been able to ascertain, the power of direction under s.20C has never been exercised in relation to the OHS functions of the Authority. There has been no suggestion that an exercise of the power has ever been, or would be, contemplated for the purpose of giving a specific direction in relation to a particular enforcement or compliance matter.

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108 (1992) 173 CLR 349.

109 Section 31(1).

110 by Mason CJ and Gaudron J, p. 368.

111 *Waters* p. 380, per Brennan J; see also McHugh J p. 413: "The power of the Minister to give directions under s.31(1) is subject to the operation of the general law. By the general law, I mean the body of common law and equitable rules which are supplemented or amended by statutes and regulations and other instruments having the force of law. Section 31(1), therefore, would not authorise a direction that the Corporation commit a crime or tort or breach a contract or by-law. Nor would it authorise a direction that the Corporation commit a breach of a statute such as the Act."

209. At the same time, the language of s.20C would seem to authorise the giving of such a specific direction. The Minister may, under s.20C(1)(b), give a –

> *"specific written direction in relation to a matter".*

The word "matter", plainly enough, is as broad or as narrow as the occasion requires.

210. In my view, it would be appropriate for s.20C to be amended to include a limitation comparable in effect to that imposed by s.12M of the *Legal Aid Act* 1978. That is, the terms of the power to give directions to the Authority should reflect the accepted – and proper – position, namely that the Minister cannot direct the Authority in relation to a particular enforcement or compliance matter.

Accountability

211. Under s.34A of the Compensation Act, the Authority is obliged, by not later than 28 February in each year, to submit to the Minister an operating and financial report which must –

> *"be in a form, and contain such matters, as may be required by the Minister".*

212. Under s.46 of the *Financial Management Act* 1994, the Authority is required to submit an Annual Report to the Minister, for presentation to Parliament. The report of the Authority deals with the activities of both operating divisions.

213. These are conventional reporting obligations, and I see no reason to recommend any change.

Chapter 7: The need for a tripartite mechanism

What is tripartism?

214. Ayres and Braithwaite define tripartism as "a regulatory policy that fosters the participation of [public interest groups] in the regulatory process in three ways."

> *"First, it grants the [public interest group] and all its members access to all the information that is available to the regulator. Second, it gives the [public interest group] a seat at the negotiating table with the firm and the agency when deals are done. Third, the policy grants the [public interest group] the same standing to sue or prosecute under the regulatory statute as the regulator."*[112]

215. Based on this, the "simplest" model, the 'three parties' involved in the tripartite regulatory process are the regulator, the regulated firm, and a single public interest group that is selected to counterbalance the interests of the regulated firm in the regulatory process.

216. In their book *Responsive Regulation*, Ayres and Braithwaite consider tripartism as –

> *"a strategy for implementing laws and regulations that have already been settled."*[113]

As they recognise, however –

> *"if one wanted to extend its application to the rule-making process itself, an extension that may have merit, then clearly the simple tripartism model would provide too narrow a basis for PIG participation."*[114]

217. In this chapter, it is the "rule-making process" that is the context for my consideration of the need for tripartism in OHS regulation. In Part 5 I will say more about the involvement of unions and employer groups generally in the regulation of occupational health and safety in Victoria.

218. Tripartism in the OHS context is commonly understood to refer to the "interest" of the regulator and to the respective representative interests of employers and employees. Inevitably, on any issue that is to be considered there will be a diversity of interests within the various employer and employee constituencies. For example, the interests of small business dutyholders on a particular OHS issue may not be aligned with the interests of larger, better-resourced dutyholders.

Tripartism and OHS regulation

219. One of the objects of the OHSA has always been to –

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112 Ayres, I. & Braithwaite, J., *Responsive Regulation: Transcending the Deregulation Debate*, OUP, Oxford, 1992, pp.57-8.

113 Ayres, I. & Braithwaite, J., 1992, p.58 (emphasis added).

114 Ayres, I. & Braithwaite, J., 1992, p.58.

> *"provide for the involvement of employees and employers and associations representing employees and employers in the formulation and implementation of health and safety standards"*[115].

220. In this chapter, I consider whether there is a need for a tripartite structure to involve those groups in the formulation of health and safety standards and, if so, whether it is a matter for legislative change.

221. The Occupational Health and Safety Commission, which was created by the 1985 Act, was a tripartite body. It consisted of 14 members – a chairperson, five persons nominated by the Victorian Trades Hall Council, five persons nominated by the Victorian Congress of Employer Associations, and three persons "having knowledge of or experience in occupational health and safety" nominated by the Minister after consultation with the VTHC and the VCEA.

222. For the purposes of nominating persons to be appointed as members of the Commission, regard was to be had to the desirability of having a reasonable balance of men and women (including persons of differing ethnic backgrounds) as members.[116] The functions of the Commission were the same functions as are now conferred on the Authority.

223. In its public discussion paper published in March 1983, the Ministry of Employment and Training said:

> *"The Government is committed to involving both workers and employers in the process of setting and monitoring standards of occupational health and safety. It also acknowledges the existence of a number of professional organisations which have considerable expertise in this area and wishes to use the services of occupational health and safety specialists.*
>
> *...*
>
> *Accordingly, the Government will establish an Occupational Health and Safety Commission with representatives from unions, employers and persons with particular skills in occupational health and safety. The Commission will be charged with overseeing the health and safety of every worker in Victoria through setting standards, encouraging the adoption of improved occupational health and safety measures and generally raising awareness of the issues. It will have a more important and extended policy role than the Industrial Safety Health and Welfare Advisory Council which it replaces. It is activities the Commission will ensure the widest possible participation by workers, employers, health and safety specialists and the public."*[117]

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115 Section 6(e) OHSA (emphasis added).

116 Section 7(4) of the 1985 Act.

117 Ministry of Employment and Training, *Occupational Health and Safety Public Discussion Paper*, March 1983, p.3 (emphasis added).

224. Two years later, in his second reading speech in relation to the Occupational Health and Safety Bill, the then Minister for Employment and Industrial Affairs said:

> *"The Bill establishes the Occupational Health and Safety Commission. This is a tripartite body with a chairperson, five employer, five union and three "expert" representatives. The commission will provide a strong independent source of advice to the Government on all aspects of occupational health and safety.*
>
> *It will recommend regulations and codes of practice. It has power to form advisory committees to investigate hazards as they arise. It will commission research into particular health or safety problems.*
>
> *The commission will operate through a relatively small secretariat. However, it will utilize all of the expertise there is in the community – in the universities, in industry and in unions. All such resources must be used if we are to discover solutions to the many health and safety issues confronting us."*[118]

225. In its report published in 1972, the Robens Committee (see Chapter 9) recommended the establishment of a national Authority for Safety and Health at Work. The "form and nature" of that authority was to be determined by four "major" requirements, the last of which the Committee described in the following terms:

> *"Fourthly, the 'user interests' in this field – that is to say the organisations of employers and workpeople, the professional bodies, the local authorities and so on – must be fully involved and able to play an effective part in the management of the new institution. A principal theme of this report is the need for greater acceptance of shared responsibility, for more reliance on self-inspection and self-regulation and less on state regulation. This calls for a greater degree of real participation in the process of decision-making at all levels. Responsibility lies with those who have a voice in decisions. It is essential, therefore, that the principles of shared responsibility and shared commitment should be reflected in the management structure of the new institution."*[119]

226. It is clear that the Robens Committee contemplated that the "user interests" would have a part in the management of the new authority. That is essentially the basis on which the Commission was established in Victoria. The Commission, consistently with the object set out in s.6(e) of OHSA, involved representatives of employees and employers, and those with expertise in OHS, in the "important and extended" policy and advisory role contemplated by the 1985 Act.

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118 *Hansard*, Legislative Assembly, 30 May 1985, p.912.

119 Robens, A. (Lord), *Report of the Committee on Safety and Health at Work, 1970 – 72,* London, HMSO, Cmnd 5034, 1972, p.36.

The WorkCover Advisory Committee

227. The Commission was abolished in 1992 with the enactment of the *Accident Compensation (WorkCover) Act* 1992. That same Act amended the ACA to create (in addition to the Authority) a body called the WorkCover Advisory Committee.[120] Its role is to advise the Board in relation to its[121] objectives –

- to promote a healthy and safe work environment;
- to ensure that appropriate compensation is paid to injured workers in the most socially and economically appropriate manner and as expeditiously as possible; and
- to promote the occupational rehabilitation and early return to work of injured workers.[122]

228. The WAC consists of members appointed by the Minister. They are: (a) persons with a sound knowledge of the law relating to accident compensation; (b) persons with experience in the provision of hospital services or medical services; (c) persons with experience in accident compensation who are nominated by Victorian employer and employee groups; (d) persons with knowledge of or experience in occupational health and safety; and (e) persons with knowledge and experience in occupational rehabilitation.[123]

229. The WAC is thus a multipartite, rather than a tripartite, body, in that its membership is not confined to representatives from unions, employer organisations and the regulator.

230. The functions of the WAC are to "inquire into and report to the Board upon any matters referred to it by the Board in accordance with the terms of reference supplied by the Board"[124]. Section 31A(3) sets out three examples of matters that may be referred to the WAC by the Board. All three examples are concerned with compensation and rehabilitation, none with occupational health and safety.

231. In addition to the statute-based WAC, there are a number of other consultative bodies, all of which have been established administratively. They are the Health and Safety Working Group, the Rehabilitation and Compensation Working Group, the Major Hazards Advisory Committee and the Legal Liaison Group. Together with the

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120 The Committee is established under s.31A of ACA.
121 I assume that this is a reference to the objectives of the Authority.
122 Section 31A ACA.
123 Section 31A(2) ACA.
124 Section 31A(3) ACA.

WAC,[125] these groups are described by the Authority in its Corporate Plan for 2003-04 as its "peak forums".

232. One of the Authority's stated objectives is to "consult more widely with stakeholders":

> *"To date we have lacked a cohesive organisational approach to stakeholder engagement. This year [2003-04] we will clearly articulate and implement a comprehensive stakeholder engagement strategy to ensure our approach is consistent, comprehensive, co-operative and meets our needs and those of our stakeholders."*[126]

The Health and Safety Working Group

233. The Health and Safety Working Group was established in 2001. It is chaired by the Chair of the Authority. It consists of 12 members – two are directors of the Authority (including the Chair); one is an OHS consultant; one is from DTF; five are from unions[127]; the balance (three) are from employer groups.[128]

234. Apart from the RIS requirements and public comment processes mandated under the *Subordinate Legislation Act* 1994, the HSWG is the primary means by which unions and employer organisations may scrutinise the Authority's policy agenda and operational activities. Its principal terms of reference are as follows:

- identify and, where appropriate, recommend occupational health and safety policies to ensure the implementation of the objectives of OHSA and assist in the development and implementation of an appropriate strategic plan;
- recommend to the Board for approval, regulations and codes of practice relating to occupational health, safety and welfare;
- review regulations and codes of practice and, where appropriate, make recommendations for their revision;
- when requested by the Minister, provide advice and/or recommendations on issues related to WorkSafe;
- provide advice to the Board on occupational health, safety and welfare standards;
- provide advice to the Board about state, national and international workplace health and safety issues including new and emerging issues;
- provide advice to the Board on information strategies, particularly those for employers and HSRs;

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125 On page 18 of the VWA Corporate Plan, there is a reference to "the WorkCover Advisory Group" which I take to be a reference to the WAC.

126 Victorian WorkCover Authority, *Corporate Plan 2003-2004*, p.18.

127 VTHC, CPSU, NUW, CFMEU and AMWU.

128 VECCI, MBA and AiG.

- oversee and approve the publishing of occupational health and safety information;
- where required by the Minister, the Board and WorkSafe Victoria, conduct public meetings and discussions on questions before the Authority.

235. These terms of reference are almost as expansive as those of the old Commission. Indeed, they are in large part based upon the mandated functions of the Commission prior to 1992. Notwithstanding that broad canvas, the HSWG's role in the formulation of health and safety standards has, in practice, been limited.

236. WorkSafe Victoria refers proposed, new or replacement regulations to the HSWG for comment prior to submitting them to the Minister for approval. Members of the HSWG assisted in refining and settling the final content of the *Guidance Note on the Prevention of Bullying and Violence at Work*. The HSWG has also contributed to the evaluation of WorkSafe Victoria's Focus 100 program. Unlike the Commission, however, the HSWG does not make substantive recommendations directly to the Minister.

Major Hazards Advisory Committee

237. The other consultative body relevant to OHS regulation is the Major Hazards Advisory Committee. It too has 12 members, drawn from unions and employer groups.

238. The Authority established the committee in response to a recommendation of the Longford Royal Commission that the Major Hazards Unit (proposed by the Commission) be given the independence necessary to eliminate any conflict between the Authority's roles in overseeing the proposed safety case regime on the one hand, and administering rehabilitation and compensation on the other.[129] The MHAC was established to provide independent advice on major hazards issues to the Board of the Authority.

239. By its terms of reference the MHAC is required to:

- provide advice on strategies to reduce the likelihood and consequences of major incidents in Victorian workplaces;
- provide stakeholder advice to improve the implementation of the MHF Regulations;
- monitor and ensure the transparency of the performance of stakeholders affected by the Regulations;

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[129] Dawson, D.M. & Brooks, B.J., *The Esso Longford Gas Plant Accident: Report of the Longford Royal Commission*, Parliament of Victoria, Melbourne, June 1999, p.232.

- provide advice to maintain parity with international major hazard benchmarks; and
- provide advice on important regulatory devices that determine the effectiveness of major hazard regulation, such as the Safety Case Assessment Framework and oversight inspections.

240. As its name suggests, the work of the MHAC is limited to reviewing the formulation and implementation of the major hazards regulatory framework. Its role in OHS regulation is well-defined by virtue of that limited focus. In contrast, the HSWG must be able to review and advise on all OHS issues across all industries.

Recommendation

241. In my view, the HSWG should be abolished, to be replaced by a statutory advisory committee of equivalent status to that of the existing WorkCover Advisory Committee. (In what follows, I will refer to this proposed body as the OHS advisory committee).

242. In making this recommendation, I am mindful of the fact that any structural change, however minimal, can be disruptive, but I am convinced that this change is warranted.

243. The role and function of any committee that is charged with the responsibility of advising the Board in relation to one of the Authority's regulatory functions must be clearly defined and understood by its members, the Authority, and the community generally. The committee must be accountable to the Board in relation to the advice it provides, and the recommendations it makes.

244. Equally, in my view, the Board must be accountable to the committee in relation to the action it takes, or does not take, in response to the advice or recommendations it receives from the committee. For the sake of clarity, and to ensure that the Board is fully advised and informed (in a transparent and accountable manner) with respect to OHS issues as they arise for the Board's determination, an OHS advisory committee should be established under the Act.

245. The functions of the OHS advisory committee would be set out in OHSA, as would provisions for the appointment of members, similar in structure to the provisions governing the WAC (s.31A of ACA). The committee would have the sole responsibility for advising the Board in relation to the Authority's OHS objectives and functions. In short, the existing WorkCover Advisory Committee should be divested of its advisory role in relation to OHS, and should henceforth concern itself solely with advising the Board on the Authority's rehabilitation and compensation objectives.

246. In my view, the proposed OHS advisory committee should consist of 18 members. I would envisage representation of the respective "interests" of the regulator (2), the Government (through the responsible department) (2), employers (6) and employees (6). The other two members of the committee would be independent OHS experts, preferably an academic and a consultant.

247. A good model for the committee would, in my view, be the Reference Group established by the Minister for the purpose of assisting me in the conduct of this review. As explained in Chapter 1, that group ultimately consisted of two representatives from each of:

- the Authority (the Chair and the Executive Director of WorkSafe Victoria);
- DTF (a deputy secretary and officer);
- VECCI (the Chief Executive and the IR manager);
- AiG (the Victorian Director and the OHS manager);
- VTHC (the President and the OHS manager);
- AWU (the Secretary and the OHS manager); and
- CFMEU (the Secretary and the OHS manager).

As a result, there was a good mix of seniority and expertise, which would be critical to the consultative process in which the proposed OHS advisory committee would be engaged.

248. As to the representation of employer interests, it seems to me to be vitally important that small business be represented on the advisory committee. An obvious and appropriate source of small business representatives would be the Small Business Advisory Council. I would envisage two of the committee members being nominated by that Council to represent small business interests on the OHS advisory committee.

249. Appendix 1 to this chapter is a summary of the role of representative organisations in other Australian jurisdictions.

The new advisory committee: getting beyond the slogans

250. In his essay, "Responsive Regulation for Australia", Professor Braithwaite said:[130]

> *"What is needed is the cultivation of mutual respect among the key constituencies in any arena of regulation. This means each side giving credit when credit is due to the other. It means business giving credit to advocacy groups that pass up a golden opportunity to take a cheap shot against an organisation that is sincerely trying to improve*

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130 Braithwaite, J., "Responsive Regulation for Australia" in Grabovsky, P. & Braithwaite, J., *Business Regulation and Australia's Future*, AIC, Canberra, 1993, pp.91-2.

> *its regulatory performance. It means advocacy groups giving credit to industry and governments when they accomplish regulatory improvements. It also means respecting the obligation of the other to engage in public criticism of one's performance when it is in fact sloppy. The stakes are too high with questions of business regulation for anyone to expect or demand that the community be cut out of a robust public debate on regulatory standards. A regulatory culture where neither punches nor pats on the back are pulled is what a healthy democracy should aspire to."*

251. The success of the proposed OHS advisory committee will depend on the preparedness of the members of the committee to engage fully and frankly with each other on the issues referred by the Board to the committee for its consideration and advice. Having participated in the Reference Group discussions, I have observed first hand how well such a consultative mechanism can function.

252. During the consultations, employers and employees alike have affirmed the principle that the health and safety of any person at work in Victoria should not be at risk. Solidarity on that fundamental principle should underpin the participation and involvement of members of the proposed OHS advisory committee.

253. As a participant in the formulation of health and safety standards, each member of the committee would have a responsibility to enter into dialogue with the other members of the committee. That responsibility comes with the privilege of being a participant. I do not mean to suggest that the committee would be concerned with reaching – or would be likely to reach – an agreed position on each issue that it considers. Rather, the committee members would need to operate in a spirit of dialogue – talking with, rather than at, each other.

254. In advocating "both effective, balanced regulatory review and effective, balanced consumerism", Braithwaite[131] argues that:

> *"We have a greater chance of efficient and effective regulation if we have a regulatory culture where regulation reviewers and consumerists actually listen to each other and respect the concerns of the other; we have a lesser chance of cost-effective regulation is these two constituencies see their mission as to the destroy the other, taking it in turns to win battles without either side winning the war."*

255. The fact that there were differences of opinion between the members of the OHS advisory committee on a particular issue would make the Board aware of that diversity of opinion, as a reflection of the wider community views on the particular issue. The critical thing is to have what Braithwaite describes[132] as a –

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131 Braithwaite, J., 1993, p.87.

132 Braithwaite, J., 1993, p.92.

> *"policy space where mutually respecting interest groups really talk to each other about their concerns. Then genuinely creative ways of constituting win-win solutions to the regulatory game can be explored. In Australia, we have a long way to go before reaching such a pass. On the other hand, there is much more of the makings of such a constructive regulatory culture in Australia than in many other countries. There exists in Australian regulatory communities a kernel of mutual respect and fair play that can be nurtured."*

Role of representative organisations in other Australian jurisdictions

New South Wales

New South Wales abolished its tripartite OHS body in 1989. It has been replaced by the non-statutory Workers Compensation and Workplace Occupational Health and Safety Council of New South Wales, the key function of which is "to advise the Minister on a systemic approach to the prevention of workplace injury, injury management/return to work and compensation issues.

WorkCover New South Wales also convenes thirteen industry reference groups whose members are drawn from: nominees from peak employer and worker organisations; industry specialists with expertise in OHS, injury management and workers' compensation; WorkCover officers; and representatives from the insurance industry. These groups identify priority industry-specific issues; provide a consultation forum for the Authority; research, develop and promote industry-specific solutions; promote the integration of solutions into industry practice; disseminate information to the whole industry sector; and collaborate with WorkCover's industry teams to improve OHS performance.

Queensland

The participation of industry is an important component of the "framework for preventing or minimising exposure to risk" under Queensland's *Workplace Health and Safety Act* 1995. Among other things, participation is to be achieved via the establishment of a workplace health and safety board, the primary function of which is to "give advice and make recommendations to the Minister about policies, strategies, allocation of resources, and legislative arrangements…" [s.45(1)].

Western Australia

Western Australia has a statutory central tripartite body, WorkSafe Western Australia Commission, which is "the driving force behind Western Australia's workplace safety laws, policies and programs". It meets on a monthly basis to examine, review and make recommendations to the Minister on a wide range of occupational health and safety matters. The Commission consults with government departments, public authorities, trade unions, employer organisations and interested parties. It develops and publishes OHS information, standards, specifications, codes of practice and other guidance material. In addition, it develops, approves and accredits educational courses for HSRs.

The Commission comprises: an independent chair; the WorkSafe Western Australia Commissioner; public service officers (2); employer representatives (3); union representatives (3); and OHS experts nominated by the Minister (3).

South Australia

A central tripartite policy-making and review body existed in South Australia until 1994, whereupon it was downgraded to an Occupational Health, Safety and Welfare Advisory Committee [ss.7 – 13].

Tasmania

Tasmania abolished its tripartite body in 1995 and replaced it with the Workplace Safety Board of Tasmania.

ACT

The ACT's *OHS Act* 1989 provides for an Occupational Health and Safety Council which may advise the Minister on a number of matters including: the operation of the Act, the regulations and associated laws; the approval of codes of practice; and provision of education and training.

Chapter 8: Duplication and the regulatory burden

256. I am asked to recommend changes to the legislative framework[133] –

(a) "to remove unnecessary duplication and unnecessary regulatory burden (sic) on business, without compromising safety"[134]; and

(b) "to ensure consistency [and] transparency and [to] address duplication in the enforcement obligations under the OHS Act and other health and safety legislation".[135]

257. The first of these is similar to paragraph 9(i) of the terms of reference for the inquiry currently being conducted by the Productivity Commission, which calls for -

> *"(i) options to reduce the regulatory burden and compliance costs imposed on businesses of different sizes across Australia by the existing legislative structures for... OHS, within the context of the national objective to improve the workplace health and safety of workers."*

258. I have taken "other health and safety legislation" in paragraph 5 of my terms of reference to include not just the OHS legislation[136] but also –

(a) the other Victorian Acts which contain provisions relevant to health and safety – for example, ESA and EPA[137]; and

(b) the health and safety legislation of the other Australian jurisdictions.

259. For the purposes of this chapter, I take each of the following to be an instance of "duplication" -

(a) duplication of laws i.e. where more than one health and safety law applies to a particular set of circumstances;[138]

(b) duplication of regulatory response within Victoria i.e. where more than one Victorian regulator has a health and safety responsibility in relation to a particular set of circumstances; and

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133 The "existing legislative framework" comprises OHSA, EPSA, DGA and RTDGA, and the regulations made under each of those Acts.

134 Term of Reference 3.

135 Term of Reference 5.

136 A reference to "the OHS legislation" is a reference to OHSA, EPSA, DGA, RTDGA, and the regulations made under each of those Victorian Acts. The RTDGA adopts the Commonwealth "template" legislation, the *Road Transport Reform (Dangerous Goods) Act* 1995.

137 Brooks, A, *Occupational Health and Safety Law in Australia,* 4th ed., CCH, Sydney, 2003, pp.8; 152 – 58; 161.

138 The applicable laws might be contained in the one Act or regulations, or be contained in separate Acts and/or regulations. An example of the former are the distinct duties imposed on an employer under s.21(1) and s.22 of OHSA.

(c) duplication of jurisdictional response i.e. where a dutyholder who carries on business in Victoria also carries on business in another jurisdiction, and whose business as a whole is subject to the health and safety laws of both jurisdictions. (If the business is carried on in more than two jurisdictions, the issue becomes one of "multiplication" rather than "duplication").

260. This chapter concerns all three types of "duplication". Furthermore, although paragraph 3 of my terms of reference refers specifically to the "regulatory burden on business", it is important to point out that -

(a) the "regulatory burden" is felt by all persons upon whom an obligation is imposed by the OHS legislation, not just businesses;

(b) "regulatory burden" is a function of a variety of factors, of which duplication is only one; and

(c) a duplication of laws (and therefore of regulatory response) may also lead to uncertainty and confusion as between regulators about the nature and extent of their respective safety responsibilities.

261. As to the last point, Professor Russell noted in his recent report entitled *The Next Wave of Port Reform* that:

> *"There is a substantial need for the improvement in arrangements for port safety. Between 1995 and 2001, accountabilities for safety in the port environment were fragmented excessively.*
>
> *Safety is an area where there must be no doubts or gaps as to roles and responsibilities. It is not a matter that can be negotiated when a critical incident arises, nor should it rest on the goodwill of agencies. The institutional arrangements introduced by the port reform package have left significant "grey areas" which have required a series of memorandums to be concluded between agencies to resolve working arrangements."*[139]

262. Any removal of "duplication" from OHS regulation will not only ease the burden on business, but should also define with greater precision the respective responsibilities of co-regulators.

263. Before looking at each type of duplication, I will briefly consider what constitutes "good" regulation, and the notion of "regulatory burden".

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139 Russell, E.W. *The Next Wave of Port Reform in Victoria,* Department of Infrastructure, Melbourne , 2001, p.112.

"Good" regulation

264. In its annual report on regulation review and reform issues,[140] the Productivity Commission noted that there had been, over the last decade or so, "a significant increase in new regulations associated with the environment, health and safety. It went on to say:

> *"In these areas and elsewhere, it is generally recognised that some degree of regulation is essential for a properly functioning society and economy. The challenge for government is to deliver effective and efficient regulation – regulation that is effective in addressing an identified problem and efficient in terms of minimising compliance and other costs imposed on the community. Poor quality regulation can impose unnecessary costs, impede innovation and create unnecessary barriers to trade, investment and economic efficiency."*[141]

265. In recent years there has been an increasingly critical scrutiny of regulation as a means of delivering or implementing policy objectives. In this context the notion of "good" regulation has gained currency in Australia and the UK. Only recently, the UK Better Regulation Task Force (an independent advisory group established in the UK in 1997) revised its "Principles of Good Regulation" leaflet, which was first published in 1998, and revised in 2000.[142]

266. There are five principles of good regulation. Regulation and its enforcement should be proportionate, accountable, consistent, transparent and targeted. The terms of reference of the UK Task Force are "to advise the Government on action to ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted."

267. In a similar vein, the Chairman of the Productivity Commission referred, in an address to the Small Business Coalition in March 2003, to the "characteristics of 'good' regulation":

> *"To be 'good', regulation must not only bring net benefits to society, it must also:*
>
> - *be the most effective way of addressing an identified problem; and*
> - *impose the least possible burden on those regulated and on the broader community."*

268. He then identified five "design features" that regulation would need to exhibit to meet those tests: (a) it should not be unduly prescriptive; (b) it should be clear and concise;

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140 Productivity Commission 2003(a), *Regulation and its Review 2002-03*, Annual Report Series, Productivity Commission, Canberra.

141 Productivity Commission, 2003(a), p.1.

142 For a discussion of what the Better Regulation Task Force said about the independence of regulators, see Chapter 6.

(c) it should be consistent; (d) it must be enforceable; (e) it must be administered by accountable bodies in a fair and consistent manner, and be monitored and periodically reviewed to ensure that it continues to achieve its aims.

269. In a later address which the Chairman of the Commission gave to the Minerals Council of Australia's Annual Industry Seminar in June 2003, he referred to the "legitimate concern" of the mining industry that "regulation ... is appropriate and not unnecessarily costly in its effects, including the costs of compliance." He referred to the principle of "minimum effective regulation", as highlighting -

> *"a need for regulation that can both meet its objectives and do so at least cost. This objective is of course shared by the business community generally (and not least by the* small *business community, which is arguably least well placed to cope with regulatory burdens)."*

Justifying recommendations for change

270. In devising any changes to the OHS legislative framework I have borne steadily in mind these criteria of "good" regulation. The consultations have emphasised the concerns of Government, of the business community in general and of small business in particular, that any regulatory scheme be both effective and cost-efficient.

271. I have also been mindful of the alternative means that are available to policy-makers for delivering or implementing policy objectives. My terms of reference require me to make recommendations in relation to legislative change. In considering whether any particular legislative change is necessary, I have considered whether the policy objective can be achieved as effectively and efficiently by other means (for example, by education of dutyholders, incentives or self-regulation).

272. My working presumption has been that no further regulation should be recommended unless it is the best (i.e. the most effective and efficient) means of achieving a particular objective.[143] I have not had the time, nor the resources, to subject each of the recommendations for legislative change I have made to any cost-benefit analysis. As discussed in Chapter 12, there are reasons for thinking that cost-benefit analysis has limitations when – as with OHS law – the benefits consist of injuries and deaths prevented. At the same time, as I there explain, cost-benefit analysis is at the centre of OHS compliance, because of the "risk-cost calculus".

273. Overwhelmingly, the recommendations I am making can be seen as conferring benefits without additional cost and even, in some cases, reducing the cost. The OHSA is an existing "regulatory burden". Many of my recommendations are aimed at making compliance easier (but not less stringent) – by clarifying the Act, by

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143 As to the alternatives to prescriptive regulation, see the Office of Regulation Reform's, *Principles of Good Regulation,* pp.2-3. Access via Department of Innovation, Industry and Regional Development's website, 15 December 2003: http://iird.vic.gov.au/CA256ADF00214A61/ImageLookup/PDF/$file/princip.pdf.

encouraging the Authority to publish its interpretations of the Act, by ensuring transparent, speedy internal review of decisions, and by upgrading the ability of inspectors to give advice when required.

274. If implemented, these recommendations should lighten the regulatory burden while at the same time enhancing safety.

Regulatory burden

275. According to one definition of "regulatory burden", it means, in relation to businesses, "the costs imposed on businesses by the regulatory framework – which consists of legislative, regulatory and taxation measures".[144] These costs include:

(a) the costs involved in meeting the substantive requirements of the regulatory framework;

(b) the administration and paperwork costs involved in complying with the regulatory framework;

(c) the costs arising from the disincentives, distortions and duplication attributable to the regulatory framework; and

(d) other costs (such as psychological stress) associated with compliance.

276. Bickerdyke and Lattimore[145] identify three broad areas that comprise the "regulatory burden" on business:

> *"First, there is the time, effort and financial costs involved in complying with government regulatory or taxation requirements. A central part of firms' dissatisfaction has been increased irritation with the paperwork and compliance burden associated with the taxes and regulations.*
>
> *Second, there are the negative impacts on firms' productivity arising from any disincentives, distortions and duplication caused by these government requirements; and*
>
> *Third, there may be various other non-economic costs involved."*

277. I described in Chapter 2 the strong "safety consensus" in the Victorian community. No-one has suggested that occupational health and safety in Victoria should not be the subject of government intervention and regulation. Likewise, the Productivity Commission identified "strong support for government intervention through regulation in OHS", and has therefore not revisited the threshold question in its current inquiry.[146]

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144 Bickerdyke, I. & Lattimore, R., *Reducing the Regulatory Burden: Does Firm Size Matter?*, Industry Commission Staff Research Paper, AGPS, Canberra, December 1997, p.1.

145 Bickerdyke I. & Lattimore, R., 1997, p.1.

146 Productivity Commission, 2003(a), p.xxv.

278. Like the Productivity Commission, I take as my starting-point the proposition that the health and safety of persons at work, and of members of the public who are affected by workplace activity, is paramount, and should never be compromised. (As to the inclusion in OHSA of the paramountcy principle and other principles, see Chapter 2).

279. It is inevitable that the pursuit of this paramount social objective through state regulation will impose some burden on the economic efficiency of businesses. Paragraph 3 of my terms of reference essentially requires me to consider how, and to what extent, any unnecessary "regulatory burden" on business can be eased, without compromising safety.

280. As Bickerdyke and Lattimore noted in 1997 –

> *"the wishes of business to reduce the burden need to be traded off against the requirement that regulations and taxes continue to be effective in meeting their objectives".*[147]

In the same vein, the Australian Council of Trade Unions noted (in its submission[148] to the Productivity Commission) that the objective of the National OHS Strategy -

> *"is to reduce the burden of injury, illness and disease, not to 'reduce regulatory burden' and compliance costs imposed on business".*

281. The first of the "three broad areas" of regulatory burden is compliance costs. Bickerdyke and Lattimore identify two distinct sub-categories of compliance costs, those associated with the substantive aspects of regulations and those imposed by the administrative burden.[149] A compliance cost in the first sub-category arises when, for example -

> *"businesses may be obliged to buy and install certain equipment to protect the safety of their workers and comply with an OH&S regulation. Or they may have to purchase a variety of safety manuals".*[150]

282. Some of the concerns of business (particularly small business) –

> *"relate to the administrative processes (or lack of them) that exist to achieve the requirements of regulations or taxes – that is the way regulations are 'delivered' to businesses".*[151]

Examples of these concerns are:

(a) the way in which enforcement is achieved;

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147 Bickerdyke, I. & Lattimore, R., 1997, p.13.

148 ACTU, *Submission to the Productivity Commission Inquiry National Workers' Compensation and Occupational Health and Safety Frameworks*, July 2003, D No. 23/2003, p.19.

149 Bickerdyke , I. & Lattimore, R., 1997, p.9.

150 Bickerdyke I. & Lattimore, R., 1997, p.9.

151 Bickerdyke I. & Lattimore, R., 1997, p.45.

(b) the level of prescription (excessive or not enough);

(c) uncertainty about regulatory requirements (the purpose; what is required; when it is required);

(d) confusion between legislative requirements and voluntary "guidelines"; and

(e) the costs of dealing with a large number of regulators (and a variety of jurisdictions), and confusion about who the relevant regulator/administrator is for any given regulation.[152]

283. The Victorian Employers' Chamber of Commerce and Industry submitted[153] to the Productivity Commission in its current inquiry that:

> *"The knowledge of regulations is poor. Authorities keep developing regulations and Codes of Practice while there is minimal knowledge [of] and poor compliance with what was there previously. Little evaluation is done to determine if this cascade of additional or new obligations has a beneficial result.*
>
> *...*
>
> *The effect of the regulatory burden is that most employers are probably non compliant with something they are unaware of. But to ask the question 'what do I need to do?' would see them swamped with a truckload of legislation, regulation, Court precedents, Codes and guidance material. Most of it may not apply to their business but they would need to read it all first to decide what did and did not apply."*

284. These are well-founded concerns, and they need to be addressed. As a result, most of what I am recommending – particularly in Parts 3 and 5 of this Report – is directed at removing uncertainty and confusion, and enabling the Authority and the inspectors to provide better answers, more often, to the question "What do I need to do to comply?"

The Robens approach to "regulatory burden"

285. The adoption of performance-based standards in preference to prescriptive standards was designed to achieve – amongst other objectives – an easing of the regulatory burden. As COAG declared in 1997:

> *"Regulatory instruments should be performance-based, that is, they should focus on outcomes rather than inputs. 'Deemed to comply' provisions may be used in instances where certainty is needed. In such cases, regulations might reference a standard or a number of standards deemed to comply with the regulation. There should be no restrictions*

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152 Bickerdyke I. & Lattimore, R., 1997, p.45.

153 VECCI Submission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, May 2003, p.12.

> *on the use of other standards as long as the objectives of the regulations are met"*[154].

286. The Robens Committee (see Chapter 9) recommended a shift from prescriptive to performance-based regulation. The Committee identified a number of defects in the statutory scheme then in force in the United Kingdom. The "first and perhaps most fundamental" of these was that there was "too much law". There were -

> *"nine main groups of statutes ... supported by nearly 500 subordinate statutory instruments containing detailed provisions of varying length and complexity."*

287. The second defect identified by the Robens Committee was that the law was "intrinsically unsatisfactory", in that it was "badly structured". In the Committee's view –

> *"the attempt to cover contingency after contingency has resulted in a degree of elaboration, detail and complexity that deters even the most determined reader."*

The Committee noted that the law was "written in a language and style that renders it largely unintelligible to those whose actions it is intended to influence".[155]

288. The third major defect of the existing scheme was the "fragmentation of administrative jurisdictions".[156] (I have already referred to Professor Russell's observations on the fragmentation of accountabilities for safety in the port environment in Victoria – see para 261 above). The Robens Committee said:[157]

> *"The machinery of government cannot be monolithic. But if there is no 'right' way of dividing up administrative responsibilities, some ways are better than others. What disturbs us about industrial safety and health administration is that there are too many demarcation lines, and that they appear to have emerged more by historical accident than by design. The pattern of control is one of bewildering complexity. There are nine separate groups of health and safety statutes dealing, respectively, with factories, commercial premises, mining and quarrying, agriculture, explosives, petroleum, nuclear installations, radioactive waste disposal and alkali emissions. In England alone responsibilities for administration and enforcement are divided between five government departments (Employment, Trade and Industry, Agriculture, Environment and the Home Office) and seven separate inspectorates (factories, mines, agriculture, explosives, nuclear installations, radio-chemical and alkali). In addition, there is extensive participation by local authorities."*

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154 Council of Australian Governments (COAG), "Principles and Guidelines for National Standard Setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies", endorsed by COAG April 1995, amended November 1997.

155 Robens, A., 1972, p.7.

156 Robens, A., 1972, p.9.

157 Robens, A., 1972, p.9.

289. The Committee considered that this "tangle of jurisdictions" gave rise to a number of problems, as follows. First, there was no clear and comprehensive system of official provision for safety and health at work. There were gaps and overlaps. Overlaps inevitably lead to a duplication of compliance by dutyholders and a duplication of response from co-regulators, and create uncertainty and confusion in the minds of both dutyholder and regulator. Where there is a gap there is, critically, a lack of regulatory response.

290. Secondly, according to the Committee –

> *"the fragmentation of the legislation and its administration makes the task of harmonising, servicing and up-dating the various statutory provisions extremely difficult; and it diffuses and compartmentalises the expertise and facilities that are available to deal with occupational hazards".*[158]

291. The solution to these problems was, in the Committee's view, for the different statutes to be brought under a single administration and, so far as possible, to be revised and replaced by provisions under a single comprehensive enactment.[159]

Fragmentation of Australian OHS regulation

292. Many of the observations made by the Robens Committee apply with equal force to the legislative and administrative frameworks for OHS regulation in Australia. There are nine jurisdictions – Federal, State and Territory – each of which has its own OHS regulatory framework, consisting of Acts, regulations, codes of practice and guidance material.

293. The health and safety obligations imposed on an employer in one jurisdiction differ, to varying degrees, from those imposed on an employer in each other jurisdiction. Taking the construction industry as an example, the final report of the Royal Commission into the Building and Construction Industry noted that nine OHS statutes regulated the industry Australia-wide, while another 30 statutes regulated some aspects of the industry's operations.

294. The Royal Commission identified, in addition, 54 sets of regulations which had some application to the industry, apart from codes of practice, advisory standards and guidelines. The Commission's conclusion was scathing:

> *"The result is a fragmented, disjointed and uncoordinated system of occupational health and safety law and regulation which, when applied to a national industry such*

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158 Robens, A., 1972, p.9.

159 Robens, A., 1972, p.32.

> *as the building and construction industry, is inequitable, wasteful and inefficient"*[160].

The Commonwealth Department of Employment and Workplace Relations (DEWR) has argued that the Royal Commissioner's comments are applicable to any industry.[161]

295. In its submission to the Productivity Commission, DEWR highlighted the regulatory burden that is imposed on business by the fragmentation of laws. Appendix 1 to the submission sets out the regulatory framework that applies to the proprietor of a small to medium hotel. As at 1995, such an operator was required to comply with up to 12 statutes and six codes of practice. In 2003, according to DEWR, the equivalent regulatory framework comprises 10 statutes, 25 regulations, and eight codes of practice. Three of the applicable Acts are Victoria's OHSA, EPSA and DGA.

296. One of the national targets of the National Occupational Health and Safety Strategy 2002-2012, endorsed by the Workplace Relations Ministers' Council on 24 May 2002, is to:

> *"sustain a significant, continual reduction in the incidence of work-related fatalities with a reduction of at least 20 per cent by 30 June 2012 (and the reduction of 10 per cent being achieved by 30 June 2007."*

All parties to the National Commission (being the Federal, State and Territory governments, the ACCI and the ACTU) have accepted responsibility for the development and implementation of the strategy.

297. The "statement of commitment" contained in the strategy document reads, in part:

> *"We [the parties to the NOHSC] all share a responsibility for ensuring that Australia's performance in work-related health and safety is continuously improved.*
>
> *This Strategy will focus our efforts in working together to implement interventions to dramatically improve Australia's occupational health and safety performance over the next decade and to foster sustainable, safe and health[y] enterprises that prevent work-related death, injury and disease".*[162]

298. One of the "indicators of success" of the strategy will be the development and implementation by governments of "more effective OHS interventions".[163]

How significant is OHS law as a regulatory burden for business?

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160 Cole, T.R., *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety,* vol 6, Commonwealth of Australia, Canberra, 2003, p.15.

161 Department of Employment and Workplace Relations (C'wlth), *Submission to the Productivity Commission, Inquiry into National Workers' Compensation and Occupational Health and Safety Arrangements*, September 2003, p.5.

162 National Occupational Health & Safety Commission, *National OHS Strategy 2002-2012*, NOHSC, Canberra, p.v.

163 p.iv.

299. In their paper for the Productivity Commission, Bickerdyke and Lattimore cite surveys undertaken respectively by the Australian Chamber of Commerce and Industry (ACCI),[164] the Chamber of Manufactures of NSW (COM), and the Australian Bureau of Statistics (ABS).

300. The ACCI survey was the most comprehensive of the three, with over 2500 businesses responding. Businesses were asked to indicate the relative importance of 57 issues, one of which was OH&S regulation. Bickerdyke and Lattimore disaggregated the survey's findings according to size of business. The following table sets out the rankings given in relation to some of the issues:

Regulatory Burden	1-19 employees	20-99 employees	100-999 employees	1000+ employees
Frequency and complexity of changes to federal tax rules	1	2	2	3
Tax compliance	2	4	3	1
Frequency and complexity of changes under state tax rules	2	6	5	7
Unfair dismissals	4	5	6	6
FBT	5	1	1	5
Workers Compensation	9	8	8	8
OH&S Regulation	21	14	10	10

301. In the COM survey, OH&S ranked third overall of the regulatory burdens of greatest concern to manufacturing firms, after business taxation and superannuation. Bickerdyke and Lattimore concluded that concern about OH&S "tended to increase along with firm size" but did not feature prominently in either the ACCI or ABS surveys.[165]

302. Based on the consultations I have conducted, I would express the opposite view - that is, concern about OHS tends to decrease as the firm gets larger. Although my survey of business was unsystematic, my clear impression was that larger businesses felt much less apprehensive about OHS compliance than did small business.

303. The chief reason for the difference seemed to be that larger businesses had one or more managers with responsibility for OHS compliance or, more often, for environmental and OHS compliance. These managers had their share of issues to raise about the OHS scheme but it was small business proprietors who expressed particular concern about the difficulties both of working out what was required and of implementing the necessary measures.

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164 Details of the respective surveys are set out in Appendix D to their paper.

165 Bickerdyke, I. & Lattimore, R., 1997, p.85.

Duplication of laws

304. There are four principal Acts which regulate occupational health and safety in Victoria: OHSA, EPSA, DGA and RTDGA. Each of these Acts (and the regulations made under them) is administered and enforced by the Authority.

305. The question arises as to whether the provisions of these Acts should be rationalised, and consolidated into the one piece of legislation.

306. The OHSA was assented to in 1985, as was DGA. In his second reading speech in relation to the Occupational Health and Safety Bill, the then Minister for Employment and Industrial Affairs said:[166]

> *"The Bill is a comprehensive, enabling piece of legislation. Over time, older, more detailed Acts such as the boilers and pressure vessels, lifts and cranes and scaffolding Acts[167] will be repealed and replaced by regulations under this single occupational health and safety enactment.*
>
> *This is in line with modern developments in legislative process. It will assist employers and workers who will have to only refer to a single Act to find out their rights and obligations. Detailed regulations will be made under the Bill covering specific problems relating to specific industries such as standards for scaffolding and so forth, and covering problems experienced throughout the workforce as a whole, for example, repetition injury, industrial deafness and so on."*

307. Similarly, the Dangerous Goods Bill was to be a single, comprehensive enactment:

> *"It streamlines legislation covering all dangerous goods. Three Acts, the Liquid Fuel Act 1941, the Liquefied Petroleum Gas Act 1958, and the Dangerous Goods (Road Transport) Act will be repealed immediately. The Explosives Act 1960, the Inflammable Liquids Act 1966 and the Liquefied Gases Act 1968 will repealed when appropriate regulations are drawn up.*
>
> *...*
>
> *This rationalisation will greatly assist industry and will result in more efficient administration of controls over dangerous goods. Any person wanting to know their obligations has a single Act of Parliament to which to refer."*

308. Thus, it was clearly contemplated in 1985 that there would be only two regulatory regimes, being -

(a) a "single occupational health and safety enactment" which, in addition to the regulation of workplace health and safety, would cover boilers and pressure vessels, lifts and cranes, and scaffolding; and

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166 *Hansard*, 30 May 1985, p.58.

167 *Boilers and Pressure Vessels Act 1970*, *Lifts and Cranes Act 1967* and *Scaffolding Act* 1971.

(b) a single dangerous goods enactment.

309. The first of these objectives was never achieved. An attempt was made in 1989 to amend OHSA to subsume into it the Acts which regulated boilers and pressure vessels, lifts and cranes, and scaffolding respectively. The then Minister for Industry, Technology and Resources said:[168]

> *"The safety requirements for equipment, whether in a workplace or elsewhere, do not differ. By bringing the statutory controls for this equipment under the Act, the government can avoid a potentially confusing and costly duplication of legislative controls.*
>
> *The Bill therefore amends the [OHSA] to extend the operations of the Act to cover safety in relation to the design, construction, installation and use of lifts, cranes, amusement structures, boilers, pressure vessels and scaffolding in situations where a workplace is not present. The ambit of the [OHSA] is therefore widened to include public health and safety in the domestic non-workplace context in this limited area."*

310. The counter argument was that there was "a need for specialist legislation administered by specialist people who have been properly trained in the area of health and safety".[169] It was also said:[170]

> *"[T]he Bill will replace the specialist inspectorate duties which were formerly encompassed in the Boilers and Pressure Vessels Act, the Lifts and Cranes Act, and the Scaffolding Act, and it will replace those duties under the general terms of the [OHSA]. This will lead to a reduction in the safety standards in the workplace.*
>
> *Areas such as pressure vessels, lifts and cranes and scaffolding are technical areas which require regular inspection to be carried out by those with sound knowledge of their operation. The transfer of the powers of inspectors to the provisions of the [OHSA] will mean a reduction in the quality of inspection and also a lengthening of time between each particular inspection."*

311. The Opposition argued in the Legislative Council that specialist Acts were required to protect workers and the public and that the provisions for each should not be rolled into the one Bill.[171] Reliance was placed on a letter from the Australian Chamber of Manufactures, arguing that-

> *"far from avoiding possible confusion by the intended amendment, to encompass matters of public safety in an Act focusing on health and safety in the workplace has the potential of creating confusion. The issues associated with public safety as those associated with workplace health and*

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168 *Hansard*, 11 May 1989, p.794.
169 *Hansard*, 23 May 1989, p.872.
170 *Hansard*, 23 May 1989, p.874.
171 *Hansard*, 23 May 1989, p.877.

> *safety are sufficiently important to warrant distinct pieces of legislation."*

312. The attempt to consolidate failed. EPSA was enacted instead.

Should OHSA, EPSA and DGA be consolidated?

313. Are there any good reasons, in 2003 and beyond, for maintaining separate legislative regimes for regulating occupational health and safety, the safety of prescribed equipment, and dangerous goods, given that the same regulator is responsible for all?

314. OHSA - and the regulations made under that Act - are primarily concerned with the health and safety of "persons at work"[172] and with safe "work environments".[173] But s.22 does impose a duty directed to public safety. Employers must ensure that non-employees are not exposed to risks to their health and safety arising from the conduct of the undertaking. As noted in the Discussion Paper[174], the term "undertaking" has been interpreted widely. The section does not impose any geographical limitation on the operation of the duty; the duty is owed to non-employees whether or not they are physically at the workplace.

315. The other Acts which the Authority administers do not have the workplace as their point of reference. Rather, EPSA, DGA and RTDGA - and the regulations made under those Acts – focus on the risks created by particular classes of things, wherever those risks may arise. Thus, the protection afforded by DGA and RTDGA extends to <u>any</u> person whose safety may be imperilled by –

> *"the manufacture, storage, transport, transfer, sale and use of dangerous goods and the import of explosives into Victoria."*

316. Unlike OHSA, both DGA and RTDGA protect property as well as persons. Thus, the purpose of the RTDGA is "to regulate the transport of dangerous goods by road in Victoria in order to promote public safety and protect property and environment."

317. To avoid overlap with OHSA, s.5 EPSA expressly provides that the Act does not apply to-

(a) a workplace within the meaning of OHSA (except a workplace which is being used for the manufacture, construction, alteration, maintenance or repair of relevant equipment for use outside a workplace); or

(b) relevant equipment at a workplace (unless the equipment is being manufactured, constructed, altered, maintained or repaired for use outside a workplace).

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172 Sections 6(a), (b) and (d) OHSA.

173 Section 6(c) OHSA.

174 Maxwell, C., 2003**,** *Occupational Health and Safety Act Review: Discussion Paper*, Occupational Health and Safety Act Review Secretariat, Melbourne, October, para 250.

318. When the Equipment (Public Safety) Bill was introduced in 1994, the then Minister for Industry Services said:[175]

> *"When the [OHSA] was drafted there was a clear intention that the [A]ct would replace all of the equipment safety legislation in place at the time – that is, the [OHSA] would take the place of the Lifts and Cranes Act, Boilers and Pressure Vessels Act and Scaffolding Act. Powers to revoke those Acts were included in the [OHSA].*
>
> *Over time it has been found that the [OHSA] does not provide for public safety as comprehensively as does the earlier legislation.*
>
> *...*
>
> *The government wants to rationalise the number of pieces of legislation covering equipment safety and ensure that the legislation is appropriate to the need for statutory control.*
>
> *The earlier equipment safety legislation does not allow for that. These [A]cts, for the most part, are drafted in the older, prescriptive, inflexible language which does not suit a modern implementation and enforcement approach.*
>
> *...*
>
> *The [B]ill's primary function is to provide a clear, modern statutory control over the use of potentially dangerous equipment used in the public domain. In doing that an opportunity arises to rationalise the regulatory controls over equipment generally and so produce a better environment for business in Victoria."*

319. The main purpose of EPSA is to "provide for public safety in relation to prescribed equipment and equipment sites." The objects of the Act are concerned with the "health and safety of persons" and the protection of people generally in relation to prescribed equipment.[176]

320. Part 3 of EPSA, which deals with the appointment and powers of inspectors for the purposes of that Act, is in substantially similar terms to Part V of the OHSA. Section 12(2) of EPSA provides that an inspector appointed under s.38(1) of OHSA is deemed to be an inspector under EPSA. Similarly, inspectors appointed under OHSA are inspectors under DGA.

321. There is, however, a disconformity between the powers conferred on inspectors under OHSA, EPSA and DGA, and the powers conferred on "authorised officers" under the *Road Transport Reform (Dangerous Goods) Act* 1995 (which is substantially adopted by the RTDGA).

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175 *Hansard*, 31 March 1994, p.779.

176 Much of EPSA is, nevertheless, based on the language of OHSA. For instance, the duties imposed by s.8(1) of EPSA on manufacturers, designers, importers and suppliers of prescribed equipment are (but for a few words) in the same terms as the duties imposed by s.24(1) of OHSA on manufacturers, designers, importers and suppliers of plant.

322. As an example of this disconformity, I set out a provision from each of OHSA, DGA and the Commonwealth Act.

Section 39(1)(a), OHSA:	"An inspector may for the purpose of the execution of this Act or the regulations enter inspect and examine at all reasonable times by day or night any workplace which the inspector considers it necessary to enter inspect or examine for that purpose."
Section 17(1)(a), DGA:	"An inspector shall have power to make such examination and inquiry as is necessary to find out whether this Act is being complied with and for that purpose the inspector may at any time with such assistance as the inspector requires enter any premises, vehicle, ship or boat at or in which the inspector believes on reasonable grounds that dangerous goods or any container, equipment, fittings, piping or appliance used for or in connexion with the manufacture, supply, transfer, storage, transport, sale, use of dangerous goods or the import into Victoria of explosives may be found …"
Section 18(1), Commonwealth Act:	"An authorised officer may, to find out whether this Act is being complied with, enter and search premises if the authorised officer believes on reasonable grounds that he or she will find a thing that has been, is being or is likely to be used in relation to the transport of dangerous goods by road. However, if the premises are unattended or are a residence, the authorised officer may only enter if the occupier consents."

323. DGA was the subject of a review in 1996 by Kinhill Economics.[177] One of the issues considered was whether dangerous goods provisions should remain in a separate Act, or be incorporated into OHSA.

324. The Kinhill review recommended that DGA continue as a separate Act. It said:

> *"A separate Act would signify that dangerous goods pose risks of a complexity and magnitude such as to warrant a separate focus from other areas of workplace and non-workplace safety risk. The dangerous goods legislative model would be more easily comprehended if dangerous goods regulations were called up by a separate dangerous goods Act. Finally, it would facilitate the maintenance of a separate inspectorate dedicated to the dangerous goods. This would be consistent with the Industry Commission's recommendations for the development of skills within health and safety … [C]ontrol of dangerous goods risk calls for particular skills, separate to those in OH&S more generally"*[178].

325. The review further recommended that DGA should incorporate the provisions of RTDGA. It noted in that regard –

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177 Kinhill Economics, *Review of the Dangerous Goods Act 1985: Report,* February 1996.

178 Kinhill Economics, 1996, pp.44-5.

(a) the "desirability of harmonisation of the powers of inspectors in DGA and RTDGA"; and

(b) the "anomalies in penalty provisions between DGA on the one hand, and RTDGA and OHSA on the other.

> *"Bringing penalties in [DGA] towards those in the related legislation would be consistent with the philosophy of these recommendations which is towards a unified and effective regulatory scheme for dangerous goods".*[179]

326. In NSW there will be, from late 2004, a consolidated legislative scheme covering occupational health and safety and dangerous goods regulation.

327. The regulation of dangerous goods is a key part of the current legislative framework. Each of the objects of the Act is, self-evidently, important, and no change should be made which might diminish the profile of dangerous goods risks in the minds of the Authority as regulator, or the general community.

The Acts should be separate but consistent

328. In my view, the three safety acts – OHSA, EPSA and DGA - should remain separate. The reason for maintaining the separation lies in their difference of focus. As pointed out earlier, OHSA is concerned with workplace health and safety – protecting persons at work or affected by the carrying on of work – whereas EPSA and DGA are concerned with the risks created by things – goods and equipment respectively.

329. I see no benefit at all in an omnibus "Workplace and Public Safety Act". This change would simply mean that what are now recognisably separate safety codes would become individual parts of a much larger and much more unwieldy piece of legislation. Like Kinhills, however, I do think that the provisions of RTDGA should be incorporated into DGA. The case for a single dangerous goods code seems to me to be a strong one.

330. What is important, in my view, is for the Authority to make sure that its responsibilities for administering DGA and EPSA are not neglected because of its - admittedly huge – responsibility for administering OHSA. For example, there is now strong public identification of the name "WorkSafe" with workplace safety. Some attention needs to be paid to promoting a different regulatory identity for the Authority in relation to dangerous goods – for example, in enforcing fireworks regulations – and in relation to public safety on fairground and other equipment. The Authority has played a very active part in relation to the well-publicised incidents at the Arthurs Seat Chairlift in January 2003 and the Royal Melbourne Show in September 2003.

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179 Kinhill Economics, 1996, p.50.

331. Likewise, I have recommended in Chapter 28 that the provisions conferring investigation and enforcement powers on inspectors under the three safety codes should be made uniform. Anything less makes the task of inspectors much more difficult and is calculated to increase the cost of regulation.

332. The Authority must also ensure that, both in the training of inspectors and in the setting of their inspection priorities, appropriate emphasis is given to the Authority's responsibilities under DGA and OHSA.

The enforcement of the various safety codes

333. To what extent are OHSA, DGA and EPSA enforced? To what extent is compliance with each Act monitored?

334. In the financial year ended 30 June 2003, WorkSafe recorded 17,854 contraventions under OHSA and 1,402 under DGA.[180] Only three contraventions under EPSA were recorded.

335. In the financial years ended 30 June 2001, 2002 or 2003, there were no prosecutions brought under EPSA, in either the Magistrates' Court or the County Court, and only six prosecutions were brought under DGA, all in the Magistrates' Court.

336. These figures indicate that there is a significant imbalance of regulatory activity by the Authority between OHSA on the one hand and DGA and EPSA on the other. If this is in fact the case – and the Authority has not suggested to the contrary – it is a matter which requires urgent attention. Any resource implications must be considered favourably, given the very high expectations of the community on matters of public safety.

Duplication of regulatory response

337. There are many instances of co-regulation of safety in Victoria. This is what I referred to earlier as "duplication of regulatory response" - where more than one safety regulator has responsibility in relation to a particular set of circumstances. One example is the safety of electrical installations on Victorian construction sites, which is covered by OHSA (administered by the Authority) and by ESA (administered by the OCEI).

338. Another example is the regulation of safety at Victorian ports, which is currently spread across seven agencies – one Federal (AMSA) and six State (MBV, EPA, Fire Brigade, Water Police, Victoria Police, and the Authority). The Authority is responsible for onboard safety (shared with AMSA and MBV), and for the safety of vessels at berth (shared with AMSA and EPA), cargo unloading (shared with AMSA) and landside operations (shared with Fire Brigade and Victoria Police).

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180 The contraventions were under either the Act or the regulations made thereunder.

339. As mentioned earlier, the management of safety in Victorian ports was reviewed in 2001. The terms of reference of the review required a report on "the allocation of responsibilities and adequacy of arrangements for the management of safety in ports". In Chapter 6 of his report,[181] Professor Russell said:

> *"While safety responsibilities were transferred by the Port Services Act 1995 from the former port authorities to various State agencies ..., the funds, staff and expertise in the port setting were not.*
>
> *This deficit in terms of knowledge and resources is felt keenly five years later by these agencies, carrying statutory responsibility usually for regulation, too often without the capacity or experience to deliver satisfactory inspection, enforcement, monitoring or industry training.*
>
> *The relationship between port managers, shipping lines and regulators has been at times combative because enforcement has too often been the only basis of the relationship. The working relationships that should be generated by development of standards, training, education, industry awareness and positive, innovative programs to achieve desired outcomes, is subverted by the lack of resources available to the regulator to engage with the industry.*
>
> ...
>
> *What has emerged has been a reasonably effective performance from the players, however, efficiency may have been compromised at times due to uncertainty regarding which agency had coverage of specific matters and what the hierarchy of decision-making was".*[182]

340. The Authority has acknowledged publicly that –

> *"there are times when WorkCover interacts with the jurisdiction of other Government regulatory agencies. Sometimes the activities of these agencies can overlap and industry stakeholders can be covered by more than one agency"*[183].

341. It might be thought that a duplication of regulatory response to a workplace activity (or an incident that has arisen from that activity) was better than no regulatory response at all. But, unless there is a clear delineation of safety responsibilities as between co-regulators, there is a constant risk that each regulator may assume that the other is regulating a particular workplace or activity when, in fact, neither is doing so. If that occurred, the workplace or activity in question would – unintentionally – remain unchecked, thereby increasing the risk to the health and safety of persons at that workplace.

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181 Russell, E.W., 2001.

182 Russell, E.W., 2001, p.117.

183 VWA website: www.workcover.vic.gov.au./vwa/home.nsf/pages/MOUs.

342. One solution to this problem of overlap is the memorandum of understanding. According the Authority's website[184] -

> *"To promote a co-operative approach, WorkCover has developed Memoranda of Understanding with a number of these regulatory agencies. Each Memorandum establishes protocols to deal with cross-jurisdictional issues and aims to remove duplication of requirements for stakeholders."*

343. The Authority has entered into memoranda of understanding with other regulatory agencies, namely Department of Infrastructure, Australian Maritime Safety Authority (a Commonwealth agency), Country Fire Authority and Metropolitan Fire and Emergency Services Board, Office of the Chief Electrical Inspector, Environment Protection Authority, Office of Gas Safety, Marine Board of Victoria and Department of Primary Industries.

344. The Authority is currently negotiating memoranda of understanding with the Department of Human Services, Victoria Police and the State Emergency Services respectively.

345. As Professor Russell observed, the effectiveness of such memoranda essentially rests on the goodwill of the agencies concerned[185]. In that regard, I note that the Authority/OGS MOU, like other MOUs, is not intended to create legally enforceable obligations between the parties.

Gas and electricity regulation

346. Two of the objectives of the memorandum of understanding between the Authority and the Office of Gas Safety are consistency and the avoidance of duplication of regulatory response. The MOU declares that:

> *"WorkCover and the OGS share the following objectives:*
>
> *...*
>
> *(d) to ensure that consistent approaches to regulation are adopted and that duplication of activities of both parties is avoided as far as feasible in respect of facilities, operations, installations and workplaces over which both parties have regulatory jurisdiction."*

347. In the Discussion Paper, I referred[186] to the areas of obvious overlap between the functions of the Authority and the respective functions of the OCEI and the OGS. I referred in particular to overlap in:

- monitoring compliance with safety standards;
- incident investigations;

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184 VWA website: www.workcover.vic.gov.au./vwa/home.nsf/pages/MOUs.

185 Russell, E.W., 2001, p.112.

186 Maxwell, C., 2003, para 232.

- prosecutions (an electrical incident may involve offences under both the OHSA and the *Electrical Safety Act*); and
- the development of guidance materials and Codes of Practice.

348. I have since had the benefit of discussions with senior officers from the Energy and Security Division of the Department of Infrastructure, and with the Chief Electrical Inspector. It is clear that there is insufficient congruence of function between the Authority on the one hand and OCEI and OGS on the other to justify even considering subsuming the functions of the latter into the functions of the Authority.

349. The OCEI, for example, has functions which extend far beyond electrical safety issues in the workplace. It is responsible for areas such as:

- the integrity of electrical supply;
- approval of electrical equipment and certification of its efficiency;
- consumer protection and public safety, including a particular electrical safety in the home.

350. A more limited change would be to transfer to the Authority the workplace safety functions of these specialist regulators. But I do not consider that even this change is warranted. Even in a workplace, an issue of electrical or gas safety may raise questions relevant to the integrity of supply, which are properly the province of the specialist regulator.

351. Though I have not attempted to evaluate the operational effectiveness of the existing memoranda of understanding, it is clear that there exists between WorkSafe and the specialist regulators the goodwill which Professor Russell identified as the key to success of an MOU.

Duplication of jurisdictions

352. The lack of national consistency and uniformity of regulation of occupational health and safety in Australia has been commented on frequently doing the consultations. In that regard, my terms of reference refer specifically to the inquiry currently being conducted by the Productivity Commission -

> *"to assess possible models for establishing national frameworks for ... OHS arrangements."*

353. In the overview contained in its interim report,[187] the Commission said[188] -

> *"For OHS, the Commission considers that a uniform national regime should be established as a matter of priority. In essence, all jurisdictions agree with the fundamental principle of 'duty of care'. It is the foundation stone of OHS regulation and has been found to be sufficiently robust to accommodate the wide range of circumstances and changes facing the various jurisdictions. There are no compelling arguments against a single national OHS regime, and there are significant benefits, particularly for multi-state employers."*

354. As recently as August 2003, the Victorian Government argued a contrary position[189] -

> *"The Terms of Reference presuppose that current OH&S laws are fragmentary and inconsistent across jurisdictions and, thus, impose an onerous compliance burden upon multi-jurisdictional companies. The Commission has presented no evidence demonstrating the application of inconsistent OH&S standards between different jurisdictions and the associated costs. This is because the differences in standards are minimal in nature and effect. All States have developed similar performance-based legislation founded upon the Robens model and incorporating the key concepts of 'duty of care' and 'practicability'."*

355. In its submission to the Productivity Commission, the Australian Industry Group (AiG) identified two alternatives open to a multi-State employer to satisfy the requirements of all jurisdictions in which it carries on business, as follows:

- *"Establish national standards that ensure the organisation is meeting the requirements of all legislation. This can be difficult in very competitive product markets and the potential arises for conflict between the national standard and what a single jurisdiction requires. Examples include licences and plant certification. OR*

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187 Productivity Commission, 2003(b), *National Workers' Compensation and Occupational Health and Safety Frameworks*, Interim Report, Canberra, October. Retrieved Productivity Commission website, December 2003: http://www.pc.gov.au/inquiry/workerscomp/interimreport/index.html

188 Productivity Commission, 2003(b), p.xxi.

189 Victorian Government Submission, Productivity Commission Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks, 15 August 2003, p.28, retrieved from: http://www.pc.gov.au/inquiry/workerscomp/subs/sublist.html

- *Establish a series of standards that are relevant to each jurisdiction. This approach creates significantly more work and may create confusion within the organisation, particularly when there are movements of staff between jurisdictions. The difficulty of this approach is visible in organisations that have the same people working in two jurisdictions, e.g. businesses based in Albury/Wodonga. This level of administrative complexity can also divert the attention and the resources of the organisation to the administration of the system rather than the practices that are required to develop safer workplaces."*[190]

356. The Productivity Commission cited the conclusion of the Cole Royal Commission that –

> *"there would be no more salutary reform to occupational health and safety law and regulation than a single national scheme comprehensively regulating occupational health and safety in Australia."*

357. In relation to the National OHS Strategy, the Commission commented[191] that:

> *One element that [the strategy] seeks to achieve is a nationally consistent regulatory framework. However, implementation of the strategy rests with the individual jurisdictions and their action plans lack uniformity in both content and pace.*

358. My own view is that the case for uniform OHS legislation is overwhelming. The current system, where the provisions are different in each State and Territory, has a number of indefensible consequences, in particular that –

(a) the level of OHS protection for a person at work varies according to the State or Territory in which he/she works;

(b) the cost of compliance for a multi-State employer is inevitably greater than if there were a single uniform set of OHS laws;

(c) there is huge inefficiency and duplication of effort as individual States take it in turns to review and update their legislation.

359. I am well aware of the manifold difficulties – political, administrative and mechanical – which invariably attend the development of uniform laws. Concerns were expressed to me at the Reference Group that if a "uniform laws" model were adopted, this would have the effect of "slowing down" the process of OHS regulation and standard-setting. Unions are concerned that the "lowest common denominator"

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190 Australian Industry Group Submission, *Productivity Commission Inquiry into National Workers' Compensation and Occupational Health and Safety Frameworks,* 2 February 2004, retrieved from: http://www.pc.gov.au/inquiry/workerscomp/subs/sublist.html

191 Productivity Commission, 2003(b), p.xxv.

would prevail and that individual States would therefore be inhibited if they wished to introduce "best practice" changes.

360. I understand these concerns, and past experience with uniform laws would suggest that they are not without foundation. But there are, I think, reasons for being considerably more optimistic about what could be achieved with uniform laws for OHS.

361. First, there has, for the past several years, been feverish law reform activity across the States, with new legislation in Queensland in 1995, in New South Wales in 2000, and recent reviews of the OHS legislation in Western Australia and South Australia. In an era where the competition for Parliamentary time is acute, governments appear to be giving high priority to improving their OHS laws.

362. Secondly, there is already in existence an active National OHS Commission. I have referred elsewhere in this Report to the important policy leadership of that Commission, which operates, of course, subject to the Ministerial Council. The National Strategy adopted by the Ministers in 2000 is a powerful document, and this suggests that the national commitment to "best practice" OHS legislation is strong and genuine.

363. Thirdly, the OHS field is characterised, as I said in the Introduction, by passionate engagement. I have been impressed by the number of people, both in and out of government, whether working in employer organisations or in trade unions or in universities, who are thinking and writing and arguing publicly about how to improve OHS legislation. It is simply not a subject which, if there were a proper process for uniform law-making, any State or Territory would be allowed to neglect. There is, it seems to me, simply too much momentum for that to occur. Put another way, the quality of the OHS legislation appears to be a matter of substantial reputational importance. No State or Territory would be keen to develop a reputation for dragging the chain.

364. First and last, however, it is the paramountcy of workplace health and safety, and the strength of the community's affirmation of that objective, which in my view makes OHS law a prime candidate for uniform legislation. After all, if the States have managed to implement uniform legislation for third party access to natural gas pipelines[192], surely it would be possible for agreement to be reached on national OHS legislation.

365. A good example of template legislation, particularly relevant to this Review, is the *Road Transport Reform (Dangerous Goods) Act* 1995 (Cth). The Act regulates the transport of dangerous goods by road in the ACT and the Jervis Bay Territory in order

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192 *Gas Pipelines Access (South Australia) Act* 1997 and corresponding laws in every other State.

to promote public safety and protect property and the environment. The Act and the regulations have been adopted by the States and the Northern Territory, in accordance with agreements scheduled to the *National Road Transport Commission Act* 1991, as part of the uniform national road transport legislation envisaged by that Act.[193] The legislation in Victoria which adopts the template Act is the RTDGA, itself a component of the OHS legislative framework.

366. My review is, of course, confined to the Victorian legislative scheme. In the interests of enhancing uniformity – at least incrementally - where an existing piece of legislation in another State appears suitable for adoption in Victoria, I am recommending that that be done.

193 See s.3 of the *Road Transport Reform (Dangerous Goods) Act* 1995 (C'wlth).

PART 3: GENERAL DUTIES: SCOPE AND LIMITS

Chapter 9: The Robens model: historical background

367. In 1972, a British Government Committee of Inquiry into Health and Safety at Work chaired by Lord Robens released a ground-breaking report (the Robens Report) calling for a new approach to the regulation of occupational health and safety.

368. The Robens Report identified a number of major flaws in the existing OHS legislation.

369. In the Committee's view, there was "too much law" regulating occupational health and safety. Much of this law had been developed in a "piecemeal fashion decade after decade".[194] Overwhelmed dutyholders struggled to navigate a complex maze of prescriptive and technical provisions – in the Committee's view, a problem that contributed to "apathy" about health and safety issues.[195] Furthermore, maintaining and updating this body of law was "an endless and increasingly hopeless task"; thus, the legislation was incapable of responding to technological, social and economic change.[196]

370. Furthermore, existing law reflected a preoccupation with physical hazards and overlooked "equally important human and organisational factors", such as the impact of work systems on the attitudes and behaviour of people in the workplace.[197]

371. There was no over-arching legislative framework: responsibility for the administration of the various health and safety law was split between the various regulatory agencies. Some workplaces had obligations under several jurisdictions, while others were not covered at all. The separate inspectorates did not share knowledge and expertise.[198]

372. The legislation did not afford protection to all workers or provide for the participation of workers in achieving safe and healthy workplaces.

373. It failed to impose sufficiently stringent penalties and was rarely used as the basis for prosecution.[199]

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194 Robens, A. (Lord), *Report of the Committee on Safety and Health at Work, 1970 – 72,* London, HMSO, Cmnd 5034, 1972, para 22.

195 Cole, T.R., *Final Report of the Royal Commission into the Building and Construction Industry, Reform – Occupational Health and Safety,* vol. 6, Commonwealth of Australia, Canberra, 2003, p. 162.

196 Robens, A., 1972, para 29.

197 Robens, A., 1972, para 31.

198 Cole, T.R., 2003, pp. 162 – 3.

199 Johnstone, R., "Improving worker safety: reflections on the legal regulation of OHS in the 20th century", *Journal of Occupational Health and Safety – Australia & New Zealand,* 1999(a), vol. 15, no. 6, pp. 522 – 23; Bohle, P. and Quinlan, M., *Managing Occupational Health and Safety: A multidisciplinary approach,* second edition, Melbourne, MacMillan, 2000, p. 264.

Key recommendations of the Robens Report

374. The Robens Report proposed a number of reform objectives. It called for "the creation of a more unified and integrated system to increase the effectiveness of the State's contribution to safety and health at work".[200] All OHS legislation was to be brought together under a single enabling Act, which would establish broad procedures and standards, to be administered by a single regulatory agency and inspectorate.

375. The Report also advocated a transition from the traditional command-and-control regime to a self-regulating system, founded upon:

- "the acceptance and exercise of [responsibility for OHS] at all levels within industry and commerce, particularly by directors and senior managers";[201]
- a systematic, rather than ad hoc, approach to prevention;[202]
- provision for greater employee participation in improving and maintaining health and safety, because "real progress is impossible without the full co-operation and commitment of all employees".[203]

376. In this scheme, the State would relinquish its punitive role in order to stimulate attitudinal change and encourage preventative action.[204]

377. The Robens Committee recommended that the new Act should -

- enunciate "the basic and overriding responsibility of the employer to provide a safe working system including safe premises, a safe working environment, safe equipment, trained and competent personnel, and adequate instruction and supervision";[205]
- be limited to essential matters, such as the administration of the statute, a general regulation-making power and provisions dealing with offences and penalties;[206]
- prescribe general duties only. Detailed provisions would be relegated to regulations and guidance;
- cover all workplaces, work processes, hazards and categories of worker; and

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200 Robens, 1972, para 41.
201 Robens, 1972, para 46.
202 Robens, 1972, para 49.
203 Robens, 1972, para 41.
204 Cole, 2003: 162.
205 Robens, 1972, para 129 – 130.
206 Cole, 2003: 165.

- impose duties on "upstream" parties (such as designers, manufacturers and suppliers) in recognition that OHS risks are best controlled at their source.

Standards-setting in the post-Robens era

378. In the years following the Robens Report, OHS legislation in most Western industrialised nations has moved away from prescriptive or specification standards, towards Robens-style general duties (or principle-based standards), performance-based standards and process-based standards. It should be noted that these standards are "ideal-types"; most contemporary OHS legislation relies upon a mix of standards – depending on the policy objective to be achieved.

Specification standards

379. Specification standards have the virtue of spelling out precisely the actions a dutyholder must take in a given situation. Thus, it is clear to dutyholder and inspector alike whether or not a standard has been breached. Specification standards are an appropriate approach where there is a single, commonly agreed, means of controlling a hazard or risk.

380. Specification standards, however -

- set only minimum health and safety standards and do not encourage innovative or cost-effective solutions;
- cannot provide for a continuous cycle of improvement;[207]
- quickly become obsolete and are difficult to keep up-to-date; and
- are more effective in regulating static, physical hazards typical of factories (such as inspections of boilers or ventilation requirements) than more subtle hazards associated with the social organisation of work (such as musculoskeletal disorders or stress).

General duties or principle-based standards

381. A general duty articulates an all-encompassing principle that can be applied to every workplace and allows dutyholders the freedom to develop their own solutions to particular OHS problems. Unlike specification standards, general duties do not readily become obsolete. While often classed as performance-based standards, general duties focus on broad social objectives and allow the dutyholder substantial discretion in achieving compliance.[208]

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207 Bluff, E. & Gunningham, N., "Principle, Process, Performance or What? New Approaches to OHS Standards Setting", Working Paper 9, presented at the Australian OHS Regulation for the 21st Century conference, NOHSC, Gold Coast, 20 – 22 July 2003, p.8.

208 Coglianese, C., Nash, J. and Olmstead, T., Performance-Based Regulation: Prospects and Limitations in Health, Safety and Environmental Protection, Regulatory Policy Program Report, No. RPP-03, Harvard University, Cambridge Massachusetts, 2002, p. 5.

382. At the same time, it is often argued that the breadth and flexibility of a general duty creates significant ambiguity and uncertainty for dutyholders and inspectors. A general duty does not articulate a desired performance outcome (that is, the goal to be achieved), nor is it possible to determine clearly whether compliance has been achieved until the matter has been tested in court.

Performance-based standards

383. A performance-based standard establishes the outcome required, but leaves to the dutyholder the choice of concrete measure(s) to achieve that outcome. The performance standard may be loosely specified, in which case the dutyholder will be required to make qualitative judgments, or tightly specified, in which case the dutyholder will need to employ quantitative measures of performance – which in some cases may involve highly-specified modelling methodologies. Performance standards are articulated in terms of the problems they are intended to solve – for example, the severity of risk, the likelihood of injury in the event of an incident, and the number of organisations and/or persons affected[209].

384. Performance standards facilitate technological innovation, enable the dutyholder to adopt the most cost-effective solution and focus preventative efforts on specific hazards and workplace contexts.

385. On the other hand, performance standards do not necessarily encourage consideration of integrated/holistic approaches to the control of OHS risks.[210] And, like general duties, performance standards involve a degree of uncertainty. In the case of rare and catastrophic events, performance cannot be directly measured; instead, it must be predicted, making implementation more problematic.[211]

Process-based standards

386. Process-based standards stipulate a series of steps or a process to be followed in order to eliminate or reduce risks associated with particular OHS hazards. The most familiar is the three-step risk management process: hazard identification, risk assessment and risk control (see paras 694 - 703).

387. The strength of process-based standards lies in their capacity to address organisational factors – albeit only in relation to individual hazards.[212]

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209 Coglianese *et al,* 2002, pp. 4 – 5.
210 Bluff & Gunningham, 2003, p. 11.
211 Coglianese *et al*, 2002, p. 7.
212 Bluff, E. & Gunningham, N., 2003, p.13

Chapter 10: Safety and practicability

388. The objects of the Act are expressed in absolute terms. Thus, the stated object of the Act is –

- to secure, not merely to improve, the health, safety and welfare of persons at work;[213]
- to protect workers against risks, that is, to keep them safe from risks, not merely to improve the level of protection;[214]
- to eliminate risks to health, safety and welfare of persons at work, not merely to mitigate or reduce risks.[215]

389. None of the objects in s.6 contains the qualification "so far as is practicable", which features so prominently elsewhere in the Act. Parliament's intention, plainly enough, was that the imperative to establish safe workplaces be absolute, not qualified.

390. The general duties imposed by Part III of the Act are, of course, qualified by the phrase "so far as is practicable" but, if those words are disregarded, the duties are more clearly revealed. Thus the duty under s.21(1) is to –

> *"provide and maintain for employees a working environment that is safe and without risks to health".*

Under s.21(2) the (implicit) duty is –

> *"(a) to provide and maintain plant and systems of work that are safe and without risks to health;*
>
> *...*
>
> *(c) to maintain any workplace under the control and management of the employer in a condition that is safe and without risks to health..."*

391. Again, if the qualifying words are excluded, the duty which s.22 imposes on every employer and every self-employed person is a duty to ensure that –

> *"persons (other than employees) are not exposed to risks to the health or safety arising from the conduct of the undertaking".*

Likewise, under s.24(1) a designer or manufacturer of plant has a duty to ensure –

> *"that the plant is so designed and constructed as to be safe and without risks to health when properly used."*

392. In the Act, each of these duties is qualified by the words "so far as is practicable". A number of questions immediately arise, as follows:

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213 Section 6(a).
214 Section 6(b).
215 Section 6(d).

- what does "practicable" mean?
- what role does the "definition" in s.4 play?
- to what extent do the factors listed in s.4 limit the scope of the duties imposed?
- what are the policy foundations for those limitations?

What is meant by "practicable"?

393. The word "practicable" has a very simple meaning. It means "feasible" or "able to be done or accomplished".[216] In short, if something can be done, it is practicable.

394. The word "practicable" does not mean "reasonably feasible in all the circumstances" or "capable of being done in a cost-effective way". If there is something which can be done to make a workplace safe, or to eliminate a particular risk to safety, then it follows – by definition – that it is practicable to do that.

395. This has been recognised in Australia and abroad. In England, the National Industrial Relations Court said that a "practicable" standard was "very close to the concept of physical possibility".[217] As Creighton and Rozen have said:

> *"The 'practicability' criterion... seems to require that that which can be done must be done, without reference to cost, or to the gravity of the risk."*[218]

396. Likewise, if an accident can properly be regarded as having been preventable, this must mean that something could have been done to prevent it. It follows – again by definition – that it was practicable to have prevented the accident. Whether the accident was reasonably foreseeable is, of course, a quite different question.

397. So the literal meaning of the words "so far as is practicable" is that if anything can be done, it must be done. The literal meaning of s.21(1), for example, is that if there is anything which can be done by an employer to make the workplace safe, the employer has a duty to do that thing.

398. Read literally, therefore, the words "so far as is practicable" are not words of limitation. Rather they serve to emphasise the stringency of the duty. That which can be done must be done. The words "so far as" simply mean that the duty exists to the full extent of practicability.

399. Thus, for example, s.21(1) could be redrafted – without changing the meaning – to provide as follows:

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216 *Shorter Oxford Dictionary* p. 2327.

217 *Owen v. Crown House Engineering Limited* [1973] 3 All ER 618 at 622.

218 Creighton and Rozen, *Occupational Health and Safety Law in Victoria*, 1997, 2nd ed., Federation Press, Sydney, p. 59 (emphasis in original).

> *"an employer shall provide and maintain for employees, by doing whatever can be done, a working environment that is safe and without risks to health."*

As I have explained, as a matter of ordinary English that is what s.21(1) as presently drafted means.

400. Again, using a plain English approach the duty under s.21(2)(a) would read –

> *"to provide and maintain, by doing whatever can be done, plant and systems of work that are safe and without risks to health".*

401. But this is not what Parliament ever intended the Act to say, despite some public statements to the contrary.

Words of limitation

402. Because of what purports to be a definition of the word "practicable" in s.4 of the Act, the words "so far as is practicable" are actually words of limitation.

403. According to s.4, "practicable" means –

> *"practicable having regard to –*
>
> *(a) the severity of the hazard or risk in question;*
>
> *(b) the state of knowledge about that hazard or risk and any ways of removing or mitigating that hazard or risk;*
>
> *(c) the availability and suitability of ways to remove or mitigate that hazard or risk; and*
>
> *(d) the cost of removing or mitigating that hazard or risk".*

404. Properly understood, however, this is not a definition of "practicable" at all. The "definition" does not even attempt to say what the word means. It is a classic example of a circular definition: it says that "practicable" means "practicable".

405. What the "definition" does do is identify matters which the legislature intended should be taken into account in deciding what is practicable (i.e. feasible) in a particular case. When those factors are examined, it becomes apparent that the "definition" imported into the Act the concept of "reasonably practicable in all the circumstances".

406. In its discussion paper of March 1983 (which preceded the introduction of OHSA), the then Victorian Government proposed that safety duties be imposed in unqualified terms. In the course of the subsequent consultations, however, many submissions urged the inclusion of a "reasonably practicable" qualifier.

407. In its public response, the then Government rejected this proposal, saying that -

> *"The use of the phrase 'so far as is reasonably practicable' is in the Government's view an unreasonable qualification which would enable cost factors involved in providing a safe and healthy workplace to be given excessive emphasis in legal proceedings.*
>
> *At the same time the Government recognises that its initial proposal not to qualify the duty at all, in attempting to reflect the appropriate degree of responsibility by imposing an absolute responsibility on employers, may be too onerous.*
>
> *The Government remains convinced that the general duty should oblige employers to take all available steps to remove risks to health and safety. Accordingly the general duty of employers imposed by the legislation will be qualified by the phrase 'so far as is practicable'."* (emphasis added)

408. Evidently, this was a deliberate choice. The only limitation which the Government would entertain was to limit the scope of the duty to the taking of "all available steps". Provided that the appropriate safety measure was available, the duties were intended to be unqualified.

409. There was, after all, a real choice to be made, since "reasonably practicable" is quite different from "practicable". What Creighton and Rozen describe as "the standard Anglo-Australian definition" of the words "reasonably practicable" was given by the English Court of Appeal in 1949,[219] as follows:

> *"A computation must be made by [the person upon whom the duty rests], in which the quantum of risk is placed on one scale and the sacrifice involved in the measure necessary for averting the risk (whether in money, time or trouble) is placed in the other; and … if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the [dutyholders] discharged the onus on them."*[220]

410. In *Marshall v Gotham,*[221] Lord Reid succinctly identified the difference between the two terms, as follows:

> *"In my judgment, there may well be precautions which it is 'practicable' but not 'reasonably practicable' to take…"*

Lord Reid went on to say, however, that –

> *"If a precaution is practicable it must be taken unless in the whole circumstances that would be unreasonable. And as men's lives may be at stake it should not lightly be held that to take a practicable precaution is unreasonable."*

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219 *Edwards v National Coal Board* [1949] 1 KB 704. The "gross disproportion" test is discussed in detail in Chapter 12.

220 *Edwards v National Coal Board,* at 712 (emphasis added); See also *Marshall v Gotham Co* [1954] AC 360; *Austin Rover Group v HM Inspector of Factories* [1990] 1 AC 619, at 625-7; Creighton and Rozen, 1997.

221 *Marshal l v Gotham*, [1954] AC 360, at 373.

The so-called definition of "practicable"

411. As noted, the "definition" of "practicable" in s.4 of the Act contains a list of matters to be taken into account in deciding what is practicable in the circumstances. An examination of the list reveals a confusion about what the word "practicable" means. The list contains a variety of factors, some of which are relevant and some of which are quite irrelevant to the determination of what is "practicable" (i.e. feasible).

412. Thus, whether something can be done to remove a hazard does not depend on –

- the severity of the hazard; or
- the dutyholder's state of knowledge of the hazard; or
- the cost of removing the hazard.

413. Rather, the question is an objective one. Is there something which can be done? Is it or is it not feasible to remove the hazard? Whether something ought reasonably to be done is, obviously, a different question.

414. On the other hand, whether something can be done to remove the hazard does depend on –

- the state of knowledge in the industry of ways of removing the hazard; and
- the availability of ways of removing the hazard.

415. Plainly, if there is no available body of knowledge about how to remove the particular hazard, or if the means of removing it (though known) are not available, then it is not practicable to remove it. There is simply nothing which can be done.

The need for amendment

416. What I have referred to above as the irrelevant matters do, of course, raise important issues of policy. Though they have nothing to do with practicability properly so-called, these issues are critically important in defining the scope of the duties which the Act imposes.

417. In my view, each of these issues must be addressed explicitly and directly in the Act. They are far too important to be hidden away in the sub-paragraphs of a "definition" which is, in any case, no such thing.

418. The inevitable effect of including the "definition" of practicability was that the extent of the safety duties in relation to any particular hazard or risk was made to depend on –

- the severity of the hazard or risk;

- the state of knowledge – on the part of the employer and/or the employees – about the hazard or risk; and
- the cost of removing the hazard or risk.

419. In short, what was achieved by inserting the "definition" of practicability was to introduce – by the back door – the very limitation which the then Government had publicly disavowed. The content of the duties was thereafter limited to what was "reasonably practicable".

420. The result is a quite unsatisfactory legislative hybrid. The duties in s.21 are imposed in language which means, literally, that "if it can be done it must be done". Yet the "definition" in s.4 wholly displaces that literal meaning, and converts the s.21 duties into the following, qualified, form:

> *"The employer must do that which, having regard to the factors listed in s.4, it is reasonably practicable for the employer to do to provide and maintain a safe working environment".*

421. The general duty provisions are the fulcrum of the legislation. It is, therefore, of the first importance that they be couched in terms which are clear, comprehensible and internally consistent.

422. For reasons which are set out in the remainder of this chapter, I recommend that –

(a) wherever it is appropriate for a duty under the Act to be qualified by considerations of practicability, the phrase "reasonably practicable" should be used instead of the word "practicable";

(b) the factors to be taken into account in determining what is reasonably practicable in any given set of circumstances should be clearly set out, and defined, in Part III of the Act, where the general duties themselves are laid down;[222]

(c) the four factors presently listed in the "definition" in s.4 should continue to apply, and in the same terms as at present;

(d) a fifth factor, that of control, should be added to the list; and

(e) the Act should provide interpretive guidance in relation to each factor in the "reasonable practicability" matrix.

No change in the law

423. Except in one respect – the addition of control as a factor – these changes would not alter the existing law. To the contrary, the intent of the changes would be to ensure

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222 Clause 18 of the Occupational Health and Safety Bill 1983 defined "practicable" in terms almost identical to those which ultimately appeared in s.4 of the Act. At that stage, however, the definition appeared at the beginning of Part III which – then as now – contained the general duties.

that the provisions of the Act reflect more accurately both the original intention of the 1985 Act (as revealed by the "definition" in s.4, though not by what was said publicly) and the universal understanding of how the "practicability" qualifier operates in practice.

424. Moreover, by providing a clear explanation of the factors relevant to "reasonable practicability", the amendment should enhance clarity, comprehension and consistency. Not surprisingly, those objectives are supported on all sides.

425. Some have argued that any statutory elaboration of the "practicability" factors will create more uncertainty, erect new barriers to enforcement and open up new avenues for technical legal argument. In my view, these fears are unfounded. What matters is that those who are responsible, on a daily basis, for securing compliance with the Act – whether as dutyholders or as inspectors or as HSRs – should have the fullest possible understanding of what is required.

426. As appears from what follows, the statutory language in s.4 obscures a number of key issues, each of which must be addressed explicitly. That alone makes the case for amendment irresistible.

The severity of the hazard or risk

427. In practice, the "severity" of a **hazard** is assessed by reference to the seriousness of its potential consequences for the health and safety of persons at work (or members of the public). The "severity" of a **risk** is assessed by reference to the likelihood of the risk eventuating. In this sense, risks range in "severity" from very high through moderate to minimal.

428. The degree of severity of a hazard is measured on a sliding scale of the seriousness of the potential impact on health and safety. That scale has death at one end and minor discomfort at the other. Severity in this sense also varies according to the number of persons who would be affected if the risk eventuated.

429. The *Accident Compensation Act* provides some guidance in this regard. Section 98E of that Act contains a table allocating lump sum amounts of compensation by reference to the seriousness of the injury or impairment in question. At one end of the scale is the loss of both eyes, for which a fixed amount of $161,390 was payable.[223] In the mid-range is the loss of one eye, for which a fixed amount of $64,556 was payable. At the lower end of the scale, the loss of the sense of smell or taste attracted a payment of $27,436. At the bottom of the scale, the loss of a toe attracted compensation of $9,683.

430. Should the content of the safety duties vary according to whether the hazard might cause death or merely the loss of a toe? Let it be assumed that in one workplace there

223 These figures were inserted into the ACA in 1997.

are two known hazards. Hazard A carries a risk of death, while hazard B carries a risk of minor injury only. Let it be further assumed that –

- there are available methods of eliminating both hazards; and
- the cost of implementing those measures is the same in each case – that is, it is no more expensive to eliminate the major hazard than the minor.

431. Is it suggested that, in those circumstances, a dutyholder has a more stringent duty in respect of the major hazard than in respect of the minor hazard? Surely the right to work free from risks to health and safety is - as ss.6(b) and (d) of the Act recognise - a right to be protected against risks of whatever kind. The right to a safe workplace is, presumably, just as much a right not to lose a toe as it is a right not to lose one's sight.

432. But the scale of severity does not begin and end with physical or psychological injury or disease. Indeed, a risk of physical injury of any kind would seem to justify placing the hazard at the "severe" end of the scale. At the lower end of the scale are all sorts of adverse, but short-lived, impacts on health and welfare, such as bruises, headaches, feelings of nausea and so on. Where what is under consideration is the taking of measures to prevent such occurrences, it seems appropriate to take into account their relatively minor nature in deciding what the dutyholder "could reasonably be expected to have done" in the circumstances.

433. This issue of relative severity comes into sharp focus when the cost of preventive measures is considered. As discussed in the next Chapter, the critical relationship is one of proportionality between the hazard and the cost of removing it. If the example given earlier were changed, such that hazard A carried a risk of death and hazard B carried a risk of minor bruising, it might reasonably be concluded that an expenditure of $X was disproportionate to hazard B, but that the same expenditure was not disproportionate to hazard A.

434. The question of the severity of the risk (as distinct from the hazard) raises different considerations. Let it be assumed that in one workplace there are two machines of the same kind, one new and one old. Let it be further assumed that each machine carries with it a risk of injury to the operator's hand, but that the risk of such an injury in the case of the old machine is high, whereas in the case of the new machine it is low, although not non-existent.

435. Two alternative answers suggest themselves. First, since the Act is concerned with the elimination of risk, the employer's duty to create a safe workplace should apply uniformly throughout the workplace, and should apply equally to all (non-negligible) risks, whether assessed as high or low.

436. On the other hand, the likelihood of the risk eventuating does seem to be properly relevant to deciding what it is reasonable to expect the dutyholder to do in relation to

that risk. For example, if there is a high probability of the risk eventuating then it would be unreasonable for the employer to do anything less than eliminate it. If, on the other hand, the likelihood of the harmful occurrence is remote, then the obligation to do what was reasonable in the circumstances might require no more than appropriate risk control measures.

437. On any view, the "severity" concept needs to be clarified, so as to make explicit the two distinct elements which the present language conceals, namely –

(a) the likelihood of the risk eventuating; and

(b) the degree of harm which would follow if the risk eventuated.

The state of knowledge

438. The phrase "the state of knowledge about the hazard or risk" is also ambiguous. It might mean the state of knowledge of the dutyholder, or it might mean the state of knowledge in the industry, or it might mean the state of knowledge in the world at large.

439. The Act itself gives no guidance in this regard. As interpreted by Ormiston J in the Full Court of the Victorian Supreme Court[224], the phrase refers both to the subjective knowledge of the employer (including "not merely the knowledge of its executives or officers, but also of any employee, agent or third party contractor") and to the objectively-determined knowledge of the industry.

440. But how is it thought that the employer's duty to remove a hazard is qualified by the employer's own state of knowledge (or lack of) about the hazard? No-one to whom I have spoken has suggested that ignorance of a hazard should be a complete defence. Plainly enough, that would amount to a licence to ignore safety. On the other hand, actual knowledge of the hazard, especially over a period of time, is clearly relevant to what steps the dutyholder ought reasonably to take (or have taken).

441. The consensus appears to be that the safety duties should apply to any hazard of which the dutyholder is aware or ought reasonably to be aware. So much is unambiguously clear from the imposition of duties (under the Regulations rather than in the Act) to undertake:

- hazard identification;
- risk assessment; and

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224 *Chugg v Pacific Dunlop* (unreported, Sup. Ct, Full Ct, 5 May 1989) per Ormiston J, at 35. See also *Holmes v R E Spence & Co* (1992) 5 VIR 119, at 124.

- control of risk.[225]

442. Whether a particular dutyholder ought reasonably to be aware of a particular hazard depends, in part, on "the state of knowledge" generally. Where the dutyholder was not aware of a particular work-related hazard, it will be relevant to ascertain whether other participants in, or advisers to, the relevant industry were aware of it. If so, and relevant safety information was available, there is a strong case for saying that the safety duty extended to removing that hazard, regardless of the dutyholder's own ignorance of the hazard.

443. On any view, the "state of knowledge" concept needs to be clarified. The key distinction between actual and constructive knowledge needs to be addressed clearly and explicitly.

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225 See, for example, *Occupational Health and Safety (Plant) Regulations 1995*, Part 3. These risk management duties are discussed further at paras 694 - 703 of this Report.

Chapter 11: Control and responsibility

> *"As a matter of principle the legislation should not have the effect of imposing obligations on employers concerning circumstances over which they have no control, such as when employees are normally working neither at their home base nor at other premises or sites within the control of the employer"* – Robens Committee.[226]

Overlapping duties and the relevance of control

444. In days gone by, the typical workplace was controlled by a single employer, with whom each member of the workforce had a contract of employment. Today, the picture is altogether different. It is now common, especially in larger undertakings, for workers in a given workplace to be engaged under a range of different employment arrangements with different employers. The corollary is that there will often be a range of dutyholders whose safety duties under the Act apply simultaneously to the same workplace.

445. For example, on a large building site one would expect to find –

(a) the principal building contractor and its employees;

(b) a number of sub-contractors, each with its own employees;

(c) workers supplied by one or more labour-hire companies; and

(d) one or more apprentices placed by a training organisation.

446. Each of the employers (and labour suppliers) would owe duties to its employees under s.21 of the Act. In addition, by force of s.21(3), the principal contractor would owe duties to –

(a) each sub-contractor; and

(b) the employees of each sub-contractor.

but only in relation to matters over which the employer had control.[227]

447. In addition, each of those employers, and any self-employed person on the site, would have a duty under s.22 to ensure that persons other than employees were not exposed to risks to their health or safety. Finally, the occupier of the workplace would have a duty under s.23 to ensure that the workplace was safe.

448. Each of these overlapping duties is subject to the practicability qualification, but the four factors in the current "definition" of practicability give little or no guidance as to what is expected of the various dutyholders.

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226 Robens, A., 1972, p.51

227 Or would have had control but for any agreement between the employer and the independent contractor to the contrary – s.21(3)(b)(ii).

449. The lack of guidance from the Act is mirrored by a lack of published guidance material from the Authority about the allocation of responsibility amongst overlapping dutyholders. The unstated assumption appears to be that this uncertainty is conducive to better health and safety outcomes, because each dutyholder will be striving to the maximum degree to ensure a safe working environment.

450. The message from the consultations, however, is that the reality is quite different. Unions and employers alike have submitted that the existence of multiple overlapping duties breeds confusion and frustration, and leads ultimately to a failure of responsibility.

451. One fundamental difficulty lies in the assumption which the Act makes, that each of the concurrent dutyholders is equally able to exercise control over the activity which gives rise to the relevant risk. The concept of non-delegable duties,[228] imported from the common law relating to compensation for workplace injuries, underpins the implicit obligation on each dutyholder to exercise control.

452. At common law, whether an employer has a "special duty" not only to take care but to ensure that care is taken by others depends on whether the employer has –

> *"undertaken the care, supervision or control of [employees]..or is so placed in relation to [them]... as to assume a particular responsibility for safety, in circumstances where [they] might reasonably expect that due care will be exercised".*[229]

453. The reality is that the capacity to control the activities which take place in a workplace will vary amongst the different dutyholders. And what their respective employees "might reasonably expect" of them by way of the exercise of due care will be determined, in part, by their capacity to control the relevant activities.

Control in OHSA

454. The Act goes some way to acknowledging the significance of control in defining the scope of the safety duties. Thus, in s.21(2)(c), the employer's obligation to maintain a safe workplace extends to –

> *"any workplace under the control and management of the employer".*

The obligation under s.21(2)(d), to provide adequate facilities for the welfare of employees, is likewise referable to workplaces under the employer's control.

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228 As Lord Wright said in *Wilsons and Clyde Coal Co Ltd v English* [1938] AC 57, at 83-84, in relation to an employer's common law duty of care*: "Such a duty is the employer's personal duty, whether he perform or can perform it himself, or whether he does not perform it or cannot perform it save by servants or agents. A failure to perform such a duty is the employer's personal negligence.*"

229 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687.

455. The "upstream" safety duty, which s.24 imposes on manufacturers and suppliers of plant and equipment, is similarly limited to the sphere of activity over which they have control. They are responsible for ensuring that –

> *"the plant is so designed and constructed as to be safe … when properly used".*[230]

Understandably, these dutyholders have no responsibility for the consequences of improper use of the plant in the workplace, over which they have no control.

456. The relevance of control is most clearly recognised in s.21(3), which extends the safety duties of the principal employer to employees of sub-contractors but only in relation to those activities over which the principal has control . The policy rationale is clear enough. The principal contractor cannot reasonably be expected to remove risks over which it has no control.

457. As observed by the Industry Commission in 1995, there is a need to:

> *"define what needs to be done on whose behalf. This needs to be supported by a series of specific rights and obligations. These are necessary to elaborate the essential features of the duty of care for each person concerned by it."*[231]

458. The following scenarios illustrate the inability of the Act as it stands to delineate the scope of the respective duties.

Scenario A

459. X employs A as an apprentice labourer. X has little work for A to do, so he hires A to Y, a major construction company, to assist with excavation works. X ascertains that A will be working in and around trenches and satisfies himself that Y has appropriate safety procedures in relation to trenching work.

460. X speaks to the relevant foreman at the excavation site, to confirm that the foreman will be taking the necessary safety precautions. X also instructs A on the safe procedures for working in and around trenches, according to WorkSafe's Code of Practice. A is seriously injured when an unsupported trench wall collapses on him.

461. X owes A a duty under s.21. Y owes A a duty under s.21 (by virtue of the operation of s.21(3) and s.22.). The duties imposed on X and Y are, in each case, non-delegable and personal. There is obvious overlap in the duties. But it is difficult to see how the existing practicability factors could usefully differentiate between X and Y.

462. The first question in relation to X and Y is whether there were steps which could have been taken (i.e. which were "practicable") to remove or reduce the risk to A. That

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230 Section 24(1)(a) – emphasis added.

231 Industry Commission, *Work Health and Safety: Report of the Inquiry into Occupational Health and Safety,* Industry Commission/AGPS, Canberra, 1995.

there were precautions which could have been taken is beyond dispute. There could have been appropriate ground support in the trench.

463. The next question raised by the definition of "practicability" is whether that measure should have been taken, having regard to the severity of the risk and the cost of using ground support. As the cost of using ground support is negligible, and the severity of the risk was high (in terms both of the likelihood of its occurrence and of the seriousness of the potential consequences), no issue of disproportionality arises. The issue of what should have been done is therefore resolved.

464. But the issue of who should have taken the measure – X or Y or both – remains unaddressed. Should it make any difference that it was Y who had the exclusive control over the site? Should X have been entitled to rely on Y, having made the initial check of Y's foreman about safety precautions?

465. It is difficult to see how the resolution of these issues has anything to do with practicability, even in its extended sense in s.4. X might argue that –

(a) for X to have supervised all A's work at Y's site would have been prohibitively expensive for X, since he would have been unable to do his own (remunerative) work elsewhere;

(b) because X could not perform the shoring up of the trench himself, it was a measure that was not "available or suitable" for him in the circumstances.

466. But such arguments assume that the elements of practicability should be assessed in light of the subjective circumstances of the dutyholder. If this were so, the standard of care owed by an employer to an employee would depend to a significant extent on matters peculiar to the employer, including the employer's financial circumstances.

467. As discussed more fully in the next Chapter, that is not what Parliament intended. As the Full Court of the Victorian Supreme Court declared almost 15 years ago, what is "practicable" is to be determined objectively, not by reference to the subjective position of the particular dutyholder.[232]

Scenario B

468. P is the principal contractor on a major building site. P employs a number of foremen to oversee the works, but otherwise engages subcontractors to perform discrete tasks. The subcontractors in turn engage contractors and employees.

469. S is contracted by P to perform roof tiling work. S employs two workers for the job. Roof tiling work necessarily involves working at height, so P instructs S and his employees to install a catch platform and scaffolding beneath the roof on which they will be working. P provides S with these control measures.

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232 *Chugg v Pacific Dunlop Ltd* (unreported, Supreme Court of Victoria, Full Court, 1989).

470. Approximately one hour before S and his workers commence work, P's foreman reiterates the importance of installing the catch platform before work commences, and asks S and his workers to demonstrate that they are aware of how to do the installation. The foreman, satisfied with the demonstration, leaves the area and turns his attention to other subcontractors.

471. S subsequently instructs one of his employees to get up on a roof before the catch platform has been installed. S does so because he is concerned that, if he waits until the catch platform is installed, the job will not be completed in time. The worker falls from the roof three metres to the concrete floor below and is killed.

472. P owes a duty to S and his workers under s 21 (by virtue of s.21(3) and under s.22). S owes a duty his workers under s.21. The duties imposed on P and S are non-delegable and personal.

473. Again, it is difficult to see how the existing practicability factors might differentiate between P and S. Clearly, there were available measures which could have been implemented to remove the risk i.e. the use of a catch platform, which would have cost little to install. The severity of the risk was high, both in probability of occurrence and in potential harm. The cost of the safety measure was therefore not disproportionate to the severity of the risk.

474. It seems clear enough that S committed an offence under s.21, by failing to do what was practicable to remove the risk.

475. On the assumed facts, P could maintain that he did everything that could reasonably have been expected of *him*, and had exercised *due diligence* to prevent the contravention. Should P also be guilty of an offence under s.21 or 22?

476. If P is to be excused in relation to S's failure to use the catch platform, the policy basis for differentiating between them must reside in P's lack of control over the activity giving rise to the risk, and over implementation of the safety measure. Again, should the answer be any different if it were P's employee, rather than S's employee, who had died?

The need for a control test

477. The tension between the theory of non-delegability and the reality of differential degrees of control is apparent in the differing approaches taken by the courts. In *Kondis*, for example, the High Court took a strict view of the responsibility of the principal employer in relation to risks created by the conduct of a sub-contractor:

> *"..The employee's safety is in the hands of the employer; it is his responsibility. The employee can reasonably expect therefore that reasonable care and skill will be taken. In the case of the employer, there is no unfairness in imposing on him a non-delegable duty; it is reasonable that he should*

> *bear liability for negligence of his independent contractors in devising a safe system of work. If he requires his employee to work according to an unsafe system of work he should bear the consequence…In the result the [employer's] duty provide a safe system of work was non-delegable and the [employer] was liable for any negligence on the part of the its independent contractor in failing to adopt a safe system of work."*

478. On the other hand, the House of Lords in *Associated Octel* treated a dutyholder's ability to control the activity giving rise to the relevant risk as being directly relevant to the question of what was (reasonably) practicable in the circumstances:

> *"..The question of control may be very relevant to what is reasonably practicable. In most cases the employer/principal has no control of how a competent or expert contractor does the work. It is one of the reasons why he employs such a person – that he has the skill and expertise, including the knowledge of appropriate safety precautions, which he himself may not have. He may be entitled to rely on the contractor to see that the work is carried out safely, both so far as the contractor's workmen are concerned and others including his own employees or members of the public; and he cannot be expected to supervise them to see that they are applying the necessary safety precautions. It may not be reasonably practicable for him to do other than rely on the independent contractor."*

479. As the earlier examples demonstrate, the existing practicability factors do not address the relevant considerations. This is highly undesirable, for at least two reasons.

480. First, a breach of the general safety duties results in criminal liability. It is unsatisfactory to impose criminal liability by reference to such a "vague, open-ended and inaccessible" concept[233].

481. Secondly, a lack of adequate guidance to dutyholders, as to how they should make decisions about risk control and in particular as to how their respective efforts should be co-ordinated with each other, increases the likelihood of imperfect decisions about these matters, which are vitally important in injury prevention.

482. As Johnstone has argued:

> *"What the OHS statutes need to do is to recognise expressly modern forms of capital organisation and modern work relationships…The OHS statutes, or more particularly, regulations made under the statutes, need to particularise more clearly the different organisational forms (holding and subsidiary companies, franchising, outsourcing and so on) and work relationship (homeworking, contracting, subcontracting, labour hire and so on) in a modern economy. The regulations need explicitly to outline the general OHS obligations of those in control of the work processes involved, and to provide for the co-ordination of*

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233 Brooks, A, "Rethinking Occupational Health and Safety Legislation", *Journal of Industrial Relations*, vol. 30, 1988, p. 355.

> *OHS management efforts of all of the parties involved. For example, it is not sufficient for there to be a statutory duty on each entity …involved in a work process if those parties do not co-ordinate their work processes and OHS measures…"*[234].

Overlapping duties: the example of labour hire

483. Dutyholders generally contend that the general duties are unduly onerous and that, particularly in cases involving multiple dutyholders, the duties are incapable of discharge because of the nature of the contractual arrangements and the varying layers of control over any given activity.

484. Freehills submitted to the Review that this has the potential to cause "considerable frustration" and involves the "application of unrealistic expectations of or approaching perfection". The submission argued that–

> *"feelings of inevitability of prosecution in the event of an incident, whatever the perceptions of culpability may be, can dampen enthusiasm for proactive risk management."*[235]

485. The position of labour hire, or "on-hire", firms brings the stringent operation of the general duties into focus. Whilst I am mindful of the parallel inquiry concerning the labour hire industry being conducted by the Parliamentary Economic Development Committee, labour hire and group training arrangements raise specific issues for OHSA and, in particular, for the nature and extent of labour hire firms' duties under Part III of the Act.

486. The Recruitment and Consulting Services Association, which represents many on-hire firms, attached to its submission an opinion of Dr David Neal, a barrister. Dr Neal described the issues in this way:

> *"The effect of a series of decisions on 'labour-hire' is that on-hirers will be treated as having overlapping and even co-extensive duties with the host-employer…While an on-hirer would be guilty of an offence…if it failed to ensure that the host employer had conducted a risk assessment, to say that the on-hirer is not entitled to "plead reliance" on the host employer, or that it has the obligation to train its employees to do the risk assessment, demonstrates the extent to which the case law now fails to allocate duties in accordance with control. The concept of non-delegable duty exacerbates these problems…The blanket rejection of reliance on the host-employer comes close to vicarious liability for the breach of the on-hirer."*

487. As employers, labour hire firms and group training agencies must comply with the duty imposed by s.21. The duty extends to all work conducted by the employees,

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234 Johnstone, R. "Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking", *Australian Journal of Labour Law,* vol. 12, 1999(b), p.54 (emphasis added)

235 Freehills' submission to this Review. Access via VWA website: http://www.workcover.vic.gov.au/dir090/vwa/home.nsf/pages/OHSAct_review

wherever it is conducted. Labour hire and group training agencies are prosecuted by the Authority, albeit infrequently, when hired workers are exposed to health and safety risks at host workplaces.

488. The host employer also owes duties to the hired worker – under s.21 (by operation of s.21(3)) and s.22. These duties necessarily overlap with the labour hire or group training agency's duties. The fact that the host has a duty to protect workers does not relieve the labour hire or group training agency from the duties imposed on it by the Act. In fact, in *Ankucic v Drake Personnel Limited* [236] the NSW Industrial Relations Commission (IRC) suggested that labour hire agencies have a special obligation to ensure that the host's premises, or the work done, do not present a threat to the health, safety and welfare of hired workers.

489. The imposition of the s.21 duty on labour hire and group training agencies does not raise any significant issues. It is agreed by all concerned that labour hire and group training agencies, as employers, must secure the safety of the workers they hire out. That said, there is considerable confusion and concern about the content of that duty. Labour hire and group training agencies ask-

> *"What do I have to do to comply with the duty?"*

490. It is axiomatic that, in order to be effective and credible, the Act must impose obligations with which dutyholders - in their infinite variety - are able to comply. Moreover, to impose liability on a labour hire firm on the basis of negligence on the part of the host employer, in the absence of any failure by the labour hire firm to take a step or measure which it could have taken, does come close to imposing vicarious liability – and criminal liability at that.

491. In my view, the NSW decisions referred to by Dr Neal go some way to elucidating the content of the duty. For example, in *Drake Personnel Ltd v WorkCover*[237], the Full Bench of the NSW IRC held that a labour hire firm:

> *"has a positive obligation .. to directly supervise and monitor the work of the employee to ensure a safe working environment."*

492. There is, however, a considerable amount of uncertainty about the practical content of duties such as these. This is due partly to the fact that, in quite a number of the cases decided to date, the labour hire agency has pleaded guilty.

493. For example, in *Ankucic v Drake*, Drake pleaded guilty to allegations that it –

- failed adequately to inform the host employer of the experience and qualifications of the hired employee in the operation of the relevant wood

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236 [1997] NSWIRComm 157 (25 November 1997)

237 [1999] NSWIRComm 341 (12 August 1999).

working equipment (which injured the worker) and failed to inform the host of what additional training and instruction the hired worker required to safely operate the equipment.

- failed to instruct the hired worker not to operate any item of woodworking equipment until he had been properly trained by the host in its safe operation.
- failed to train the hired worker in the safe operation of docking saws.
- failed to check and assess the information, instruction and training given by the host to the hired worker; and
- failed to ensure that the docking saw was properly guarded.

494. The final item in this list is apt to mislead, since it suggests that the labour hire firm is liable for having itself failed to take the measures necessary to guard the machine. If that were the case, the duty would be very onerous indeed and all but impossible to discharge. The labour hire firm has no control over the relevant plant. It can, of course, do many other things (as set out in the other particulars of negligence above) aimed at securing the worker's safety. It is the failure to do those things – the matters over which it does have control - which renders it criminally responsible.

495. The Act must make this clear, and there is an urgent need for the Authority to produce guidance material dealing with the concept of "control" in modern working arrangements.

Amending the Act

496. In my view, "control" should be added to the list of practicability factors. The definition of "control" will need to include the capacity to control, even where control is not in fact being exercised. It will also need to be made clear that an ability to influence decisions is a species of control. Moreover, the extent of a dutyholder's control must be assessed in light of the control actually exercised by, or capable of being exercised by, any person in respect of whose acts or omissions the dutyholder may properly be regarded as responsible. This obviously includes its employees and agents.

497. By making explicit the relevance of control, the Act will enable appropriate consideration to be given – by dutyholders, by inspectors and the courts – to another issue which has frequently arisen during the consultations. It is the issue of whether, or when, it is reasonable for a dutyholder to relinquish control, or to refrain from exercising control, on the ground that a contractor with particular skills or expertise has been engaged to carry out the relevant activity. The answer to that question will depend, as usual, upon the circumstances of the case. Of particular relevance would be matters such as the respective levels of expertise of the dutyholder and the

contractor, the severity of the risk and the dutyholder's knowledge of the contractor's safety procedures.

498. Once the concept of control is explicitly addressed, the practicability qualification will be able to moderate overlapping duties to take into account modern work arrangements. As Professors Quinlan and Johnstone submitted to the Review –

> *"One of the real strengths of the current duties arrangement is that by specifying a range of duty holders they can accommodate complex and shifting work arrangements and indicate the need for responsible actions by all relevant parties. This is not to say that the level of responsibility should be identical. The principles for assigning the degree of responsibility in terms of practicability (which includes the extent that the duty holder exercises control – see the High Court decision in Slivak v Lurgi) are well understood."*[238]

499. The inclusion of an express reference to control would bring OHSA into line with legislation in other States. In NSW and Queensland, it is a defence if a dutyholder can show that the contravention occurred by reason of matters beyond its control. In my view, it is preferable for control to be addressed at the threshold, when the duties are imposed, so that the scope of individual duties can be determined. In this way, control issues are integrated with the other factors which determine what is "reasonably practicable".

Control at a practical level

500. Where consideration is to be given to the control which is capable of being exercised by a corporate dutyholder, consideration would not, of course, be confined to the "controlling mind" of the corporation, as that concept has been developed in company law[239]. Instead, regard would be had to the control in fact exercised (or capable of being exercised) in practice by officers of the company (see further Chapter 17).

The need for safety rulings

501. Once again, the Authority's interpretation of the "control factor", as it applies to different circumstances, would be an obvious candidate for a published safety ruling (see Chapter 27).

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238 Professors Michael Quinlan and Richard Johnstone, submission to this Review. Access via VWA website: http://www.workcover.vic.gov.au/dir090/vwa/home.nsf/pages/OHSAct_review

239 *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153

Chapter 12: Safety and cost

502. Many of the hard questions in occupational health and safety concern cost. Every day, WorkSafe inspectors debate with dutyholders whether "the risk justifies the expenditure" – for example, whether the duty to remove a hazard or risk "so far as is practicable" requires an expensive engineering solution or an inexpensive administrative solution[240].

503. In this chapter, I examine the importance of the cost-risk calculus in the enforcement of safety duties under the Act, and the lack of guidance in the Act, and from the Authority, as to how this all-important exercise is to be undertaken.

504. I recommend that the cost factor in "practicability" be clarified, to make clear that dutyholders are obliged to take risk prevention measures unless the cost of a preventive measure would be "grossly disproportionate" to the risk as assessed. The Act should also be amended to state explicitly what it currently says implicitly, that the content of the safety duties in a workplace does not depend upon the particular financial circumstances of the dutyholder.

No "excessive emphasis" on cost

505. As noted in Chapter 10, the Victorian Government in introducing OHSA was determined to ensure that cost did not become too dominant a consideration in decision-making about health and safety. The Government refused to include an express test of "reasonable practicability" precisely because it was thought that to do so –

> *"would enable cost factors involved in providing a safe and healthy workplace to be given excessive emphasis in legal proceedings."*

506. Cost was not, however, excluded from the Act. On the contrary, cost is specified in s.4 as one of the four "practicability" factors. Thus, in order to determine what it is "practicable" for a dutyholder to do, s.4 requires consideration of –

> *"(d) the cost of removing or mitigating [the] hazard or risk."*

507. There is nothing in the Act or in any of the Regulations which provides the slightest guidance as to how cost considerations are to be brought to bear in determining the scope of the safety duties. Nor has the Authority published any authoritative guidance. There are isolated discussions on the cost factor in Authority publications, but these relate only to particular fact situations - as with the worked examples in recent codes of practice, which attempt to illustrate how the elements of practicability

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240 For a discussion of the "hierarchy of controls", see Chapter 15.

can be applied to decision-making about risk controls for common industry hazards[241].

508. The result, once again, has been the exact opposite of what the Government evidently hoped for in 1985. Cost has become the single most significant factor in decision-making - by dutyholders and by the Authority through its inspectors - about what ought to be done in a particular setting to remove or mitigate a hazard.

509. Time and again, so I have been told, when an inspector identifies a contravention in a workplace, and indicates an intention to require its rectification[242], the dutyholder responds by saying something along the following lines -

> *"But I cannot afford to do that. We have never had an accident with that machine and you can't seriously be expecting me to spend money which we don't have to fix a non-existent problem".*

510. There is, in my view, an urgent need for guidance, in the Act itself and from the Authority, as to how cost factors should be brought to bear. At present, decisions on cost are made in a haphazard and inconsistent way, uninformed by anything resembling a cost-benefit methodology.

Cost and the forecasting of risk

511. OHSA mandates the taking of anticipatory action, action in advance, to prevent injury or death in the workplace. It requires pre-emptive action. Its focus is prospective, not retrospective. Dutyholders are obliged to eliminate risk, so as to secure the health, safety and welfare of persons at work[243].

512. Risk prevention is, therefore, concerned with hypotheticals. It is based on degrees of probability (and severity). It is about predicting what might happen.

513. Inevitably, prediction is heavily based on past experience. As a result, some of the most reluctant employers are those with the best safety records. They typically say something like the following –

> *"There is no need for me to put in a guardrail. I have been running this factory in the same way for 30 years, and we have never had an accident. You would have to be a fool to fall from there."*

514. Obviously, experience <u>is</u> relevant to an assessment of the likelihood of a risk eventuating. But, equally, the fact that there has never been an accident in a workplace does not mean that there is no risk, nor that the Act has been complied with.

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241 See, for example, the *Code of Practice: Manual Handling*, No. 25, 20 April 2000, p.44 and the *Code of Practice: Hazardous Substances*, No. 24 , 1 June 2000, pp.30 & 36.

242 By the issue of a improvement notice under s.43(1).

243 ss.6(a), (d).

515. The fact that risk prevention is based on forecasting the future rather than on present realities often makes it difficult for employers to accept the need to spend money on risk prevention. As a number of OHS managers in companies have pointed out to me, this difficulty is exacerbated if decision-makers have no OHS training, and are therefore less sensitised to risk. In short -

> *"Unless managers understand the concepts of risk assessment and risk control, they find it hard to understand why we need to spend money on it"*[244].

516. Once an accident happens, however, the reluctance to spend money disappears. The future possibility has, all of a sudden, become a present reality. When a dutyholder is prosecuted in respect of OHS breaches associated with the accident, the relevant safety measure – which did not exist at the time – will almost invariably have been implemented by the time the matter comes on for trial.

517. Partly, no doubt, this is because the dutyholder wishes the court to know that the safety lesson has been learnt. But predominantly it is because the dutyholder's officers and managers are shocked and upset by what has occurred and are determined to remove any risk of a recurrence. With the reality of the risk having been demonstrated in the starkest possible way, by an injury or a death, no responsible manager would hesitate before saying:

> *"We must spend whatever is necessary to ensure that it never happens again".*

518. This phenomenon may partly explain why the cost factor in the practicability matrix has not been the subject of any judicial discussion in Australia. According to the Authority's prosecutions unit, defendants hardly ever argue, by way of a defence to a charge of failing to make the workplace safe, that the cost of the preventive measure was unreasonably high. As I said in the Discussion Paper[245], an employer whose employee had died or been seriously injured in a preventable work accident could hardly plead:

> *"I was aware of the risk but it would have cost me too much to take preventive measures".*

519. But compliance with the Act day-to-day does not – cannot – enjoy the certainty of hindsight. Judgments must be made in advance, based on predictions and forecasts. This has a number of obvious consequences

520. First, there will always be scope for disagreement about the degree of risk, whether measured according to likelihood or according to severity of harm. Secondly, it is vital that the Act and the Authority give as much guidance as possible to assist the

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244 For a discussion of management training, see Chapter 20

245 Maxwell, C., 2003, para 90.

making of these judgements. To that end, I have recommended in Chapter 27 that the Authority publish safety rulings, particularly in relation to the critical practicability factors, to assist inspectors and dutyholders in their approach to the delineation of safety duties.

521. Thirdly, the Authority must be prepared to take prosecution action against dutyholders for breaches of the Act in circumstances where no injury has occurred. These are referred to as "pure risk" prosecutions, since the allegation of breach is based on an observation that risks exist which have not been adequately identified or controlled. I understand from the prosecutions section of the Authority that its aim is for 60% of the investigative work to be of this proactive kind, that is, not based on incidents which have occurred.

522. Because it cannot be based on the wisdom of hindsight, a "pure risk" prosecution throws into sharp relief the anticipatory approach to prevention which the Act requires. The Court is, of necessity, called on to determine what is reasonably practicable – including by reference to cost – by assessing risk in advance, in the same way as it must be determined every day by dutyholders.

523. Justice Harper in the Victorian Supreme Court captured this perspective well in *Holmes v R E Spence & Co*[246], as follows:

> *"...The Act does not require employers to ensure that accidents never happen. It requires them to take such steps as are practicable to provide and maintain a safe working environment ... The courts will best assist the attainment of this end by looking at the facts of each case as practical people would look at them: not with the benefit of hindsight, nor with the wisdom of Solomon, but nevertheless remembering that one of the chief responsibilities of all employers is the safety of those who work for them. Remembering also that, in the main, such a responsibility can only be discharged by taking an active, imaginative and flexible approach to potential dangers in the knowledge that the human frailty is an ever-present reality ..."*

Balancing risk and cost

524. The Australian Industry Group, in its submission to the Review, succinctly described the orthodox approach to the cost issue in risk prevention, as follows -

> *"Cost must be considered in relation to the level of risk, as determined by likelihood, exposure and severity".*

The key question is: is the expenditure justified by reference to the degree of risk to be prevented?

525. The unstated premise is that the required expenditure should be (no more than) that which is proportionate to the risk. Put differently, the typical dutyholder will say:

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246 (1992) 5 VIR 119 at 123 (emphasis added).

> *"I should not be required to incur expenditure out of proportion to the likelihood and seriousness of injury in this workplace".*

526. That there is a relevant relationship between cost and risk cannot be doubted. Examples at either end of the scale readily demonstrate the point. Suppose there was a manufacturing process which involved lifting items from a conveyor belt and that there was a small risk of the operator catching her finger in one of the belt wheels. Assume that the worst that could occur was for the worker's finger to be bruised. If the only way of eliminating that risk was to replace the entire conveyor at a cost of $10,000, that would be generally regarded as an unjustified expense.

527. On the other hand, suppose that there was a production process which produced deadly fumes. Safety masks could be provided quite cheaply, but they would not guarantee that the workers would be free of exposure. The only way to eliminate the risk would be to install a ventilation system (costing, say, $20,000). The risk here is very high, both in likelihood and severity. Clearly, the expenditure should be made, and the law should require it to be made. Otherwise, the employer would be knowingly exposing workers to a risk of death.

528. The Authority's published view[247] does not go beyond pointing out that–

> *"all of [the practicability] factors must be taken into account when determining whether the duty has been met rather than **only** looking at any single factor, for example cost. What is necessary to meet the requirements of the duty depends on the effect on employees, the technical feasibility and cost effectiveness of, for instance, the adoption of particular work processes in the workplace."*[248].

529. The notion of cost-risk balancing in the determination of what is reasonably practicable has recently been endorsed by members of the High Court. In *Slivak v Lurgi (Australia)Pty Ltd*[249], a case concerning the South Australian Act, Gaudron J said:

> *"To determine what is "reasonably practicable" it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk"*[250].

530. Callinan J cited with approval what Lord Oaksey had said in 1954 in *Marshall v Gotham Co Limited*[251]:

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247 Victorian WorkCover Authority, *Guide to the OHS Act 1985,* 7th revised ed. Access via VWA website: http://workcover.vic.gov.au/vwa/publica.nsf/InterPubDocsA/

248 AiG submission to this Review, p. 6.

249 (2001) 205 CLR 304.

250 At 323 [53], referring to the English cases discussed later in this Chapter. The position in New Zealand is similar: see *Auckland CC v NZ Fire Service* [1996] 1 NZLR 330 at 338.

251 [1954] AC 360.

> *"What is "reasonably practicable" depends on a consideration of whether the time, trouble and expense of the precautions suggested are disproportionate to the risk involved"*[252].

531. The High Court has formulated a similar test in relation to workplace negligence at common law. The question of what a reasonable employer would do to prevent a risk of injury –

> *"is to be answered by balancing the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action ...."*[253].

A false balance?

532. It is often argued that to balance risk and cost in this way is simply inappropriate, because it does not involve a comparison of like with like. In essence, the argument is that:

> *"the risk is borne by the worker, while the cost is borne through the employer and through the cost structure by the employer's clientele (and ultimately the community at large). In other words, the scales are false."*[254].

533. There is, in my view, considerable force in this argument. The so-called cost/risk balance is simply a form of cost-benefit analysis. It inevitably involves quantifying in dollar terms the benefit of preventing an injury or a death. The very notion that the value of a person's life can be weighed in the scales at a particular dollar value is a disquieting one.

534. In part, this legitimate concern is to be addressed by ensuring that there is what the UK Health and Safety Executive calls –

> *"a transparent bias on the side of health and safety"*[255].

This bias should be given statutory form in the "gross disproportion" test, which I recommend later in this chapter.

535. But, however inappropriate or unseemly the exercise of cost-risk balancing may appear, it is, inescapably, part of the legislative framework. This is true both of decisions about whether to regulate and of decisions about whether particular regulations have been complied with. The former is most clearly demonstrated in the detailed cost-benefit analysis which is required whenever new regulations are proposed to be made under OHSA.

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252 At 370, cited at 205 CLR 333 [88].

253 *Miletic v Capital Territories Health Commission* (1995) 69 ALJR 675 , at p.677.

254 Gunningham, 1984, cited in Creighton, B. & Rozen, P., *Occupational Health and Safety Law in Victoria*, 2nd ed. Federation Press, Sydney, 1997, pp.101-102.

255 Health and Safety Executive, *Reducing Risks, Protecting People – HSE's Decision Making Process*, HMSO, London., 2001, Appendix 3, para 20.

536. The requirement that a regulatory impact statement be prepared for any new regulation is imposed by s.7 of the *Subordinate Legislation Act* 1994. Under s.10(1)(d) of that Act, a regulatory impact statement must include –

> *"an assessment of the costs and benefits of the proposed statutory rule …"*

The assessment of the costs and benefits must include:

> *"an assessment of the economic, environmental and social impact and the likely administration and compliance costs including resource allocation costs."*[256].

537. A relevant, recent example of such statement is that prepared for the Occupational Health and Safety (Prevention of Falls) Regulations, which I shall refer to as the "Falls RIS".

538. According to the Falls RIS, the analytical tool of cost-benefit analysis (CBA) is used –

> *"in a range of policy and investment analysis contexts to establish whether the benefits of a change – such as the introduction of the proposed Regulations – exceed the costs … In CBA, annual costs are summed over the expected life of the proposed Regulations and compared with the summed value of annual benefits With each succeeding year in the analysis, costs and benefits are 'discounted' by successively larger amounts to reflect the community's preference for benefits now rather than later. A standard rate of discount, expressed as an annual percentage, is used in calculating discounted benefits and costs.*
>
> *In economic terms, the proposed Regulations would be desirable if discounted benefits exceed discounted costs. The most desirable option in economic terms would be that which produces the highest net benefits"*[257].

539. The methodology adopted for cost-benefit analysis in relation to regulations is instructive, because it represents a sophisticated version of what is supposed to happen, in a much more "rough and ready" way, in workplaces every day. That is, an attempt is made to assess the benefits of eliminating (or mitigating) a risk in order to determine whether the relevant expenditure is justified.

Prevention of falls: the cost-benefit analysis

540. The basic methodology for assessing the costs and benefits of the proposed Prevention of Falls Regulations was described as follows:

> *"From the information provided by employers, costs of compliance per employee exposed to falls risk were estimated in respect of each of the main duties imposed by the proposed Regulations. Examples include hazard*

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256 Section 10(2).

257 Victorian WorkCover Authority, *Regulatory Impact Statement: Occupational Health and Safety (Prevention of Falls) Regulations,* VWA, Melbourne, 2002, para 3.1.

> *identification and risk assessment, training, risk controls and documentation of emergency procedures. Up-front (capital) costs and recurrent costs per risk- exposed individual were calculated. These unit cost estimates were then applied to estimates of the total population of employees exposed to falls risk over two metres to arrive at compliance cost estimates for Victoria.*
>
> *Benefits are estimated in the RIS as the costs that employers, employees and the community could save through a reduction in the incidence of falls."*[258].

541. In the estimation of compliance costs and benefits, the Falls RIS assumed full compliance. The estimated cost therefore reflected the initiatives which employers would have to take to achieve compliance, over and above current levels of expenditure[259].

542. Of particular interest is the approach to assessing risk exposure:

> *"The risk associated with a fall over two metres varies from one employer and industry sector to another. People who work in the building and construction trades such as roofers, bricklayers and carpenters face very significant falls risks. Relative to construction industry workers, truck drivers face a lower probability of falling from heights greater than two metres, but the severity of their falls is nevertheless over four times the average of all WorkCover claims. On the other hand, office workers face very little fall risk in the conduct of their normal duties. Even within enterprises in which high risk activities take place, not all employees will be exposed to the risk.*
>
> *Estimating risk exposure has been a very important part of the RIS because the number of risk-exposed employees is the basis for estimating total compliance costs with the proposed Regulations across Victoria as a whole. <u>Each employer participating in the compliance surveys was asked to estimate the proportion of their workforce that was routinely or occasionally exposed to the risk of falling more than two metres</u>."*[260]

543. In estimating compliance costs to employers, the Falls RIS examined the likely costs of –

(a) hazard identification and risk assessments;

(b) risk controls (excluding ladders and administrative controls);

(c) ladders;

(d) administrative controls;

(e) emergency procedures for risk control measures; and

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258 VWA, 2002, paragraph 3.2.

259 VWA, 2002, paragraph 3.4.

260 VWA, 2002, (emphasis added).

(f) training[261].

544. On this basis, total employer compliance costs were assessed as follows:

> *"The average cost per risk-exposed employee is estimated to be $605 (up-front) and $495 per year recurrent (in Table 2). Total up-front costs in year one would be $65.6 million. Recurrent costs would be $45.2 million per annum. When expressed in terms of all workers in Victoria (rather than only those exposed to falls from height risk), capital costs per employee would be approximately $35 (up-front) and $24 per year (recurrent)."*[262].

545. As to benefits, available data suggested that full compliance would result in large reductions in the incidence of falls. At the same time, the Falls RIS acknowledged that complete elimination of incidents could not be expected even with full compliance. The Authority concluded that, on an assumption of full compliance, the proposed Regulations could reduce the incidence of falls over two metres by at least 50%[263].

546. The benefits of preventing falls were quantified by reference to both the direct and the indirect costs of the claims associated with the avoided injuries These total costs were estimated to be $111 million. Separately, there was a quantification of the value of avoiding fatalities. Based on information contained in a Bureau of Transport Economics report, the Falls RIS analysis assumed the value of a life to be $1.5 million. The Falls RIS concluded that –

> *"total benefit potential from fatalities forgone (sic) is $7.4 million per year"*[264].

547. After adjustment for self-employed persons and employees of self-insured employers, the total (preventable) cost of falls in the workplace was estimated to be $146.9 million per annum.

548. The conclusion of the Falls RIS was that the proposed Regulations "would therefore be justified in economic terms". In the end, it was a simple arithmetical exercise:

> *"Section 3.6 estimated that total costs of complying with the proposed Regulations would be $352.2 million in discounted terms over ten years. Given benefits over the same period of between $424.2 million and $458.6 million as estimated in section 3.9.2, the net present value of the proposed regulations would be between $72.0 million and $106.4 million at the 6% discount rate."*[265]

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261 VWA, 2002, paragraph 3.2.
262 VWA, 2002, paragraph 3.6.7
263 VWA, 2002, paragraph 3.9.2.
264 VWA, 2002, paragraph 3.9.2 The HSE uses a figure of £1 million.
265 VWA, 2002, para 3.9.2 .

Cost-benefit analysis in the workplace: the UK approach

549. In 2001, the UK Health and Safety Executive published a description of its decision-making process in applying the *Health and Safety at Work Act* 1974 to decisions about workplace risk. HSE uses cost-benefit analysis –

> *"to inform its decisions when regulating and managing risks. It does this by expressing all relevant costs and benefits in a common currency – usually money".*[266]

550. The approach to quantifying benefits varies, as follows:

> *"A suitable and sufficient assessment of cost and risk can often be done without the explicit valuation of the benefits, on the basis of common sense judgements while, in other situations, the benefits of reducing risk will need to be valued explicitly. The latter is far from easy because the health and safety of people and their societal concerns are not things that are bought and sold, and yet a monetary value has to be attributed to matters such as the prevention of death, personal injury, pain, grief and suffering."*

551. When comparing cost against risks, HSE is governed by two key principles, namely that –

> *"● there should be a transparent bias on the side of health and safety. For dutyholders, the test of 'gross disproportion' implies that, at least, there is a need to err on the side of safety in the computation of health and safety costs and benefits. HSE adopts the same approach when comparing costs and benefits and moreover, the extent of the bias (ie the relationship between action and risk) has to be argued in the light of all the circumstances applying to the case and the precautionary approach that these circumstances warrant … ;*
>
> *● whenever possible, standards, should be improved or at least maintained."* (emphasis added).

552. The test of "gross disproportion" is taken from the decision of the English Court of Appeal in *Edwards v National Coal Board*[267]. The case concerned the death of a colliery worker in a mine. The question was whether it had been "reasonably practicable" for the mine owner to make the mine wall safe. According to Asquith L.J., the phrase "reasonably practicable" implied that –

> *"A computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them [of*

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266 Health & Safety Executive, 2001, Appendix 3, paragraph 10.

267 [1949] 1 KB 704.

> *showing that prevention was not reasonably practicable]"*[268].

553. According to Tucker L.J. –

> *"... in every case it is the risk that has to be weighed against the measures necessary to eliminate the risk. The greater the risk, no doubt, the less will be the weight to be given to the factor of cost."*[269].

The "gross disproportion" test

554. The "gross disproportion" test appears to have originated with what Lord Atkin said in *Coltness Iron Company Limited v Sharp*[270]:

> *"In the facts of this case where the dangerous machinery was exposed for only a few minutes and the only means of effecting the necessary repairs in a part of the mine where it was unlikely that any workmen would be exposed to risk of contact with the machine other than the engineer engaged in the work of repair, I am unable to take the view that it was reasonably practicable by any means to avoid or prevent the breach of [duty]. The time of non-protection is so short, and the time, trouble and expense of any other form of protection is so disproportionate that I think that the defence [that protection was not reasonably practicable] is proved."*[271].

555. In *Marshall v Gotham Co Limited*[272], Lord Oaksey rephrased what Lord Atkin had said, as follows:

> *"What is "reasonably practicable" depends upon a consideration whether the time, trouble and expense of the precautions suggested are disproportionate to the risk involved"*[273].

556. Lord Reid in the same case applied what Asquith L.J. had said in *Edwards*. In concluding that the relevant precautions were not reasonably practicable, Lord Reid said:

> *"The danger was a very rare one. The trouble and expense involved in use of the precautions, while not prohibitive, would have been considerable. The precautions would not have afforded anything like complete protection against the danger..."*[274].

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268 At 712 (emphasis added).

269 At 710.

270 [1938] A.C. 90.

271 At 93-4 (emphasis added).

272 [1954] A.C. 360.

273 At 370.

274 At 373. His Lordship's reference to "prohibitive" expense appears to have been a reference to whether the cost of the precautions would have made "working the mine uneconomic" – see 372

557. More recently, the House of Lords had to consider the statutory duty of an employer –

> *"to ensure, so far as is reasonably practicable, that the premises … are safe and without risk to health"*[275].

Lord Jauncey drew a distinction between what it was "reasonable" for a person to do, and what it was "reasonably practicable" for the person to do:

> *"It could, having regard to his degree of control and knowledge of likely use, be reasonable for an individual to take a measure to ensure the safety of premises, but it might not be reasonably practicable for him to do so <u>having regard to the very low degree of risk involved and the very high cost of taking the measure</u>."*[276].

The position in Victoria

558. Although neither the Courts nor the Authority have ever said so, something approximating the "gross disproportion" test already applies in Victoria.

559. That is certainly the view expressed in the *Practical Guide to Victorian Occupational Health and Safety Legislation*, written by Mr Barry Sherriff, a Melbourne solicitor who specialises in occupational health and safety law. According to the *Practical Guide,* which is regarded as an authoritative source of guidance for dutyholders and legal practitioners alike –

> *"The consideration of cost requires a value judgment to be made, which should prudently only be made in favour of not acting where the likelihood of injury is remote or <u>the cost is so disproportionate to potential benefit that it would be clearly unreasonable</u> to require the expenditure."*[277].

560. Some notion of gross disproportion is also evident in what Harper J said in *Holmes v R E Spence & Co*[278]-

> "*… <u>If the danger is slight and the installation of a guard would be impossibly expensive</u>, or render the machine unduly difficulty to operate, then it may be that the installation of that guard is properly to be regarded as impracticable …"*

561. As I have explained in Chapter 10, the definition of "practicability" has the effect, as a matter of law and in practice, of establishing a test of "reasonable practicability". As we have seen, that test has – for more than 50 years of Anglo-Australian jurisprudence – approached the cost issue as being one of "gross disproportion".

562. The codes of practice made under the Act have not adopted this notion of "gross disproportion". The codes seem rather to assume that even a slight imbalance of cost

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275 *Austin Rover Ltd v Inspector of Factories* [1990] 1 AC 619.

276 At 636 C (emphasis added); see also at 625-6 per Lord Goff, citing *Edwards* and *Marshall*.

277 Part 1 p.11 (emphasis added).

278 (1992) 5 VIR 119 at 124 (emphasis added).

over risk is enough to put the relevant risk control measure beyond the scope of the employer's duty. Thus, the codes postulate the following as the appropriate test:

> *"Are the costs of the risk control commensurate with the benefits gained (severity of risk controlled)?"*[279].

The Act should be clarified

563. In my view, Parliament should now crystallize in the Act the test of "gross disproportion". That is, the Act should say that, once the severity and likelihood of the risk have been assessed, the relevant safety measure should be implemented unless the cost of doing so would be grossly disproportionate to the risk as assessed.

564. In making such a clarification, the Parliament would be adhering to the original intention of the Act – that cost should not be given excessive emphasis. As we have seen, this clarification would accord with what has been said in the (limited) judicial and legal commentary about the cost factor in the existing "practicability" test under OHSA. It would also be consistent with the approach adopted in the UK, both by the regulator and by the courts.

565. Most importantly of all, this clarification should greatly simplify the task of inspectors and dutyholders. It would henceforth be clear that cost should not be an obstacle to risk prevention unless there is such a manifest disproportionality between the cost of a preventive measure and the benefit (in risk prevention) that it would be clearly unreasonable to expect the measure to be implemented.

566. By promoting a "transparent bias" in favour of safety, the "gross disproportion" test would reinforce a precautionary approach[280]. It would establish a presumption in favour of safety. That is, the test would require the requisite preventive measure to be taken unless there was a stark imbalance between the cost and the risk.

567. Finally, the "gross disproportion" test seems particularly appropriate given the community's interest in workplace safety. As the Industry Commission pointed out in 1995, employers under existing premium arrangements bear only 40% of the total cost of workplace injury[281]. The community bears the other 60% of the cost.

An objective approach to cost

568. The question of what is "practicable" for the purposes of OHSA must be determined objectively. That is, the degree of risk control which the Act requires to be determined

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279 *Code of Practice : Hazardous Substances*, No. 24, 2000, p.30; *Code of Practice : Dangerous Goods (Storage & Handling)*, No. 27, 2000, p.23 (emphasis added). Access via VWA website: http://www.workcover.vic.gov.au/vwa/home.nsf/pages/codes_downloads

280 Cf. *Environment Protection Act* s.1C: The "precautionary principle" in the environmental sustainability literature reflects a view antithetical to the cost-benefit approach. It assumes that risks are unknowable and thus cannot be calculated in numerically. The approach suggested here is much more limited in scope.

281 Industry Commission, 1995, p. xix.

by objective standards, not by the particular circumstances (including financial) of the dutyholder.

569. This was authoritatively established in 1989 by the Full Court of the Victorian Supreme Court in *Chugg v Pacific Dunlop Limited*[282]. According to the joint judgment of Kaye and Beach JJ –

> *"Because of the nature of the several matters set out in para (a), (b), (c) and (d) [of the definition of "practicable" in s.4], what is practicable is not to be assessed subjectively according to the knowledge and circumstances of the employer, but rather it is to be determined objectively."*[283].

570. The particular question in the case concerned sub-paragraph (b) of the definition of "practicable", which addresses "the state of knowledge". But the view of the Court was based on, and was expressed to apply to, each of the four practicability factors, including cost.

571. The approach in *Chugg* was endorsed in 1996 by a differently-constituted Full Court in *R v Australian Char Pty Ltd*[284]. In the view of Phillips CJ, Smith and Ashley JJ, the definition of "practicable" in s.4 does –

> *"call up consideration of the conduct of the employer judged objectively"*[285].

572. No occasion has arisen for Victorian Courts to apply the objective test in a case dealing specifically with questions of cost. But it is clearly the law in Victoria – and has been for nearly 15 years – that such an approach is required.

573. What this means in relation to cost is that whether or not a particular safety measure is "practicable" in the relevant sense does not depend on the financial circumstances of the particular dutyholder[286]. It is immediately apparent why this must be so. Parliament cannot have intended – nor would the community have accepted – that the degree of a worker's exposure to risk in a particular industry should depend on the financial circumstances of the employer in question.

574. An example will readily illustrate the point. Suppose two foundries were in operation in Melbourne, one prosperous, the other struggling to achieve financial viability. How could any coherent system of occupational health and safety law countenance a lower level of OHS protection for a worker in the struggling foundry than for the worker in

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282 Kaye, Beach and Ormiston JJ, unreported, 5 May 1989.

283 At p.16; see also per Ormiston J at p.36. The decision went on appeal to the High Court, but on other points – see *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

284 (1996) 64 IR 387 at 395–7 and 399.

285 At 399.

286 Sherriff in the Guide (p.1-11) takes a contrary view, saying that the reasonableness of incurring cost "may also be relative to the financial circumstances of a particular company." The only authority cited for this proposition is an unreported decision of the Magistrates' Court from March 1996.

the prosperous foundry? The notion only has to be stated for it to be seen to be indefensible.

575. Just as the question of knowledge is to be determined objectively - by reference to what ought to be known about the risks – so the question of balancing cost and risk must be determined objectively, by reference to what is reasonably necessary to eliminate or control the risk, not by reference to what the particular employer has the capacity to afford.

576. Every day, so I have been told, inspectors are met with dutyholders' protestations of limited financial resources, especially in smaller workplaces. If an inspector were to allow differential levels of safety protection according to the size and resources of the dutyholder, this would be to exercise a discretion which the Act simply does not confer.

577. The uncertainty about cost is exacerbated by references to cost in the codes of practice which appear to suggest that subjective, employer-specific factors can determine the content of the safety duties. The following example is from a case study of risk control given in *Code of Practice No. 24 (1 June 2000) Hazardous Substances*, in relation to the use by a spray painting workshop of a two-pack paint system containing the hazardous chemical hexamethylene diisocyanate:

> *"Once the risk assessment and the necessary air monitoring had been completed, risk controls were considered. Any solution had to eliminate, or if this were not practicable, reduce the risk to health posed by the paints and solvents. Elimination of the two-pack paint was not an option because of the desired finish, turnaround times and cost to the client."*[287]

578. In my view, the lack of clarity about cost needs to be addressed urgently. First the Act should be amended so that it makes explicit what is at present only implicit, that "practicability" is to be determined objectively, not according to the particular circumstances (including financial) of the dutyholder.

579. Secondly, as I have suggested elsewhere, the Authority should prepare guidance material, whether in the form of a safety ruling or a guidance note, explaining clearly to dutyholders and inspectors how the cost-risk calculus should be performed, and demonstrating by some worked examples how the "gross disproportion" test applies.

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287 *Code of Practice: Hazardous Substances,* No. 24, 2000, p.53 (emphasis added).

Chapter 13: Protecting workers and the public: ss.21 and 22

580. Under Term of Reference 1, I am asked to provide recommendations on any changes that are needed to the existing legislation to-

> *"better secure the health, safety and welfare of persons at work, to protect them against risks to health and safety and secure safe and healthy work environments ..."*

581. The language used here is recognisably the language of s.6 of the Act (which sets out its objects). As I pointed out in the Discussion Paper, whereas the objects of the Act (and my Terms of Reference) refer to the health, safety and welfare of "persons at work", the operative provisions in the Act refer to "employees". Thus, the general duties in s.21 are owed by employers to employees. Part IV of the Act makes no provision for participation by, or representation of, workers who are not "employees".

582. In s.4 of the Act, the term "employee" is defined to mean –

> *"a person employed under a contract of employment or under a contract of training."*

The definition of "employer" is in corresponding terms.

583. Subject to any statutory extension, therefore, provisions of the Act which refer to "employees" apply only to those employed under contracts of service. The definition of "employee" excludes –

- anyone engaged under a contract for services, i.e. an independent contractor; and
- any worker whose services are provided to the employer by a third party supplier of labour – for example, a labour hire company.

584. The Act contains only one statutory extension of the term "employee". Under s.21(3), the duties which are imposed on an employer by ss.21(1) and (2) extend to –

(a) an independent contractor engaged by the employer; and

(b) any employees of that contractor,

but only in relation to matters over which the employer has control or would have had control but for any agreement to the contrary between the employer and the contractor.

585. Everywhere else in the Act, the narrower definition of "employee" applies. So an employer's duties (for example) –

- to monitor the health of employees[288]; and

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288 Section 21(4)(a).

- to pay workers whose work is interrupted by the issue of a prohibition notice[289],

have no application to independent contractors or their employees or to labour hire employees.

Protect each person at work

586. In my view, the substantive provisions of the legislation should reflect the broader concept of "persons at work", as embodied in the objects of the Act.

587. The focus of health and safety protection, and therefore of the corresponding obligations, must surely be to protect each person who is at work in a workplace. It hardly seems relevant, at least at this general level, to enquire into the precise legal basis of a person's employment.

588. What matters is that, for the period during which a person is at work in a workplace, there is a responsibility to ensure that –

(a) the work which that person undertakes does not create health and safety risks for him or her or for others in that workplace (or non-workers who are affected by the activity in that workplace); and

(b) that person's health, safety and welfare are not put at risk by hazards in that workplace.

589. In the course of the consultations, it has been suggested that a definition of "worker" should be introduced into the Act. Such a term could accommodate the whole range of different workplace relationships in the new economy – including contractors, casual workers, outworkers and labour hire workers – but would not seek to draw any distinctions between them where their rights and responsibilities with respect to occupational health and safety are concerned.

590. In my view, this amendment should be made. A suggested form of provision is set out at the end of this Chapter.

591. At present, the protection of persons other than employees is governed by s.22. The introduction of the term "worker" will have the advantage of sharpening the distinction between s.21 and s.22. The duties under s.21 will apply to all those at work in the workplace (subject always to the dictates of "reasonable practicability"), while the duties under s.22 will apply not to those who are working but to those who are affected by what is going on in the workplace.

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289 Section 26(6).

Duties of persons other than employers

592. As we have seen, the definition of the general duties under the Act is founded on – and limited by – the traditional employer-employee relationship. Thus it is only employers upon whom the general duty under s.21(1) is imposed and only employers and self-employed persons upon whom the duty in s.22 is imposed.

593. There are, of course, persons (natural persons as well as corporations) who carry on business undertakings, including large-scale undertakings, but have no employees. As was pointed out early in the consultations, such persons are not subject to the duties under s.21 and – except for those who could be characterised as "self-employed persons"[290] – are not subject to the duty under s.22.

594. This would seem to be a gap in the Act which must be filled. Take, for example, a private company which is in the business of building residential units. For this purpose, the company buys land and contracts with builders to have the units constructed. Assume further that there are two directors of the company, who manage its affairs, but neither of whom has a contract of employment with the company. So they are not "employees" (as defined). All the administration and property management services are, likewise, contracted out.

595. In those circumstances, the company is not an employer. No-one is employed by the company under a contract of employment. Nor will the company, as a matter of ordinary parlance, be characterised as a "self-employed person". The company itself is not "working for gain or reward". It is retaining others to work for it.

596. In short, however large or complex the construction enterprise carried on by the company, it owes no duties to any person in respect of health and safety issues arising either at any of the construction sites or as a consequence of the carrying on of the building activities.

597. I am in no position to assess how widespread an issue this is. But the rapid growth in the labour hire industry would suggest that it might not be insignificant. After all, it is of the essence of labour hire that the hired workers are not employees of the person who hires them.

598. In my view, the solution is to include in the Act a term designed to capture this category of persons. A possible term would be "proprietor", which could be defined to mean "a person (other than an employer) who conducts an undertaking". As s.22 makes clear, it is the "conduct of the undertaking" which gives rise to the risks for which the person conducting it should be responsible. This definition of "proprietor" would include a self-employed person.

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290 In s.4 of the Act, "self-employed person" is defined to mean "a person who works for gain or reward otherwise than under a contract of employment or apprenticeship, whether or not that person employs one or more other persons."

599. As suggested in paragraph 591, it would appear that the interrelationship between s.21 and s.22 was originally conceived of as follows. Section 21 would impose duties on employers in respect of those in the workplace (i.e. employees) while s.22 would impose duties in respect of those (outsiders) affected by what was being done in the workplace.

600. To introduce the concept of "worker" into s.21 will have the advantage of bringing within the ambit of the protection of that section all those who work at the workplace, regardless of their employment relationship with the person in control of the workplace. Likewise, the inclusion of the notion of "proprietor" in s.21 will make it clear that the duty is owed by the person whose undertaking is being carried on, whether or not that person has an employment relationship with any of the persons who are working in the undertaking.

601. As s.21 expands, so s.22 can properly contract. Section 22 can be redrafted to make clear that it protects non-workers, so that the focus of s.22 is protection of the public against risks created by workplace activities. The s.22 duty should also apply to a "proprietor".

No change in existing duties

602. The changes I am recommending do not in any way change the scope of the duties imposed on employers by the existing provisions. They simply change the distribution of those duties as between s.21 and s.22.

603. The existing sections are generally regarded by commentators as being sufficiently broad to oblige employers to afford protection to all workers and all members of the public. As Richard Johnstone has commented –

> *"OHS statutes have a broad coverage of workers. The coverage would appear to be strongest in commercial arrangements involving contracting and sub-contracting, where some OHS statutes [including Victoria] make explicit provisions for such relationships...Even where explicit provision is not made, the blanket protection given to 'persons other than employees', and the broad judicial interpretation of these provisions, means that most persons whose OHS is affected by the activities of an employer or self-employed person are afforded protection by the OHS statutes."*[291]

604. Here, as elsewhere, I am concerned to achieve greater clarity and comprehensibility in the language of the Act, not to impose additional burdens – except in relation to the new "proprietor" category.

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291 Johnstone, R. 1999(b) , "Paradigm Crossed? The Statutory Occupational Health and Safety Obligations of the Business Undertaking", *Australian Journal of Labour Law*, vol 12.

605. The revised duties will more closely reflect the recommendation of the Robens Report that there should be a "positive declaration of the over–riding duties" which -

> *"establish[es] clearly in the minds of all concerned that the preservation of safe and health at work is a continuous legal and social responsibility of all those who have control over the conditions and circumstances under which work is performed. It would make it clear that this is an all-embracing responsibility, covering all workpeople and working circumstances unless specifically excluded."*[292].

606. Moreover, the new duties and clarification of "reasonable practicability" will render the deemed employer provision (s.21(3)) redundant.

607. Of course, as discussed in detail in Chapter 11, the precise content of the duty (i.e. what the principal must do in order to fulfil the duty) may differ in relation to each category of worker, as the degree of control exercised by the principal will directly affect what is "reasonably practicable" in the circumstances. Nevertheless, the policy foundation for the imposition of the duty is identical in each case – each worker is "at work" in the principal's undertaking and the principal should therefore bear the burdens, as well as enjoying the benefits, of the worker's endeavours. Moreover, the principal, together with other dutyholders, is best placed to take action to prevent harm to workers.

Proposed provision

608. The revised duties of employers and "proprietors" might be expressed as follows-

> *"21(1) Every employer and every proprietor shall provide and maintain so far as is reasonably practicable for workers a working environment that is safe and without risks to health.*
>
> *...*
>
> *22 Every employer and every proprietor shall ensure so far as is reasonably practicable that persons (other than workers) are not exposed to risks to their health and safety arising from the conduct of the undertaking of the employer or proprietor."*

609. The following definitions would be necessary to support this reformulation of the duties-

> *"employer" [retain current definition]*
>
> *"proprietor" means a person (other than an employer) who conducts an undertaking*
>
> *"worker" means:*
>
> *(i) in relation to an employer – an employee or a person working in the employer's undertaking.*

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292 Robens, A., 1972, paragraphs 129-130 (emphasis added).

> *(ii) in relation to a proprietor – a person working in the proprietor's undertaking."*

610. Concerns have been expressed to me that the word "undertaking" is of uncertain scope. Like "practicable", it is not a word in common use and it should ideally be replaced by a term which is better known and understood. Alternatively, it might be sufficient to have an inclusive definition, picking up what Hansen J in the Victorian Supreme Court said in *Whittaker v Delmina*[293] -

> *"The word is not defined in the Act. The expression is broad in its meaning. In my view such a broad expression has been used deliberately to ensure that the s[ection] is effective to impose the duty it states . . . The word must take its meaning from the context in which it is used. In my view it means the business or enterprise of the employer . . .and the word 'conduct' refers to the activity or what is done in the course of carrying on and the business or enterprise. A business or enterprise, including for example that conducted by a municipal corporation, may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances must be as infinite as they may be variable. Although such a place may, and often will be, a workplace as defined it seems that the legislature has chosen not to use that word and, rather, to use an expression of breadth and possibly wider application. I am of the view that this was deliberate to ensure the duty applied as it was intended and that the word 'undertaking' should not be read as synonymous with 'workplace'. It is neither helpful nor necessary to do so."*

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293 [1998] VSC 175 at [47]

Chapter 14: A systematic approach

611. Since the mid-1990s, OHS regulatory agencies in industrialised nations have increasingly promoted a *systems* approach to the management of OHS. The basic rationale is that such an approach –

> *"stimulate[s] modes of self-organisation within firms in such a way as to make them self-reflective and to encourage internal self-critical reflection about their OHS performance"*[294].

612. OHS management systems establish structures and processes for identifying, assessing and controlling OHS risks. Gallagher defines OHS management systems as –

> *"a combination of the planning and review, the management organisational arrangements, the consultative arrangements, and the specific program elements that work together in an integrated way to improve health and safety performance"*[295].

613. This chapter considers whether the OHSA should place a greater emphasis upon systematic management of OHS hazards and risks – or even go so far as to explicitly require employers to adopt some type of formal OHS management system.

Systematic approach to the control of risk

614. Section 21(1) of the OHSA imposes a duty on employers to "provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health". "Working environment" includes all aspects of the circumstances in which work is being performed. As Sherriff observes in the Practical Guide, the working environment is "not restricted to the physical environment or characteristics of the workplace".

615. Whereas inspection and prosecution activities are typically based on "snapshots" of the working environment (particular tasks, actions or conditions), the "working environment" concept also encompasses the *processes* that either give rise to, or mitigate, workplace risks. It follows, in my view, that the existing obligation under s.21(1) to provide a safe working environment extends beyond controlling risks associated with discrete tasks or hazards and includes the systematic management of workplace hazards and risks.

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294 Gunningham, N. & Johnstone, R., "The Legal Construction of OHS Management Systems", in Frick, K., Jensen, P.L., Quinlan, M. & Wilthagen, T., *Systematic Occupational Health and Safety Management: Perspectives on an International Development,* Amsterdam, Pergamon, 2000, p.126.

295 Gallagher, C., Underhill, E. & Rimmer, "Review of the Effectiveness of OHS Management Systems in Securing Healthy and Safety Workplaces", a report for the National Occupational Health and Safety Commission, 2001, p.10.

616. Section 21(2)(a) of the OHSA requires the employer to -

> *"provide and maintain … systems of work that are so far as practicable safe and without risks to health"*[296].

The Act is supported by regulations which mandate a generic risk management approach - hazard identification, risk assessment and risk control – and, in some cases, hazard-specific hierarchies of control. Thus, to some extent, the legislative framework already provides for the systematic management of OHS hazards and risks.

617. It was the employer's failure to carry out a risk assessment which founded the conviction in *WorkCover Authority of New South Wales v Milltech Pty Ltd* (2001). Marks J found Milltech guilty of a breach of s.15(1) of the *New South Wales Occupational Health and Safety Act* 1983 (which was equivalent to s.21 of the OHSA). Marks J remarked that the case was –

> *"yet another illustration of the need for employers to exercise abundant caution, maintain constant vigilance and take all practicable precautions to ensure safety in the workplace. It is essential that the approach should be pro-active and not a reactive one; employers should be on the offensive to search for, detect and eliminate, so far as reasonably practicable, any possible areas of risk to safety, health and welfare which may exist or occur from time to time in the workplace".*

618. It is arguable that the systematic control of risk is an inevitable corollary of the move to performance-based law. Quinlan has observed that "the logical connection between systematic OHS management and safe systems of work [has] only [been] apparent in hindsight".[297] Nevertheless, these conceptual models share a common principle - that workplace health and safety can only be achieved through proactive and planned interventions.

619. Although a systems approach is woven into general duty provisions in principal OHS legislation, no Australian jurisdiction has specifically mandated the use of OHS management systems.[298]

OHS management systems

620. Formal, rule-bound OHS management systems emerged out of –

- the Safety Movement of the early twentieth century, which promoted safe worker behaviour on the grounds that it was "good for business";

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296 Emphasis added. The OHSA does not define "systems of work". In his commentary on the Act, Sherriff describes a system of work as "a planned and co-ordinated assemblage of procedures and/or arrangements which together provide the method by which word is undertaken.

297 Quinlan, M., "Promoting occupational health and safety management systems: a pathway to success – maybe", in *Journal of Occupational Health and Safety – Australia and New Zealand,* vol. 15, no. 6, 1999, p.536.

298 The same is true of the UK, Canada and New Zealand.

- the emergence in the 1980s of corporate management principles and organisational models;
- engineering risk management models, such as those adopted in safety case regimes and voluntary OHS management systems introduced in the wake of catastrophic industrial disasters; and
- external quality assurance schemes (audit systems) and standards-setting initiatives.

Du Pont Safety Model

621. The widely-marketed Du Pont Safety model is an example of an OHS management system developed within a human resources management framework. The model "is claimed to be *the* benchmark of occupational safety and ... has been developed into an international consulting business".[299]

622. One of its fundamental assertions is that "96% of safety incidents are directly caused by the actions of people, not by faulty equipment or inadequate safety standards".[300] Consequently, the model has a strong behavioural bias, focusing upon modification of hazardous worker behaviour rather than on the workplace itself (design of the working environment, systems of work, plant and so forth). This bias is implicit in statements such as "each worker must be convinced ... [to work] safely".[301] The goal is seen to be worker compliance, rather than worker participation.

623. Throughout its international operations, Du Pont reports extremely low lost time injury figures (LTIs). There are concerns, however, that the use of LTI as a numerical index of OHS performance in fact encourages under-reporting of injuries and undermines the detection and control of OHS hazards and risks. Undue focus on managing claims can lead to inadequate control of risks not usually associated with "lost time", such as occupational diseases which involve a long period of latency between initial exposure and onset of symptoms.

Other corporate management models

624. Other corporate management models which have incorporated OHS management systems are:

- "Total Quality Management" (TQM), which uses statistical methods to identify quality problems, and

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299 Frick, K & Wren J (2000), "Reviewing Occupational Health and Safety Management – Multiple Roots, Diverse Perspectives and Ambiguous Outcomes", in Frick *et al*, pp.26-28.

300 Du Pont, cited in Andrea Shaw, (2001) "The Limitations of the Du Pont Approach to OHS", unpublished manuscript, 20 February, 2001.

301 Nielsen, K., "Organization implicit in various approaches to OHS management", in Frick, K *et al,* 2000, p. 108.

- "Best Practice", which measures organisational performance against "best in class" performance benchmarks.

625. The focus of these voluntary systems is to improve productivity and quality of product. Both approaches emphasise "continuous improvement through empowered teams". Of the two, the Best Practice approach appears to attach a high level of importance to worker participation and senior management commitment.[302]

626. OHS management systems must compete against the "core" profit-driven priorities of these broader corporate management systems – and thus are often marginalised.[303]

Safety case and safety management systems

627. A safety case regime is a stringent form of permissioning scheme, requiring the operator of a major hazard facility to demonstrate to the regulator that all major risks at the facility are effectively controlled. The safety case includes a detailed, documented, safety management system. It must be tested and verified by the regulator before the facility is permitted to operate.

628. Safety case regimes were developed in the wake of a series of catastrophic industrial disasters during the 1970s, such as Flixborough (1974), Seveso (1976), Piper Alpha (1977), and Alexander L. Kielland (1980). Initially introduced to regulate off-shore oil facilities, safety case regimes have more recently been extended to other major hazard facilities. In Victoria, the *Occupational Health and Safety (Major Hazard Facilities) Regulations* 2000 (the MHF Regulations) were introduced in response to the recommendations of the Royal Commission into the tragic explosion in 1998 at Esso's Longford plant.

629. There was in fact a model OHS management system in place at the plant at the time of the disaster – the Operational Integrity Management System (OIMS). The Royal Commission concluded that the system failed because it had -

> *"take[n] on a life of its own, divorced from operations in the field. Indeed it seemed in some respects, concentration upon the development and maintenance of the system diverted attention from what was actually happening in the practical functioning of the plants at Longford".*[304]

630. The Longford catastrophe demonstrated the gap that may lie between a model OHS management system and its implementation[305]. Despite the voluntary adoption of an OIMS at Longford, auditing processes were ineffective, critical hazards had not been

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302 Gallagher, G., Underhill, E., Rimmer, M., 2001, pp. 49 – 58.

303 Hedegaard Riis, A. & Jensen, P.L., "Denmark: Transforming Risk Assessment to Workplace Assessment", in Walters, D., (ed.), *Regulating Health and Safety Management in the European Union: A study of the dynamics of change,* PIE-Peter Lang, Brussels, 2002, p. 70.

304 Cited by Hopkins 2000, in Gallagher, Underhill, E. & Rimmer, M., 2001, p. 32.

305 Gallagher, C., Underhill, E. & Rimmer, M., "Occupational safety and health management systems in Australia: barriers to success", *Policy and Practice*, IOSH Services, Feb 2003, p.68.

identified and assessed, management took a "hands off" approach, procedures for dealing with hazards and incidents were inadequate, training was ineffective and information flows were poor[306].

631. A recent review of Victoria's major hazards regulatory regimes by the Department of Treasury and Finance found that, although it was "too early to tell", the safety case regime established under the MHF Regulations appeared to be "delivering on its objective to improve safe operation" at major hazard facilities. It concluded that –

> *"new high standards are being set in Victoria via the MHF and Offshore Safety regimes, particularly in the areas of employee involvement and regulatory assessment/oversight practices".*[307]

Audit tools and standards

632. Formal audit systems set minimum standards and provide a measure of OHS performance. AS 4804: 2001[308] sets out general guidelines on establishing an OHS management system. AS 4801: 2001[309] is a specification standard against which an organisation's OHS management system can be assessed. Organisations can seek accreditation through the Joint Accreditation Scheme for Australia and New Zealand (JAS-ANZ).

633. According to Gallagher, Underhill and Rimmer, formal audit tools in OHS management systems may –

- promote documentation of systems, thereby encouraging consistent, informed decision-making about control of workplace hazards and learning from past mistakes;[310]
- be effective in alerting organisations to neglected OHS problems; and
- deepen understanding of the concept of OHS management systems.

634. However, there is a tendency for organisations to treat audit tools as models for OHS management systems, rather than as guides to the establishment of such systems. Gallagher *et al* identified a number of serious problems associated with existing audit tools.

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306 Hopkins, A., *Lessons from Longford: the Esso Gas Plant Explosion,* CCH Australia Ltd, Sydney, 2000.

307 Ernst & Young, Department of Treasury and Finance and the Safety Case Working Party, *Review of Major Hazards Regulations,* Ernst & Young, 2002, p.3.

308 AS 4804: 2001, *Occupational Health and Safety Management Systems – General guidelines on principles, systems and supporting techniques,* Standards Australia.

309 AS 4801: 2001, *Occupational Health and Safety Management Systems – Specification with guidance for use,* Standards Australia.

310 Gallagher, G., Underhill, E., Rimmer, M., 2001, p. 31.

635. Firstly, audits often encourage the proliferation of paperwork, rather than preventive action. They may also lead to complacency and neglect of actual OHS problems, as noted by the Longford Royal Commission (para 629 above).

636. Secondly, these audit tools are often linked to external incentives, which can foster an instrumentalist approach to their use. Gallagher *et al* cite an example of an employer which gained initial level accreditation under the Victorian SafetyMAP scheme (discussed below) and then "refused to consult further with unions on OHS".[311]

637. Thirdly, audit tools encourage the spread of standardised approaches, which may not be well tailored to the circumstances of individual workplaces. In particular, a standardised approach is unlikely to be appropriate for SMEs. Rather than developing a flexible, workplace-specific OHS management system, efforts tend to focus on "managing the tool".

638. Fourthly, audit tools often encourage "tick the box" activity, particularly if those administering them have insufficient knowledge of OHS. There is a common – but unsound - assumption that a high level of conformity with an audit equates with effective OHS management. Where external consultants are engaged to conduct audits, they may "give easy scores to please" the employer. (As against this, consultants are likely to want to develop a reputation for independent, rigorous scrutiny).

639. Fifthly, audit tools (like the Du Pont Safety model) encourage a focus upon physical hazards and tend to overlook psychosocial hazards, occupational disease and issues associated with precarious employment.

640. Finally, and perhaps most importantly, these tools are not designed to assess the key elements of an effective OHS management system, that is, senior management commitment and worker participation at all stages of the OHS management process.[312] They are largely based on a medical-technical model of OHS management and are characterised by a top-down, hierarchical approach to organisational change.[313]

Victoria – SafetyMAP

641. Introduced in 1994, Victoria's SafetyMAP (Safety Management Achievement Program) is an audit tool intended to assist organisations:

- to measure the performance of their health and safety program;
- to implement a cycle of continuous improvement;

311 Gallagher, G., Underhill, E., Rimmer, M., 2001, p. 33.

312 Gallagher, G., Underhill, E., Rimmer, M., 2001, pp. 34 – 38.

313 Shaw, A., & Blewett, V., "What Works? The strategies which help to integrate OHS management within business development and the role of the outsider", in Frick, K.., *et al,* 2000, p. 458.

- to compare their health and safety systems to a recognised benchmark; and
- to gain recognition for the standards achieved in health and safety.

642. SafetyMAP certification is provided via the Joint Accreditation Scheme for Australia and New Zealand (JAS-ANZ), and has recently been revised to align it more closely with AS 4801 and AS 4804.

643. Over the ten years of SafetyMAP's operation, participation levels have been very low. To date, only fifteen organisations have met requirements for advanced certification under the SafetyMAP scheme, six organisations have achieved transitional certification, and 109 have reached initial level certification. This is a total of 120 participating enterprises, most of which are large employers. Self-evidently, this constitutes a tiny proportion of the total number of employers in Victoria.

644. Would-be participants in the scheme are told that certification will provide significant benefits, including: cost efficiencies; performance verification; public relations advantages (via the use of the SafetyMAP logo); capacity to demonstrate due diligence; and competitive advantage. The benefits do not, however, extend to an assurance that legislative requirements have been met.

645. A candidate for "Initial Level Certification" must meet criteria "selected as encompassing the building blocks for an effective, integrated health and safety system that is also capable of meeting legislative requirements".[314] Elsewhere, the guidance material warns that -

> *"conformance to SafetyMAP criteria, whether recognised by formal certification or other means, does not assure compliance with statutory obligations nor does it preclude action by a statutory body"*[315].

646. Nor does certification exempt an organisation from inspections by the Authority. Indeed, a recurrent complaint during the consultations was that SafetyMAP certification was costly and time-consuming, but "made no difference" to the Authority's treatment of the certified employer. I return to this issue of "incentives for compliance" in Chapter 24.

The potential of OHS management systems to deliver improved OHS performance

647. Proponents of OHS management systems maintain that, in the right circumstances, these systems can result in substantial and sustained improvements in OHS performance. OHS management systems are more likely to succeed if they are

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314 Victorian WorkCover Authority, *Auditing Health and Safety Management Systems,* 4th edition, Victorian WorkCover Authority, Melbourne, 2002, p.6.

315 Victorian WorkCover Authority, 2002, p. 4.

participative, involve a high level of management commitment and focus upon eliminating risk at source, rather than changing worker behaviour[316].

648. Detractors see OHS management systems as a "paper tiger", which devours resources, encourages the proliferation of bureaucracies and technocracies, and ignores the OHS realities actually confronted at workplace level. Other critics argue that the managerial approach common to many OHS management systems does not support genuine worker participation and inevitably excludes precariously-employed workers.[317]

649. There is very limited evidence to support the claim that OHS management systems deliver improved health and safety outcomes. According to Gallagher –

> *"[t]he few research studies seeking to draw out the connection between health and safety management systems and injury outcome data give an indication of defining characteristics of better performing enterprises, but they also reflect the methodological constraints relating to the measurement of health and safety performance. Evidence on the performance of alternative systems similarly is scant. This issue does not appear to have been the focus of academic research and has received limited attention in the popular health and safety literature".*[318]

650. Indeed, Hovden claims that a preoccupation with formal systems is –

> *"the major constraint in developing a concept of SHE [safety, health and environment] management able to adapt to, and cope with, the challenges of continuous and rapid changes in technology and society".*[319]

651. The research literature suggests that adherence to formal, rule-bound OHS management systems can actually increase the risk of workplace injury and disease. According to Weick *et al*, safe workplaces rely on the "mindfulness" at all levels of an organisation, achieved by: questioning safety failures; "reluctance to simplify interpretations"; "sensitivity to operations"; and resilience.[320] The research on "high reliability organisations" demonstrates that superior OHS performance is achieved not through compliance with formal systems but through initiative-taking at all levels of an organisation, non-routine work processes, participative management and team cohesion.[321]

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316 Gallagher, C., Underhill, E. & Rimmer, M., 2001, *passim*.

317 Frick, K., *et al,* 2000, pp. 4 – 5; 11.

318 Gallagher, C., *Health and Safety Management Systems: An Analysis of System Types and Effectiveness,* Melbourne, National Key Centre in Industrial Relations, 1997.

319 Hovden, 1998, cited in Shaw, A. & Blewett, V., "Auditing and Evaluating", unpublished, undated paper.

320 Weick, K. *et al* cited in Shaw, A., "The Limitations of the Du Pont Approach to OHS", Shaw Idea Pty Ltd, unpublished, February 2001, p.2.

321 Simard, M. & Marchand, A., cited in Shaw, A., 2001, p.3.

652. Gallagher has classified prevention strategies according to whether they are oriented towards the control of employee behaviour ("safe person") or towards the control of workplace hazards at source ("safe place"). Likewise, management styles are classified as "traditional" or "innovative".

653. In the first category, knowledge and skills are concentrated in one or a few OHS specialist/s, OHS is peripheral to broad management systems, and workers have little or no involvement in the OHS management system. By contrast, where the style is "innovative", senior management play a key role in workplace health and safety, OHS is well-integrated into broader management systems and practices, and worker participation is seen as vital to the success of the system.

654. These classifications yield four categories of OHS management systems, as follows:

(i) sophisticated behavioural (innovative management/safe person);

(ii) unsafe act minimisers (traditional management/safe person);

(iii) adaptive hazard managers (innovative management/safe place); and

(iv) traditional engineering and design (traditional management/ safe place).[322]

655. Only the third type supports the objects of the OHSA – in particular, the objects in s.6(d) ("to eliminate, at the source, risks to the health, safety and welfare of persons at work") and s.6(e) ("to provide for the involvement of employees …and associations representing employees … in the formulation and implementation of health and safety standards").

656. Unfortunately, types (i), (ii) and (iv) tend to dominate the field.

OHS management systems and precarious employment

657. Questions have been raised about the capacity of OHS management systems to adapt to the fragmented and "disorganised" nature of the contemporary workplace:

> *"The suitability of OHSMS to small volatile workplaces is questionable, as the approach assumes a large, static workplace with a stable workforce"[323].*

658. Quinlan and Mayhew argue that:

> *"fractured labour markets make it difficult for regulators to implement a systematic approach to OHS, for employers to voluntarily adopt systems and for unions and workers to play a role in supporting this. Studies of contingent workers indicate they possess an extremely low level of awareness of OHS legislation. … [W]ithout a major re-orientation of labour markets and regulatory strategies, the potential for*

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322 Gallagher, C., Underhill, E. & Rimmer, 2001, pp. 13 – 14.

323 Bottomley, B., *Occupational Health and Safety Management Systems: Strategic Issues Report,* Sydney, NOHSC, Sydney, 1990.

> *more systematic approaches to management systems to enhance OHS performance will be increasingly constrained"*[324].

OHS management systems and small business

659. In all jurisdictions, small enterprises constitute the overwhelming majority of workplaces. Small size has been associated with high levels of occupational risk, lower levels of participation in preventive management, higher incidence of injury and limited access to external assistance[325]. For these reasons, regulatory agencies have tried a number of regulatory and non-regulatory strategies to promote the systematic management of OHS in small workplaces.[326]

660. Since, however, OHS management systems concepts are a product of experience in large organisations, they are not well suited to the needs of small enterprises, which typically lack in-house expertise and financial resources, and rely on informal methods of management (particularly in family-run businesses).

Regulating for OHS management systems

(a) Implementation of the European Union Framework Directive 89/391

661. The European Union Framework Directive 89/391 (the Framework Directive) concerned "the introduction of measures to encourage improvements in the safety and health of workers at work". The Directive sought to harmonise OHS legislation in EU member states and establish in law the systematic management of workplace health and safety. It has been described as "the largest 'experiment' … in mandating OHS management by minimalist statements".[327]

662. The content of the Framework Directive was a reflection of legislative approaches in EU member states. Most importantly, the Framework Directive borrowed the concept of "internal control of the working environment" from Scandinavian countries, where it had been in common use for several years prior to the declaration of the Directive.

663. In doing so, the Framework Directive went beyond narrowly technical approaches to the management of OHS hazards and risks. "Prevention" is defined as "all the steps or measures taken or planned at all stages of work in the undertaking to prevent or reduce occupational risks" [Art. 3]. Employers are required to develop "a coherent overall prevention policy", covering "technology, organisation of work, working

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324 Frick *et al,* 2000, p. 175.

325 Eakin, J., Lamm, F. & Limborg, H.J., "International perspective on the promotion of health and safety in small workplaces", in Frick *et al,* 2000, p. 227.

326 "Dialogue-consultancy" in Denmark; "regional worker representation" in Sweden; "community development-economic incentive" in Canada; and "side door" approach using accountants as a conduit for OHS advice in Australia, Eakin *et al,* 2000.

327 Frick, K. & Wren, J, in Frick, K. *et al,* 2000, p. 30.

conditions, social relationships and the influence of factors relating to the work environment" [Art. 6(g)].

664. Drawing on Nordic social democratic traditions, the Directive enshrines the concept of worker participation in OHS management systems.[328]

665. Further, the Framework Directive explicitly requires the employer to undertake a risk assessment process, which must result in preventative measures "integrated into all activities of the undertaking and/or establishment, and at all hierarchical levels" [Art 6(3)(a)].

666. Finally, the Directive requires employers to enlist competent external services or persons if lack of competent staff within the organisation means that protective and preventative measures cannot be organised.

667. Implementation of the Directive has not given rise to uniformity across European jurisdictions. Differences between EU member states - in legal and political systems, industrial relations climates, principles of governance and labour markets[329] - have resulted in quite diverse domestic implementation of the provisions of the Directive. It has been argued that individual legal traditions are as recognisable as ever.

668. The lessons to be drawn from the implementation of the Framework Directive in EU member states can be summarised as follows:

- Genuine worker participation (which may include the involvement of trade unions) is critical to the success of OHS management systems. But, even in the social democracies of Scandinavia, workers and their representatives have expressed frustration about continued lack of consultation, particularly in relation to risk assessment processes.
- A distinction needs to be made between the Scandinavian "internal control of the working environment" approach (which relies on worker participation at all stages and levels of decision-making) and OHS management systems focusing on worker behaviour.
- Joint assessment of hazards and risks actively undertaken by workplace parties at enterprise level (as in Denmark) is more effective than elaborate, heavily-documented risk assessments prepared by external consultants. The latter should only be called in if the necessary expertise cannot be sourced from within the organisation.

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328 Walters, D., *Regulating Health and Safety Management in the European Union: A Study of the Dynamics of Change,* Brussels, PIE-Peter Lang, 2002, p. 43 - 45.

329 Frick, K., Jensen, P.L., Quinlan, M. & Wilthagen, T., "Systematic Occupational Health and Safety Management – An Introduction to a New Strategy for Occupational Safety, Health and Well-being", in Frick, K. *et al,*2000, p. 5.

- Thus, the European experience tends to support a systematic and participative approach to the control of workplace hazards and risks, rather than the introduction of formal OHS management systems provided by external consultants.

(b) Australian developments

Industry Commission recommendations on systematic OHS management

669. In its 1995 report, *Work, Health and Safety,* the Industry Commission reviewed the use of risk management principles and safety management systems throughout Australia. It recommended that in each Australian jurisdiction, the principal legislation should be amended to explicitly require employers to undertake a risk assessment process.

670. The Industry Commission observed that some organisations had successfully implemented "enterprise safety management systems" and recommended that –

> *"the principal OHS legislation in each jurisdiction explicitly recognise the use of safety management systems by individual enterprises to identify, assess and manage the risks to health and safety associated with the enterprise".*

671. It further proposed that legislation treat the adoption of such systems as *prima facie* evidence that the employer has fulfilled the general duty of care. To be granted evidentiary status, OHS management systems should satisfy the following criteria:

- *"there is adequate on-going consultation between the employer and … employees, and, as appropriate, their trade union representatives;*
- *all the risks to health and safety at the workplace in question are being adequately addressed; and*
- *relevant mandated requirements are being met or an equivalent level of protection to health and safety is achieved"*[330].

672. The Industry Commission also recognised that OHS management systems were more appropriate to larger organisations; SMEs might be "better served by other approaches such as Codes of Practice".

Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002

673. Section 16 of the Cth Act requires an employer to develop an OHS policy in consultation with "any involved unions". According to the Regulatory Impact Statement on the OHS (CE) Amendment Bill 2002, this duty -

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330 Industry Commission, 1995, cited in Parliament of New South Wales Standing Committee on Law & Justice, "Final Report of the Inquiry into Workplace Safety", Sydney, November 1998, pp. 54 – 55.

> *"restrict[s] the flexibility of employers to design safety management arrangements, in direct consultation with all their employees, which take account of the circumstances of their own organisation".*[331]

It is said to foster an -

> *"adversarial approach to safety management due to management of safety issues in an industrial relations context".*[332]

674. The 2002 Bill would replace s.16 with a duty -

> *"to develop, in consultation with the employees of the employer, safety management arrangements [that will, among other things] enable effective co-operation between the employer and the employees in promoting and developing measures to ensure the employees' health, safety and welfare at work".*[333]

675. These arrangements may include -

- a written occupational health and safety policy;
- "arrangements relating to risk identification and assessment";
- agreements between the employer, employees and their representatives in relation to continuing consultation on OHS and other matters; and
- provisions for OHS training.[334]

676. Concomitantly, the Bill introduces a new requirement that, when developing or varying safety management arrangements, employers have regard to advice issued by the Safety, Rehabilitation and Compensation Commission as to the scope of these arrangements[335]. Thus -

> *"[w]hile employers would not be compelled to comply with advice from the Commission in relation to safety management arrangements, they may find themselves in breach of their fundamental duty of care of their employees if they choose to ignore the Commission's advice and develop safety management arrangements which do not meet their fundamental duty of care".*[336]

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331 Australian Government, *Regulatory Impact Statement on the Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002,* p.v. Retrieved from Parliament of Australia information website February 2004: http://www.parlinfoweb.aph.gov.au/piweb/Repository/Legis/ems/Linked/26060203.pdf

332 *RIS on the Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002,* p.viii.

333 s.16(2)(d).

334 s.16(3).

335 *RIS on the Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Bill 2002,*, p. vi – vii.

336 p. ix.

677. The amendment stops well short of mandating OHS management systems, but makes it clear to the employer that compliance with the general duty of care can best be achieved via a participatory and systematic approach to the management of risk at enterprise level – and, specifically, through hazard identification and risk assessment.

Provisions under the New South Wales *Occupational Health and Safety Act* 2000

678. One of the objects of New South Wales' *Occupational Health and Safety Act* 2000 is "to ensure that risks to health and safety at a place of work are identified, assessed and controlled". Although the Act does not directly impose a duty upon employers to adopt a systematic approach to OHS management or mandate the use of OHS management systems, s.34(b) provides for the making of regulations–

> *"requiring persons to identify, assess and deal with the risks to the health and safety of persons arising from work (including risks arising from the place of work or from any plant or substance for use at work)".*

679. The brevity of these references suggests that their inclusion was intended merely as a "platform for the creation of regulations".[337] Detailed employer risk management duties have since been prescribed in Chapter 2 of New South Wales' Occupational Health and Safety Regulations 2001.

680. In recognition of the importance of genuine worker participation in systematic control of workplace hazards and risks, s.15 of the NSW Act requires consultation at all stages of the risk management cycle, including:

> *"(a) when risks to health and safety arising from work are assessed or when the assessment of those risks is reviewed; and*
>
> *(b) when decisions are made about the measures to be taken to eliminate or control those risks; and*
>
> *(c) when introducing or altering the procedures for monitoring those risks […]; and*
>
> *(d) when changes that may affect health, safety or welfare are proposed to the premises where person work, to the systems or methods of work or to the plant or substances used for work[…]".*

681. These provisions are more conceptually limited than the recommendations contained in the *Final Report of the Inquiry into Workplace Safety,* which informed the development of the new NSW Act. The Standing Committee on Law and Justice was charged with the task of inquiring into, and reporting on, workplace safety matters,

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337 Jamieson, S. & Westcott, M., "Occupational Health and Safety Act 2000: A Story of Reform in New South Wales", in *Australian Journal of Labour Law*, vol. 14, 2001, p.183.

including "integrating management systems and risk management approaches aimed at reducing death and injury in the workplace".[338]

682. Among other things, the Committee's Report recommended that the *Occupational Health and Safety Act* –

- "be amended to give statutory recognition to the use of OHS management systems and risk management as key tools in meeting the general duties requirements imposed upon employers in s. 15 of the Act";
- "be amended to impose a duty upon employers to adopt a systematic approach to the management of occupational health and safety. This systematic approach could be as simple as the application of the six-step approach to OHS being promoted by WorkCover NSW,[339] or it could be as complex as the application of an accredited OHS management system".

683. Neither of these recommendations was taken up in the drafting of the new Act. It has been suggested that this reflected a preference of the New South Wales Government for the "two-track" approach advocated by Gunningham and Johnstone (see below), and a concern about the risk of "implementation failure" posed by mandating OHS management systems.[340]

Inspecting the adequacy of OHS management systems

684. Saksvik and Quinlan contend that –

> *"[i]n order to be effective, [OHS management systems require] independent vetting as well as design input and feedback loops. Government inspectorates lack the resources to perform the first task and, in practice, are excluded from the latter two roles"*[341].

685. The adequacy of an OHS management system simply cannot be determined via a single, discrete inspectorial visit. A different methodology and a different set of evaluative tools are required.

686. With the exception of staff within WorkSafe Victoria's Major Hazards Unit, the WorkSafe inspectorate has no training in a methodology for assessing the presence and effectiveness of OHS management systems. For example, inspectors are not equipped to evaluate intangibles such as the "health" of the prevailing culture within a workplace.

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338 Parliament of New South Wales Standing Committee on Law & Justice,, "Final Report of the Inquiry into Workplace Safety", Sydney, November 1998, p. 3.

339 The six steps are: "(i) develop an OHS policy; (ii) set up a consultation mechanism with employees; (iii) establish a training strategy; (iv) establish a hazard identification and workplace assessment process; (v) develop and implement risk control; (vi) promote, maintain and improve these strategies".

340 Jamieson, S. & Westcott, M., 2001, p. 184.

341 Saksvik & Quinlan, "Regulating Systematic Occupational Health and Safety Management: Comparing the Norwegian and Australian Experience", in *Relations Industrielles*, Winter, vol. 58, 2003, no. 1, p. 50.

687. If OHS management systems were to be mandated, WorkSafe Victoria would need to develop a methodology and an expertise for evaluating whether organisations have gone beyond paper compliance.

Options

(a) "Two-track" approach

688. The introduction of an effective OHS management system could be used as evidence that the employer has complied with its general duty obligations. In some Canadian jurisdictions, the courts have determined that the defence of due diligence is "most readily demonstrated by the adoption of an OHS management system".[342]

689. Gunningham and Johnstone advocate a "two-track" approach to regulation, under which enterprises can choose either -

- to continue to comply with the existing suite of OHS legislation; or
- to move beyond minimal compliance and adopt a "best practice" OHS management system and a high level commitment to a safety culture.[343]

Clearly, if "good" employers can establish these systems, inspectorial resources can be redeployed more strategically to focus on those employers who fail to achieve even minimal compliance with OHS standards.

690. Gunningham and Johnstone recognise the potential pitfalls of these systems, namely, increased hierarchy, worker disempowerment, control of behaviour rather than workplace hazards, paper compliance and "implementation failure". They nevertheless contend that governments should provide incentives to encourage those organisations capable of doing so to introduce OHS management systems. An incentive-based approach –

> *"can influence behaviour without direct intervention in the affairs of enterprises…[can] encourage them to seek out the most cost-effective (and often innovative) solutions to problems, …[and] decentralise decision making to enterprises who often have better information on how to solve a problem than government, and …reduce government's enforcement costs".*[344]

691. A "two-track" system seems to me to have some real potential disadvantages. First, it may simply allow participating organisations – most likely, large enterprises – to "opt out" of the regulatory framework, thereby establishing two very different standards of health and safety.

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342 Gunningham, N. & Johnstone, R., "The Legal Construction of OHS Management Systems", in Frick, K., Jensen, P.L., Quinlan, M. & Wilthagen, T., *Systematic Occupational Health and Safety Management: Perspectives on an International Development,* Amsterdam, Pergamon, 2000, p.128.

343 Gunningham & Johnstone, 2000, p.137.

344 Gunningham & Johnstone, 2000, p. 138. On incentives generally, see Chapter 24.

692. Secondly, SMEs could be significantly disadvantaged by this approach. It is not clear whether OHS management systems could be scaled down, "abridged" or otherwise tailored to fit the more informal methods of operation typical of small business. Nor is it apparent whether such abbreviated systems would undermine any benefits that fully elaborated systems might otherwise deliver.

693. Gallagher *et al* observe that research in this area is virtually nonexistent. Further, it is unclear which parts of the system are critical to retain.[345]

(b) Risk management approach

694. The conventional three-step risk management model, comprising hazard identification, risk assessment and risk control has been important in modernising the management of workplace health and safety, and is mandated in most hazard-based regulations made under the Act.

695. The risk management process has for many years been considered an essential component of the systematic approach to the control of workplace hazards and risks. Thus, not surprisingly, many submissions to the Review recommended that the model be adopted in the Act itself. For example, one submission argued that the introduction of a general duty to identify, assess and control all hazards would make the legislation "more streamlined, clearer, less cumbersome and less ambiguous". Others did not share this view, commenting that the regulations provide the best scope for industry - or hazard-specific risk management processes.

696. One submission in particular raised questions about "inflexible adherence" to the risk management model.[346] Reflecting on his extensive experience in the field, Brian Bottomley observed that, while pertinent to many common physical hazards, the model is not necessarily appropriate for subtle, multi-factorial hazards such as musculoskeletal disorders, fatigue, and occupational violence and bullying. The use of the risk management model may, he says, encourage the misconception that all hazards are simple, objectively observable and derived from a single source. He argues that psychosocial hazards are not well served by a natural science model and would be better served by methods that "tap the human experience of risk and injury".

697. Further, the application to these hazards of probabilistic risk assessment methodologies may "generate a risk management practice based on false certainty". These methodologies do not deal particularly well with the compounding effects of the multifarious factors associated with a psychosocial hazard such as fatigue. Where hazards are complex and recalcitrant to definition, the hazard identification and risk

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345 Gallagher *et al,* 2001, p, 41.

346 Brian Bottomley, submission to this Review. Access via VWA website: http://www.workcover.vic.gov.au./dir090/vwa/home.nsf/pages/OHSAct_review

assessment phases can overlap, causing confusion. It becomes very difficult to estimate the likelihood and severity of the risk. In these circumstances, a "universal precautions" approach may be preferred.

698. Bottomley also submits that, in the case of risks for which there are well-known and universally-accepted risk controls, there is little point in requiring an employer to perform a risk assessment – especially given the frequency with which many become entangled in a "risk assessment web", never to make it as far as putting risk controls in place. In these circumstances, it is more sensible and cost-effective to require the employer to simply implement the particular risk control via prescriptive regulation.

699. Finally, Bottomley notes that the sequential emphasis of the conventional risk management model can obscure the iterative nature of actual risk management processes.

Conclusion

700. These arguments are cogent. In my view, the Act should give clear support to the risk management model but without mandating it in every case.

701. Likewise, the Act should support a **systematic** approach to workplace health and safety, but it should not go so far as to impose an obligation to implement an OHS management **system**.

702. I recommend that a new provision be inserted into s.21, along the lines of s.29(B) of *Queensland's Workplace Health and Safety Act* 1995. It might read thus –

> *"Compliance with s.21(1) may, having regard to the circumstances of the particular case, include identifying hazards, assessing risks associated with these hazards, selecting and implementing control measures, and monitoring and reviewing the effectiveness of these measures".*

703. In addition, the Act should emphasise the importance of consultation in the systematic control of workplace hazards and risks, by specifically setting out the phases of the risk management process at which employees must be consulted, as per s.15 of the New South Wales *OHS Act* 2000 (see further Chapter 20).

Chapter 15: The hierarchy of control

704. The general duties in the OHSA require dutyholders to ensure safety and absence of risks "so far as is practicable". This amounts, in substance, to an obligation to control risks to the extent that it is reasonably practicable to do so. The concept of control of risk, however, is not mentioned in the Act.

705. The control of risk, in any given situation, may involve the elimination of the particular hazard, or the reduction of the risk.[347] Both the elimination of hazards and the reduction of risks may involve a dutyholder taking a single step or a combination of steps.

706. Many current regulations made under OHSA seek to structure the risk control process by requiring dutyholders to adopt the measure or measures which, depending on the nature of the hazard or risk, will afford the highest level of protection. These requirements are not different from, or greater than, the obligations imposed by the general duties under the Act since, by virtue of the words "so far as is practicable", dutyholders are obliged to achieve the highest, reasonably practicable, level of protection.

707. Typically, the OHSA regulations specify, in descending order, the varying degrees of control of risk which should be sought. This ranking is known, universally, as the "hierarchy of control".

708. The traditional hierarchy of control is best exemplified by the current *Plant Regulations*, which require dutyholders to adopt measures which eliminate (or engineer out) hazards. If that is not practicable, dutyholders must reduce the risk by processes of –

- substitution;
- isolation;
- engineering controls.

Administrative controls and personal protective equipment may be used, but only as a last resort, to support the control of risk by these other means.

709. While the traditional hierarchy works well in relation to some physical risks, such as those involving hazardous substances or machinery, it is not suited to all hazards and risks. As Brian Bottomley, an experienced OHS consultant, has submitted:

> *"The traditional hierarchy has always encouraged the fiction that risk controls were a matter of one thing or another as you worked your way from the top to the bottom."*

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347 See, for example, the explanation of "risk control" in paragraph 13.1 of the Victorian *Code of Practice : Manual Handling*, No. 25, Victorian WorkCover Authority, 2000.

Moreover:

> *"With..multi-factorial hazards [such as bullying, occupational violence and fatigue]..the traditional hierarchy has only marginal application and control may be restricted to administrative or organisational measures. It could be argued that forcing hardware solutions has not always been successful. For example, occupational violence measures such as physical barriers have in some cases created new and greater risks than the ones they sought to control."*[348]

710. In short, there is no single hierarchy of control which can be applied to every hazard or risk. It would not, therefore, be possible, or desirable, to prescribe a "hierarchy" in the Act. At the same time, it would be entirely consistent with the objects of the Act for s.21 to mandate control of risk, and to do so by adopting the formula - routinely used in the regulations - of "eliminate or, if not reasonably practicable, reduce."

711. The principle which underpins the hierarchy of control is that dutyholders must provide the highest level of protection that is reasonably practicable. The Act should reflect this in the proposed statement of principles (see Chapter 2).

712. In my view, s.21(2) should be amended to add a provision making clear that the general duty under s.21(1) requires dutyholders to control risks by implementing a measure or combination of measures which:

(a) eliminates hazards, or

(b) where it is not reasonably practicable to eliminate hazards, reduces risks so far as is reasonably practicable.

713. Consistently with what I said at the conclusion of the previous chapter, the new provision should also specify that the general duty will ordinarily require dutyholders, for the purposes of eliminating hazards or reducing risk –

- to identify all work environment hazards; and
- to assess the risks associated with all work environment hazards.

Tolerability of risks

714. The fact that the safety duties under the Act – and under corresponding legislation throughout the English-speaking world – are qualified by considerations of (reasonable) practicability reflects the community's acceptance that –

(a) some risks can never be eliminated; and

(b) some risks, which could be eliminated at great expense, will be tolerated.

715. The concepts of "tolerable risk" and "unacceptable risk" have been explored by the British Health and Safety Executive, in its important 2001 publication entitled

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348 Brian Bottomley, submission to this Review.

Reducing Risks: Protecting People. HSE has developed its own "tolerability of risk" framework as a conceptual model. This involves a sliding scale of risks, with "unacceptable" risks at one end and "broadly acceptable" risks at the other, defined as follows:

> *"Unacceptable risks – a particular risk falling into this category is unacceptable whatever the level of benefits associated with the activity. Any activity or practice giving rise to risks falling in that category would, as a matter of principle, be ruled out unless the activity or practice can be modified to reduce the degree of risk, or there are acceptable reasons for the practice to be retained.*
>
> *Broadly acceptable risks – generally regarded as insignificant and adequately controlled. The levels of risk characterising this region are comparable to those that people regard as insignificant or trivial in their daily lives. Nonetheless, dutyholders must reduce these risks wherever it is reasonably practicable to do so, or the law requires it."*[349].

716. The middle ground between unacceptable and broadly acceptable regions is referred to by HSE as the "tolerable region". In that category, risks are tolerated, in the expectation that they will be –

> *"properly assessed and the results used to properly determine control measures…based on the best scientific evidence..and the residual risks are not unduly high and are kept as low as reasonably practicable."*[350].

It is also expected that risks in this region must be periodically reviewed.

717. Of course, as the HSE acknowledges –

> *"the factors and processes that ultimately decide whether a risk is unacceptable, tolerable or broadly acceptable are dynamic in nature and are sometimes governed by the particular circumstances, time and environment in which the activity giving rise to the risk takes place."*

718. Moreover, research in relation to risk perception has found that public conceptions of risk tend to rely upon intuitive judgements rather than on axioms of probability. Some commentators argue that we are inclined to overestimate risks associated with low probability/high consequence hazards (eg. fires and explosions) and to underestimate more familiar hazards that involve a high incidence of injury (eg. manual handling). Furthermore, public conceptions of risk are also influenced by social and cultural values, and conceptions of "danger" are shaped by social relations – for example, the culture and practices of the residential construction industry that

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349 HSE, *Reducing Risks, protecting people: HSE's decision-making process*, HSE Books, 2001, pp. 42-43

350 HSE, 2001, p. 43

tends to normalise injury.[351] Thus, while the legislative framework deals with the concept of risk in probabilistic terms, the regulator must also take into account public perceptions of risk.[352]

719. It is to be hoped that, in any explanatory or interpretive material which the Authority publishes in the future on "reasonable practicability", these important concepts can be elucidated. The question of what degree, and kind, of risk is tolerable should the subject of continuous review and public debate.

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351 Mayhew, C. & Quinlan, M., "Subcontracting and occupational health and safety in the residential building industry", *Industrial Relations Journal*, vol. 28, no.3, 1997, *passim*.

352 Gaskell, G and Allum, N., "Two Cultures of Risk", The Risk Research Institute, Centre for Analysis of Risk and Regulation, London School of Economics, 2001.

Chapter 16: Duties of employees

720. Under s.21(1), an employer must provide a safe working environment for employees. Section 25 recognises that employees also have a vital role to play in work safety. Under that section, employees must -

(a) take reasonable care for their own safety and the safety of others; and

(b) co-operate with the employer in any action it takes to comply with the Act.

A breach of either of those duties is a criminal offence.

721. The core legislative concept, therefore, is that employers and employees have complementary duties. Safety in the workplace depends on both duties being performed. The Act gives no primacy to one duty or the other. There is no statutory presumption that a safety breach is *prima facie* attributable to the employer or attributable to the employee.

722. Unarguably, therefore, Parliament must be taken to have intended that the respective duties of employer and employee be enforced with equal stringency. The conventional wisdom, however, is that this is not how the Authority approaches its task.

723. A recurrent complaint made during the consultations was that enforcement by WorkSafe is heavily weighted towards employer prosecution, with employees hardly ever being prosecuted.

724. The statistics appear to vindicate this view. In the 2002-2003 financial year, the Authority conducted 170 prosecutions. Of those, only five were brought against employees under s.25. In the period 1992-1999, a total of 1550 prosecutions were conducted. Of those, 1167 were against dutyholders for breaches of s.21(1). Only nine were against employees for breaches of s.25.[353] That represents a ratio, as between s.21 and s.25, of approximately one employee prosecution for every 100 dutyholder prosecutions.

Why the disparity?

725. There may be perfectly cogent reasons for the huge disparity between the rates of employer prosecutions and employee prosecutions respectively. But, for so long as the figures remain unexplained, the perception will remain abroad that the Authority is unfairly biased against employers.

726. This is a profoundly damaging perception. It breeds cynicism and antagonism on the part of employers towards the Authority in particular and OHS legislation in general.

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353 Johnstone, R., *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety Offences in Victoria*, Federation Press, Sydney, 2003, p.100.

The existence of such hostile attitudes towards the regulator is a serious obstacle to OHS compliance.

Employer's duty to equip employees to work safely

727. There are various possible explanations for the stark statistical imbalance. For example, it may be the case that, in most instances, unsafe behaviour by an employee is determined to be a consequence not of the employee's breach of s.25(1)(a) duty but of the employer's failure to properly equip the employee for the task.

728. For s.21 sheets responsibility home to the employer for ensuring employees' safety capabilities. Specifically, s.21(2)(e) requires employers –

> *"to provide such information, instruction, training and supervision to employees as are necessary to provide such information, instruction, training and supervision to employees as are necessary to enable the employees to perform their work in a manner that is safe and without risks to health."*

729. These are obligations of the first importance and, unlike the obligations imposed by some other paragraphs of s.21(2), they are not qualified by the words "so far as is practicable". In short, every employer must ensure that every employee is adequately:

- informed;
- instructed;
- trained; and
- supervised,

so as to enable – to equip – the employee to work "in a manner that is safe".

730. Many employers to whom I have spoken understand and accept the import of these obligations. They acknowledge without hesitation that, if an incident occurs which appears to result from an employee's carelessness, the first – rather than the last – question is whether what happened was the result of inadequate instruction, training or supervision by the employer.

731. Employers are also responsible, through line managers and supervisors, for monitoring the performance of their employees. If an employee is observed as having a tendency to skylark or disobey instructions or otherwise behave carelessly, that of itself is a workplace hazard, and the employer is required to take appropriate risk control measures. If such behaviour is occurring but is unnoticed by the employer, a subsequent occurrence causing injury may also be attributable to the employer's breach of its duty to supervise.

732. Furthermore, since issues of employee carelessness will almost always raise questions for the employer, it would be understandable if employers were hesitant to report

their own employees to WorkSafe for investigation. The employer's first priority must always be to implement measures in the workplace to prevent a recurrence and to reinforce safe work practices. Referral of an employee's conduct to WorkSafe would hardly be conducive to collaborative efforts in that direction.

The "primary" duty of employers?

733. The statistics might also be attributable to a view that employers have, in some sense, the primary responsibility for workplace safety.

734. There are understandable reasons for thinking that employers have the primary duty. After all, the activity which occurs in a workplace is undertaken for the purposes of, and for the benefit of, the employer's business. Certainly, the employer takes the business risk but it correspondingly stands to profit if the business is successful.

735. Moreover, everything which occurs in the workplace is under the employer's control. It is for the employer to decide how resources are allocated and, in particular, to determine staffing levels for particular tasks. It is the employer, not the employees, who sets the agenda for workers and for the workplace. In that setting, it would not seem surprising if the first question addressed by an investigator was: did the employer breach the safety duties?

WorkSafe's strategic approach to investigations

736. WorkSafe conducts investigations in relation to the circumstances of some workplace injuries and all workplace deaths. It also conducts other investigations of strategic value. The strategic or targeted investigations may be reactive – that is, incident-based – or may support a special focus on a particular industry, region, risk or combination of these matters.

737. It is the intention of WorkSafe that these strategic investigations should constitute 60% of all investigative activity. In these investigations, although the investigating inspector will necessarily examine compliance by all parties – employees included – the question is not confined to "how did this event happen?". Rather, it is a broader inquiry concerning the adequacy of safety management at the particular workplace. The contribution of employees to any particular incident or episode is relevant, but necessarily peripheral, to this central inquiry.

Other practicalities of investigations

738. There may be other explanations for the statistics, to do with the practicalities of investigating workplace incidents. Assume that an employee was injured as a result of a safety breach. If it emerged, on investigation, that the employee had failed to take reasonable care for his own safety, then – separately from any question of breach by the employer – the question would arise whether the injured worker should be prosecuted under s.25(1)(a). But no-one in the community would be surprised if a

prosecutorial discretion was exercised against taking that action, since to prosecute might be seen as unreasonably compounding the worker's misfortune. That consideration would be less compelling, of course, if the worker's carelessness had also caused injury to others.

739. It must be recalled that an equivalent discretion is exercised every day in favour of employers. The power to issue an improvement notice is only exercisable once the inspector has formed the view that a contravention is occurring or has occurred (and is likely to be repeated). *Ex hypothesi*, the basis for prosecution exists, and the decision to issue a notice is, in most cases, an exercise of a discretion not to prosecute (though the right to prosecute remains).

740. Then there is the practical issue of finding out how an incident occurred. Almost always, it will be the employees in the relevant part of the workplace who can provide the critical information to an investigator. The investigator is faced with a dilemma. The employee with first-hand knowledge of what occurred may also be the person in relation to whom a question of liability under s.25 arises. If the investigator suspects that the employee may have breached s.25, then the employee should be cautioned in the usual way, before answering any questions. That is, the employee would need to be told that he/she had no obligation to answer questions but that any answer given could be used in evidence against him/her. The experience of the Authority's prosecutions unit is that, when such a caution is administered, employees typically decline to provide any further information. More often than not, their fellow workers likewise decline to assist.

The need for transparent policy

741. Strangely, given that the Authority is well aware of the concern of employers about the perceived bias in prosecutions, there is nothing in the Authority's published prosecutions policy which deals specifically with s.25(1). This is a serious omission, for the reasons I have already outlined, as it allows the perception of bias to remain.

742. In my view, the Authority should, without delay, articulate and publish the considerations which are brought to bear when decisions are made about when to investigate, and when to prosecute, breaches of s.25.

Duties of other workers

743. For reasons explained in Chapter 13, I am recommending that Part III of the Act be amended so that the duties owed by employers are owed not just to employees – those who have an employment relationship with the employer – but to all those who are working at the employer's workplace or otherwise in the employer's undertaking. I

have suggested that the term "worker" be used uniformly to achieve this inclusive effect.[354]

744. The logical corollary of this change is that the duties which s.25(1) currently imposes upon employees should likewise be imposed on "workers" ie. on all persons working at the relevant workplace or in the relevant undertaking. A provision along these lines is already to be found in the Queensland Act, s.36 of which provides:

> *"A worker or anyone else at a workplace has the following obligations at a workplace –*
>
> *(a) to comply with the instructions given for workplace health and safety at the workplace by the employer at the workplace and, if the workplace is a construction workplace, the principal contractor for workplace health and safety at the workplace;*
>
> *(b) for a worker – to use personal protective equipment if the equipment is provided by the worker's employer and the worker is properly instructed in its use;*
>
> *(c) not to wilfully or recklessly interfere with or misuse anything provided for workplace health and safety at the workplace;*
>
> *(d) not to wilfully place at risk the workplace health and safety of any person at the workplace;*
>
> *(e) not to wilfully injury himself or herself."*
>
> (emphasis added)

745. Volunteer workers, particularly those who are engaged in emergency services, should be exempt from the criminal liability imposed by this provision. In relation to emergency service volunteers, I agree with the view expressed in the Joint Submission regarding Volunteer Emergency Service personnel, that the imposition of criminal liability on volunteers under s.25 would have a significantly "detrimental effect on volunteer morale and on emergency response".

746. The Joint Submission cited the recent Commonwealth Parliamentary Inquiry concerning recent bushfires. That inquiry said:

> *"It appears from the evidence that the consequence of the modern approach is that volunteers have less flexibility to respond to rapidly developing situations and that incident managers have adopted an overly cautious approach and do not trust the advice from below… It is now timely to review the implications of occupational health and safety legislation for the proper and effective functioning of bush fire services, especially as they apply to volunteers. If fire fighting is being restrained by a fear on the part of controllers that they will be found liable or culpable if something goes wrong then the system needs to be changed to protect those individuals when they make decisions which on the basis of the information available to them seem*

354 See Chapter 13.

> *reasonable given the twin objectives of protecting life and limb and containing the spread of wildfire."*[355]

747. In my view, the exemption for volunteers is warranted on a broader level. Volunteers make a significant and valuable contribution in many important areas of the community, not only in emergency services but also in welfare and social services. Volunteers should not be discouraged from participating in this valuable work for fear of criminal prosecution under the OHSA. In reaching this conclusion, I have also taken into account that the general criminal law contains offences such as negligently causing serious injury and reckless conduct endangering life or persons, which apply to all members of the community including volunteers.

748. I have also recommended that volunteer "officers" should be exempt from the proposed new provision clarifying the duties of officers, discussed in Chapter 17.

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355 House of Representatives Select Committee, Parliament of the Commonwealth of Australia, *A Nation Charred: Report on the Inquiry into Bushfires,* 23 October 2003, AGPS, Canberra, pp. 118-119

Chapter 17: Duties of officers

749. Under s.52(1) of OHSA, where a company commits an offence an officer of the company can also be guilty of the same offence, and liable to the penalty for that offence, if it is shown that the offence –

(a) was committed with "the consent or connivance of" the officer; or

(b) was attributable to any "wilful neglect" on the part of the officer.

750. The definition of "officer" in s.52(3) is quite wide. It includes –

(a) a director, secretary or executive officer of the company;

(b) any person who directs or gives instructions to the directors; and

(c) a person "concerned in the management" of the company.

751. Section 52 is a statutory form of "accessorial responsibility", in that it imposes criminal liability on officers who are involved in the commission of an offence by another person, such as an employer, or an occupier. The Victorian Supreme Court recently considered s.52. In *AB Oxford Cold Storage Co Pty Ltd and Fleiszig v Arnott,*[356] Kellam J express the view that "consent" in s.52 was "akin to aiding and abetting the commission of the substantive offence by the body corporate". "Aiding and abetting" is one of the traditional categories of accessorial liability.[357]

752. Statutes creating offences which can be committed by companies typically make specific provision for accessorial liability – see, for example, s.75B of the *Trade Practices Act* 1974 and s.66B of the *Environment Protection Act* 1970. But no two statutory schemes of accessorial liability are exactly the same. For example, whereas s.52(1) of OHSA requires the prosecution to prove a relevant state of mind on the part of the company officer, s.66B of the *Environment Protection Act* renders the officer automatically guilty of the same offence as the company, but makes it a statutory defence for the officer to prove that he/she had no knowledge of, or control over, the matter giving rise to the contravention.

753. It is argued by the Victorian Bar, with some force, that disuniformity of this kind creates confusion, and that uniform complicity provisions, along the lines of those set out in the Commonwealth's Model Criminal Code, should apply.

754. In my view, while considerations of uniformity are important, the overriding consideration is that the conditions for accessorial liability should be determined having regard to the types of offences created by the particular statute. There is,

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356 Unreported, Supreme Court of Victoria, Kellam J, 18 November 2003. The decision is under appeal, but not on this point.

357 At the Commonwealth level, the Model Criminal Code lays down the principles of accessorial liability applicable to the prosecution of federal offences.

moreover, a very considerable advantage – from the point of view of comprehension and certainty – in having the accessorial provisions set out in the substantive legislation.

755. But this issue need not be finally resolved, as I have come to the view that the important role of company officers should no longer be dealt with simply by treating them as accessories to the company's contravention. Instead, the Act should state clearly that each officer of a company (or other entity) has a positive duty to secure the company's (or other entity's) compliance with its duties under the Act.

Section 52 is extremely narrow

756. At present, the effect of s.52 is to render officers immune from liability except in the rarest of circumstances. The key limitations are as follows:

- a company officer cannot be liable unless it is shown that he/she was either knowingly involved in the commission of the offence or deliberately neglected to take preventive action; and
- the provision applies only to officers of companies, and not to those who take part in the management of unincorporated businesses, partnerships and unincorporated associations.

757. As to the first limitation, it is incongruous that a company commits an OHS offence regardless of its state of mind - knowledge, intention, recklessness or negligence - but an officer of the company will not be liable unless it is proved that he/she was knowingly involved in the contravention.

758. "Wilful neglect" is a rare creature indeed. "Wilful" means "done on purpose; deliberate, intentional".[358] On that limb of s.52, accordingly, an officer would only be liable in respect of the company's breach of s.21 if the officer in question had deliberately neglected to remove or control the risk in question. Self-evidently, this limb of s.52 will almost never apply.

759. The requirement of the first limb – that the officer have consented to or have connived in the relevant failure by the company – is no less stringent. It means, in effect, that the officer must have knowingly agreed to the continuation of an unsafe state of affairs. As Creighton and Rozen have observed, the requirement to prove one or other of these mental states –

> *"must inevitably have the effect of limiting the operation of the section to only the most egregious cases."*[359]

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358 *Shorter Oxford English Dictionary* p.3686.

359 Creighton, B. and Rozen, P., 1997, p.131.

760. Both the New South Wales and Queensland OHS Acts, like the *Environment Protection Act*, make company officers automatically liable for company breaches, subject to a defence of due diligence. For reasons explained in Chapter 33, I do not consider that this model should be adopted. I see no reason to depart from the basic principle that the onus of proof of a criminal charge should be on the prosecution.

761. At the same time, there is in my view a strong case for placing officer liability on the same basis as company liability and employee liability. As already discussed, a company will not be guilty of an offence unless it is proved that it failed to take those steps which were reasonably practicable in the circumstances – that is, it failed to do that which it could reasonably have been expected to do.

762. In my view, a similar test should apply to officers. Where a company commits an offence, an officer should be liable if it is proved that he/she failed to do that which he/she could reasonably have been expected to do in the circumstances to procure compliance by the company or entity, having regard to such things as –

(a) what he/she knew about the relevant matter;

(b) what he/she ought to have known about the relevant matter;

(c) his/her ability to make decisions and/or influence decisions within the company in relation to the relevant matter.

763. In short, the officer should be liable if he/she failed to do whatever was reasonably necessary – to the extent of his/her ability to do so – to cause the company to comply.

A positive duty

764. At present, officer liability is dealt with almost as an after-thought, in Part VII of the Act. The duties which s.52(1) implicitly imposes on officers are wholly negative in form. Officers must not consent to, or connive in, the commission of an offence by the company. They must not wilfully neglect safety.

765. Apart from the provision being unduly restricted, it is, in my view, a quite unsatisfactory way of articulating the duties of company officers. Consistent with the basic architecture of the Act, I consider that a section should be inserted in Part III which imposes on the officers of a company a positive duty to take reasonable care to ensure that the company discharges its duties under the Act. I have in mind a provision along the following lines:

> *"Where under this Part a duty is imposed on a body corporate [or other relevant entity][360], any person who is an officer of that body corporate, or who purports to act as such an officer, must take reasonable care to ensure that the body corporate complies with that duty".*

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360 See the discussion in the next section.

766. The phrase "must take reasonable care" would replicate the language of s.25(1), which imposes a duty in those terms on all employees. To ensure symmetry between the duties of employees and the duties of officers, the officer provision should also mirror s.25(2), by providing for a second, more serious, category of offence where an officer "wilfully or recklessly" places at risk the health or safety of any person at the workplace.

767. The enactment of such a provision would, in my view, give the necessary statutory reinforcement to the importance of company officers taking responsibility for workplace safety. As WorkSafe management and others have pointed out during the Review, workplace safety is greatly enhanced when managers – and, in particular, chief executive officers – realise that safety is their responsibility and that they – and not just the company – may be personally accountable if the company fails to comply.

768. An amendment along the lines I have suggested would also establish what, in my view, would be an appropriate symmetry between the duties of employees (under s.25) and the duties of officers. Of course, most officers are also employees and, in that capacity, have individual duties to do their work safely. But the proposed section would recognise that they have duties in their separate capacity as officers of a company or entity. Those duties oblige officers to pay attention, not to their personal responsibilities as workers, but to their organisational responsibilities as decision-makers, having control – to a greater or lesser extent, depending on their position – of how the entity itself goes about complying with its responsibilities.

769. I referred earlier to the current definition of "officer" contained in s.52(3). That definition has remained unchanged since the Act commenced in 1985. In my view, sub-paragraphs (a) and (b) of that definition should now be replaced by the fuller definition contained in s.9 of the Corporations Act 2001. According to that definition, "officer" of a corporation means:

> *"(a) a director or secretary of the corporation; or*
>
> *(b) a person:*
>
> *(i) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation; or*
>
> *(ii) who has the capacity to affect significantly the corporation's financial standing; or*
>
> *(iii) in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding advice given by the person in the proper performance of functions attaching to the person's professional capacity or their business relationship with the directors or the corporation); or*

> *(c) a receiver, or receiver and manager, of the property of the corporation; or*
>
> *(d) an administrator of the corporation; or*
>
> *(e) an administrator of a deed of company arrangement executed by the corporation; or*
>
> *(f) a liquidator of the corporation; or*
>
> *(g) a trustee or other person administering a compromise or arrangement made between the corporation and someone else."* (emphasis added).

770. Sub-paragraph (c) of the existing definition should be retained. In my opinion, it is appropriate that the duty to procure compliance with OHSA by a body corporate should also be borne by each-

> *"person concerned in the management of the body corporate"*

771. The duty of officers of the Crown should be defined by reference to terms – such as "Agency Head" – which are defined in the *Public Sector Management and Employment Act* 1998 (Vic). As with companies, the term "officer" should also encompass "any person concerned in the management of an agency".

Non-corporate dutyholders

772. While it is not unusual for provisions imposing liability on officers to be limited to officers of companies, I see no justification for that limitation in the context of OHSA. The Act is concerned with –

> *"risks to... health or safety arising from the conduct of the undertaking of the employer or self-employed person."* (s.22)

773. In short, what matters is the undertaking, and the activities associated with the conduct of the undertaking. It is those activities which give rise to risks, both to those in the workplace(s) (s.21) and to others (s.22). The Act is not concerned with the particular legal form through which the undertaking is conducted.

774. Take a partnership for example. Very large accounting and legal firms are run as partnerships. There is no corporate entity involved. Yet the management structure of such a partnership will be, for all intents and purposes, identical to that employed within a company. There seems to me to be no good reason why the duties of officers should not equally apply to the officers of such partnership undertakings.

775. The same argument would apply to an unincorporated business. Let it be assumed that the employer for the purposes of OHSA is the person who has overall charge of the undertaking. He/she would be the dutyholder for the purposes of the Act. I see no reason in principle why, if there are other persons involved in the management of

that undertaking, they should not be exposed to personal liability, in the appropriate circumstances, in the event of a breach of OHSA by the employer.

776. The *Environment Protection Act* makes provision in relation both to partnerships and to unincorporated associations. As to the latter, a contravention by any person concerned in the management of an unincorporated association renders each other person who takes part in the management guilty of the same offence.[361]

777. In the OHSA context, the employer in the case of an unincorporated association will, typically, be the committee of management. A breach of OHSA will therefore render each of the committee members liable to prosecution as principal offender. But, again, there is no reason to preclude the possibility that there will be persons who are not themselves subject to the duties which OHSA imposes but who are nevertheless concerned in the management of the association. They, too, should be subject to the officer provision.

Volunteer officers

778. In my view, the officer provision should exempt a volunteer officer – defined as an officer "who acts as such without any fee, gain or reward or the expectation of any fee, gain or reward". I am mindful that if such a provision is not included, the prospect of criminal liability may discourage persons from undertaking voluntary officer positions and, in particular, positions of great public benefit.

Officers and "practicable": you can only do what you can do

779. It is important to appreciate the interaction between the test of practicability, as proposed to be clarified[362], and the proposed duty of officers to take reasonable care to ensure that the company complies.

780. The issues of practicability relate only to a determination of what constitutes compliance for the company. That is, in every case the question is:

> *"what was it reasonably practicable (in the defined sense) for the company to do to comply with its safety duties under the Act?"*

781. The question in relation to officers of the company is a quite different one. That question is:

> *"did the officer take reasonable care to cause the company to comply, within the officer's capacity to do so?"*

782. Individual officers will have their own part to play in the development within a company of its position on a particular OHS risk. For example, one officer may discharge his duty simply by identifying a risk and reporting it to his superior. The

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361 Section 66B(4A).

362 See Chapters 10 and 11.

next officer, whose job it is to assess the risk, may discharge her duty by undertaking an inspection of the relevant part of the workplace and forming a judgment about the severity of the risk, measured both in terms of probability and seriousness.

783. The question of whether the company should do anything, and if so what, to eliminate or reduce the risk would be a matter for other, more senior officers again. The critical question of the cost of any preventive measure, and whether the company was legally obliged under OHSA to incur that expenditure, would not concern most of those in positions of management within companies. Decisions of that kind typically fall to only the most senior officers to make.

784. The critical concept in relation to officer responsibility is that the legislation should require that individual officers play their part – and no more than that. Nothing in what I am recommending would involve the imposition of unrealistic expectations on any one participating in the management of a company. On the contrary, the legislation should explicitly recognise – as is the fact – that there will in every case be limits on the ability of individual officers to influence decision-making within a company.

785. For example, a middle manager may have responsibility for the production line in a particular factory. Discharge of that officer's duty to take reasonable care to procure compliance would, presumably, extend to having in place appropriate reporting systems so that any new or emerging risks would be reported to her. The duty would also, presumably, extend to that manager assessing the significance of incident reports and deciding whether to recommend to senior management that preventive action be taken. If the manager had those systems in place, and had followed them, no question could conceivably arise of that manager having breached her duty to take reasonable care.

786. In short, it would simply not be possible, under the provisions I envisage, for a person to have any criminal liability with respect to shortcomings by a company regarding matters –

(a) about which the person could not reasonably be expected to have known; or

(b) over which that person had no control.

787. The whole emphasis of what I am recommending is on shared responsibility for workplace safety. These amendments would make clear that each person has a part to play in ensuring safety in the workplace – the company, its officers and its employees. This reinforces what I have said elsewhere, that the best OHS outcomes are achieved where there is the maximum participation in risk management.

788. As a number of employers have said to me, safety protection is not an add-on. It has to be "part of doing business every day." In my view, making explicit the responsibility of company officers can only enhance this objective.

PART 4: UPSTREAM DUTIES

Chapter 18: Designing for safety

789. In the Discussion Paper[363] I raised the question of whether the Act should impose a safety duty on the designer of a workplace. In the course of the consultations the point has been made several times that, just as a duty of safety is imposed on a person who designs, manufactures or supplies plant for use in the workplace, so a duty of safety should be imposed on a person who designs a building which is to be used as a workplace.

The interstate position

790. OHS obligations have been imposed on the designers of workplace buildings in three Australian jurisdictions, namely Western Australia, Queensland and Tasmania.

791. In Western Australia a duty is imposed on a person who designs or constructs any building for use as a workplace. The duty is subject to the practicability qualification. The content of the duty is to ensure that the design and construction of the building is such that: (a) persons who properly construct, maintain, repair or service the building or structure; and (b) persons who properly use the building or structure are not, in doing so, exposed to hazards. The beneficiaries of the duty are those persons involved in the construction of the building, those persons who maintain, repair or service the building and end users.

792. In Queensland, a similar duty is imposed. It does not, however, extend to the health and safety of those involved in the construction of the building. The duty is imposed on the designer of a building, which is intended to be used as a workplace. The designer is required to ensure that, when the building has been constructed and is being used as a workplace, and for the purpose for which it was designed, relevant persons will not be exposed to risk to their health and safety arising out of the design of the building. In determining whether the designer has discharged the obligation, regard must be had to the standards of design prevailing when the designer designed the building. Further, the designer's obligation applies only to the extent that the content of the design of the building falls under the control of the designer.

793. The Queensland Act gives examples of matters that might be considered in discharging a building designer's obligation under s.34B. These include the availability of anchorage points for window cleaners, the adequacy of ventilation and the ease of access to the building for maintenance purposes. For the purposes of s.34B, "workplace" does not include a workplace to the extent that it is also domestic

363 Maxwell, C., 2003, paras 10, 267-275.

premises, which are defined in Schedule 3 to the Act to mean premises usually occupied as a private dwelling.

794. Finally, under the SA Act, a duty is imposed on both designers and owners of buildings. Section 23A(1) imposes a duty on a person who designs a building that is reasonably expected to comprise or include a workplace. That person must: (a) ensure so far as is reasonably practicable that the building was designed so that people who might work in, on or about the workplace are, in doing so, safe from injury and risks to health; and (b) ensure that the building complies in all respects with any prescribed requirements.

795. Section 23A(2) of the Act also imposes a duty on the owner of a building that comprises or includes a workplace. The owner must: (a) ensure, so far as is reasonably practicable, that the building and any fixtures or fittings within the building that are under the control of the owner, are in a condition that allows people who might work in, on or about the workplace to be safe from injury and risks to health; and (b) ensure that the building complies in all respects with any prescribed requirements.

The national position

796. Since May 2002 the objective of safe design has been receiving priority attention at the national level. At that time, the Australian Workplace Relations Ministers' Council endorsed, as one of five priorities expressed in the National OHS Strategy 2002 – 2012, a commitment –

> *"to eliminate hazards at the design stage".*[364]

797. On 19 December 2003, the National Occupational Health and Safety Commission published an Issues Paper addressing options to achieve the elimination of hazards at the design stage. In the preface, the Commission said:

> "*Designing out potential OHS hazards before they enter the workplace can be the most effective strategy to eliminate hazards at their source, the highest level of workplace injury and disease prevention."*[365].

798. It has always been one of the objects of OHSA to –

> "*to eliminate, at the source, risks to the health, safety and welfare of persons at work."*[366]

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364 National Occupational Health & Safety Commission, 2003(b), *National OHS Strategy 2002-2012.* Retrieved 7 January 2004 from NOHSC website: http://www.nohsc/gov.au/NationalStrategy.

365 National Occupational Health & Safety Commission, 2003(a), *Eliminating Hazards at the Design Stage (Safe Design): Options to improve Occupational Health and Safety outcomes in Australia,* p. 2. Retrieved 7 January 2004 from: http://www.nohsc.gov.au/PDF/temp/SafeDesignOutcomes .

366 s.6(d).

That this is recognised by the National Commission as the highest level of prevention only underlines, in my view, the need for the Act to provide, so far as possible, for the elimination of hazards at the design stage.

Safe design explained

799. In the Issues Paper, the National Commission explained what "safe design" means, as follows –

> "*1. Eliminating hazards at the design stage or 'safe design' is concerned with controlling risks to health and safety as early as possible in the planning and design of items that comprise a workplace, or are used or encountered at work. These items, broadly defined as designed-products, include:*
>
> - *work premises (buildings), structures and other construction projects;*
> - *plant and equipment;*
> - *substances; and*
> - *work methods and systems of work.*
>
> *2. A safe design approach begins in the conceptual and planning phases with an emphasis on making choices about the design; methods of manufacture or construction and/or materials used which enhance the safety of the designed-product."*[367]

800. In the Discussion Paper, I set out the following extract, on the same subject, from a September 2003 paper prepared for the National Research Centre for OHS Regulation:

> *"For buildings, structures and other construction works, a "safe design" approach begins in the design and planning phase with an emphasis on making choices about the design, methods of construction and materials used, based on occupational health and safety (OHS) considerations.*
>
> .
>
> *Ideally, construction works would be designed and planned so as to eliminate or minimise risks to: (1) workers engaged in construction work, including initial construction, modifications and demolition; (2) those who use and occupy the completed buildings as workplaces; and (3) those who maintain, clean and repair these workplaces. The opportunities to address OHS in the design and planning of construction works are considerable. In this early phase it is possible to design out hazards and/or incorporate risk control measures that are compatible with the original*

[367] NOHSC, 2003(a), p.4.

> *design concept, and with the structural and functional requirements of a construction project.*"[368]

801. The crucial point which the National Commission makes is that the opportunities to create safer workplaces and plant are most cost-effective in the earliest life-cycle phases ie. design through to installation.

> *"Poor design can result in a range of economic costs such as low productivity, higher maintenance, higher employment and workers compensation expenses and reduced asset life. This is in addition to the human cost of injury, illness and disease."*

The benefits of safe design: the evidence

802. In order to evaluate the significance of poor design for the incidence of injuries and fatalities in Australia, the Commission commissioned research to examine the available data. The draft report on that research, provided to the Commission in November 2003, indicates:

> *"•* *a minimum of one in four workplace fatalities (26%) occurred as a result of poor design in a two year period ending 30 June 2002;*
>
> • *a minimum of 42% of compensated serious workplace injuries included in the analysis were caused in part by poor design;*
>
> • *design related issues were definitely or probably involved in at least half of the incidents in the agriculture, construction, mining, transport and manufacturing industries; and*
>
> • *nearly all the fatalities involving machinery and fixed plant were at least partly caused by design related issues."*

803. These statistics emphatically confirm the priority which Ministers, and the Commission, are giving to safe design.

A "life-cycle" approach to safe design of buildings

804. The safe design model adopted by the Commission is based on work done by the National Safety Council in the United States. It is concerned with the entire life-cycle of the design product, from concept development through to decommissioning and disposal or recycling. The diagrammatic representation of the model is entitled –

> *"Moving safety from an afterthought to a forethought in the design process."*[369].

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368 Bluff, E., "Regulating Safe Design and Planning of Construction Works", Working Paper 19, National Research Centre for OHS Regulation, September 2003. Retrieved from NRCOHSR website December 2003: http://www.ohs.anu.edu.au/publications/pdf/CDM.WP19.pdf.

369 Bluff, E., 2003, p.4.

805. According to the National Commission, a life-cycle approach to OHS in building and construction projects should have regard to:

> *"• workers in the construction phase, and others who could be affected by this work (includes construction, modification/ renovation and demolition);*
>
> *• workers who service, clean, repair and otherwise maintain the building or structure after it has been constructed, and others who could be affected by this work; and*
>
> *• end users - those who use and occupy completed buildings and structures as workplaces.*
>
> *33. In addition to designers, building owners or others who are engaged by owners (e.g. project supervisors) to initiate or procure construction works also influence OHS outcomes. This is through the design features, timeframes, cost decisions and other requirements they specify or impose.*
>
> *34. Other factors include selection and coordination of multiple contractors engaged in construction, and communication and cooperation between the respective phases of design, planning and construction."*[370]

Responses to the Discussion Paper

806. In their submission to the Review, the Royal Australian Institute of Architects and the Australian Association of Consulting Architects said:

> *"Architects fully appreciate the importance of designing for OHS in relation to their projects and recognise the broad range of issues to take into account. OHS requirements need to be considered in context of the overall concept of the project and architect's design to maintain a balance between OHS and the large number of other project requirements."*

807. In relation to the issue of upstream duties, the RAIA/ACAA submission pointed out that –

- there is already a considerable body of legislation controlling the health and safety of building for occupants;
- the Discussion Paper had said nothing about the frequency or nature of hazards caused by unsafe designs.

808. The submission called for further analysis of the "upstream" issue, arguing that until such analysis had been done –

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370 NOHSC, 2003(a), paras 32-34.

> *"any amendment of the OHS Act to incorporate this aspect will be confusing to practitioners and owners; add unnecessary burdens on business and introduce a lot of duplication in an area that is already heavily regulated."*

809. A separate submission was received from RAIA Professional Risk Services (which I will refer to as "PRS"), an insurance intermediary (wholly owned by the RAIA) responsible for management of architects' professional indemnity insurance. That submission also referred to the absence of empirical evidence to suggest that unsafe building design had been "an historical problem from a workplace safety perspective".

810. The submission argued that, in any consideration of a statutory duty for designers of workplaces, I should take account of -

(a) the involvement of a wide range of professional consultants, in addition to architects, in building design;

(b) the fact that the client controls the project, such that -

> *"the architect cannot compel the [client] to do anything about [a safety issue]. The architect does not have that element of control."*

(c) the fact that architects and building designers do not carry out building work and do not supervise the builder (as distinct from superintending the contract).

811. In answer to a suggestion I made in the course of consultations – that the addition of a statutory design safety obligation would strengthen the position of the architect in the design process – the PRS submission argued that –

> *"This suggestion grossly overstates the reality of the commercial relationship between the architect and client, and in cases where assessment of safety could be seen to involve professional judgments, particularly in relation to new and emerging areas such as psychosocial and environmental workplace issues, would lead to inevitable conflict which would make the Architect's position untenable."*

812. Finally, the PRS submission pointed out – as other dutyholders have – that the imposition of a duty would inevitably lead to requests for advice –

> *"With the threat of a statutory offence and a significant financial penalty (or perhaps even criminal liability) hanging over their heads, architects will ask the question – 'What do I need to do to ensure compliance with my duty?' A key question for the inquiry is – Who is going to be able to answer that for them? Where will they turn?"*

The Act should be amended

813. I have carefully considered the issues raised in these submissions. The concern about the lack of empirical evidence is addressed by the powerful statistics referred to earlier in this Chapter, which show that poor design is a very serious safety issue.

814. As to the question of control, I have said in Chapter 11 that it is a failing of the Act at present that it does not sufficiently recognise the limited capacity of some dutyholders to exert control over the matters or activities giving rise to safety risks. I have recommended an amendment to address this important issue.

815. Plainly enough, the control issue – as manifested in the contractual relationship between architect/designer and client – means that it is for the client, not the architect, to make the final decisions on what is to be constructed, how much is to be expended and, in particular, how much of the architect's design proposals will be incorporated. As I have said elsewhere, the Act must be drafted so as to make unambiguously clear that a person cannot be expected to perform a safety duty in relation to something over which he/she has no control.

816. The case for a legislative obligation of safe design is, in my view, a compelling one. The chief considerations are as follows:

(a) safe design maximises the prospect of eliminating hazards at source;

(b) the concept of safe design is already enshrined in the Act, in relation to plant and equipment, by s.24. The imposition of a safety duty for workplace design is simply the logical extension;

(c) the importance of safe design has been affirmed nationally at the highest levels by the relevant Ministerial Council and by the National Commission;

(d) three other States have already legislated to impose duties of this kind, and the National Commission is promoting the concept of template legislation.

817. It should also be noted that under the *Occupational Health and Safety (Noise) Regulations* 1992, a duty is imposed on a person who designs workplaces to –

> *"take noise emission and exposure into account and ensure that the workplaces … are designed so that the sound power and sound pressure levels are as low as practicable."*[371]

The Noise Regulations also impose a duty on an employer to –

> *"ensure, as far as practicable, that the design and construction of a new workplace under the control and management of the employer … prevents employees from*

[371] Regulation 9(1).

being exposed to noise at levels which are in excess of the exposure standard."[372]

818. Regulation 410 of the *Dangerous Goods (Storage and Handling) Regulations 2000* provides that an occupier must not use new premises for the storage and handling of dangerous goods, unless the occupier has first ensured that the new premises have been designed to –

(a) eliminate the risk associated with the storage and handling of dangerous goods; and

(b) if it is not practicable to eliminate the risk, reduce the risk so far as is practicable.

819. In my view, Part III of the Act should be amended to include a provision along the following lines:

*"**Duty of designers of workplaces***

(1) A person who designs a building or other structure intended to be used as a workplace shall ensure so far as is reasonably practicable that the building or other structure is designed so that –

(a) persons who construct or demolish the building or structure; and

(b) persons who might work in, on or about the workplace,

are, in doing so, not exposed to risks to their health or safety arising out of the design of the building or other structure.

(2) In this section –

***"building"** includes a part of a building.*

***"structure"** includes a part of a structure.*

***"workplace"** does not include a workplace to the extent it is also domestic premises."*

820. The phrase "persons who might work in, on or about the workplace" would include those who service, clean, repair and otherwise maintain the building or structure.

821. The introduction of the proposed new duty would enable the scope of the Manual Handling Regulations to be broadened so as to require the control of risks associated with the design of workplaces – for example, provision of sufficient space for the installation of patient lifting equipment in hospital wards, and floor surfaces that do not require staff to exert excessive force when pushing trolleys and wheelchairs.

822. The issue of advice on compliance is fully dealt with in Chapter 25.

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372 Regulation 9(4).

Duties of "occupiers" and owners of workplaces

823. In the Discussion Paper[373] I questioned whether a general duty should be imposed on the owners of buildings that are used as workplaces. Section 23 of the Act already imposes a duty on an occupier of a workplace to take such measures as are practicable to ensure that the workplace and the means of access to and egress from the workplace are safe and without risks to health.

824. "Occupier" is defined in s.4 of the Act to mean, in relation to a workplace, a person who has the management or control of the workplace.

825. In the NSW Act, a duty is imposed on a person who has control of premises used by people as a place of work.[374] That person must ensure that the premises are safe and without risks to health.

826. In my view, the Act should be amended to impose a duty in similar terms, which would obviate the need for a definition of "occupier". I would also recommend that the phrase "access to and egress from" be deleted from the provision. "Egress" is a word used only by lawyers – and only rarely at that.

827. Accordingly, I would propose an amendment along the following lines:

> *"**Duties of managers and controllers of workplaces***
>
> *A person who has the management or control of a workplace shall take such measures as are reasonably practicable to ensure that:*
>
> *(a) the workplace; and*
>
> *(b) the means of entering and leaving the workplace,*
>
> *are safe and without risks to health."*

828. It is arguable that the existing provisions of OHSA impose duties on owners of workplaces, in their various capacities – e.g. as an employer (ss.21 and 22), as an occupier (s.23). In my view, however, the Act should deal specifically with the safety obligations of a person as owner of a building that is used as a workplace.

829. I recommend that a general duty be imposed that requires an owner to ensure – again, so far as is reasonably practicable - that the building, and any fixture or fittings within the building that are under the control of the owner, are in a condition so that persons who work in, on or about the building are not exposed to risks to their health and safety. This is in similar terms to the provision in the South Australian Act,[375] to which I referred in the Discussion Paper.[376]

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373 Maxwell, C., 2003, para 275.
374 Section 10(1).
375 Section 23A(2).
376 Maxwell, C., 2003, para 274.

Chapter 19: Clarifying s.24

830. As noted earlier, one of the objects of the Act is to "eliminate, *at the source*, risks to the health, safety and welfare of persons at work." One of the objects of EPSA is expressed in similar terms in relation to the "design, construction, manufacture, installation, erection, alteration, maintenance, repair and use of prescribed equipment."[377]

831. The duties imposed by s.24 of the OHSA[378] follow the chain of responsibility toward the source of the relevant risk. Their operation is, however, confined to: (a) the design, manufacture, importation and supply of plant for use at a workplace;[379] (b) the erection and installation of any plant for use at a workplace;[380] and (c) the manufacture, importation and supply of any substance for use at a workplace.[381]

832. Duties in relation to the design, manufacture, importation and supply of plant are also imposed by regulations made under OHSA, EPSA and DGA respectively.

833. Under s.24(1) a duty is imposed on the designer, manufacturer, importer and supplier of any plant for use at a workplace. The s.24(1) duty requires the duty holder to:

- ensure, so far as is practicable, that the plant is so designed and constructed as to be safe and without risks to health when properly used;
- carry out, or arrange for the carrying out, of such testing and examination as may be necessary for the performance of the duty imposed by s.24(1)(a); and
- take such action as is necessary to ensure that there will be available, in connection with the use of the plant at the workplace, adequate information about the use for which it is designed and has been tested, and about any conditions necessary to ensure that when put to that use it will be safe and without risks to health.

834. Section 24(2) imposes a duty on an erector or installer of plant for use at a workplace to ensure, so far as is practicable, that nothing about the way in which it is erected or installed makes it unsafe or a risk to health when properly used.

835. Section 24(3) imposes a duty on the manufacturer, importer and supplier of any substance for use at a workplace. The duty holder is required to:

- ensure, so far as is practicable, that the substance is safe and without risks to health when properly used;

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377 Section 6(c).

378 Duties in similar terms are imposed by s.8 of EPSA in relation to "prescribed equipment".

379 Section 24(1) OHSA.

380 Section 24(2) OHSA.

381 Section 24(3) OHSA.

- carry out, or arrange for the carrying out, of such testing and examination as may be necessary for the performance of the duty imposed by s.24(3)(a); and
- take such action as is necessary to ensure that there will be available, in connection with the use of the substance at the workplace, adequate information about the results of any relevant tests which have been carried out on or in connexion with the substance and about any conditions necessary to ensure that it will be safe and without risks to health when properly used.

836. As with the duties in ss.21, 22 and 23 (the duty of occupiers of workplaces), the duty imposed by s.24(1)(a) is qualified by the words "so far as is practicable". I refer, in that regard, to my discussion of "practicability" in Chapters 10-12.

837. The duties imposed by ss.24(1)(b) and (c) are not qualified by "practicable", and it has been suggested that they are unqualified.[382] But, as Sherriff has correctly pointed out:[383]

> *"The term 'necessary' sets the standard by reference to outcome or result to be achieved. As the obligations provided by this part of this section are elements of the general duty of care in section 24(1)(a), the standard required is also qualified by the issue of practicability."*

838. In other words, the testing and examination required by s.24(1)(b) is whatever is necessary for compliance with s.24(1)(a), which requires of the dutyholder only what is "practicable". The duty imposed by s.24(1)(b) is, in this sense, an ancillary duty. Subject to the separating of the relevant duties into different sections, I would recommend no changes to s.24(1)(b).

839. For the sake of clarity, I would recommend that the respective duties imposed on designers, manufacturers, importers and suppliers of plant and substances be dealt with in separate sections. In other words, there should be a separate section dedicated to each dutyholder in respect of plant and in respect of substances.

840. As to substances, no duty is presently imposed on designers. In that regard, it has been noted that "artificial substances may appropriately be considered to be designed, particularly with genetic and molecular engineering." [384] Even though it might be said that s.22 of the Act imposes a duty on a designer of a substance, I would recommend that a duty be imposed on designers both of plant and substances.

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382 Creighton, B. & Rozen, P., 1997, p.80.

383 Sherriff, B., *Practical Guide to Victorian Health and Safety Legislation* , Anstat, Melbourne, 2001, pp.3- 40.

384 Sherriff, B., 2001, p.3-41.

841. "Plant", "practicable", "substance" and "workplace" are all defined in s.4 of the Act. No definition is given in the Act for "designer", "manufacturer", "importer" or "supplier".[385] In my view, none of those terms requires definition.

842. Section 4 of the Act does define "supply" to include, in relation to any plant or substance, supply and resupply by way of sale, exchange, lease, hire or hire-purchase, whether as principal or agent. In my view, the Act should provide that the duty on a supplier of plant or a substance does not apply to a person merely because the person supplies the plant or a substance in the course of a business of financing the acquisition of the plant or substance by a customer from another person.

843. The duty under s.24(1) relates to any plant for use at a workplace. "Use" is not defined in the Act. I note, however, that in the Plant Regulations, "use" in relation to plant includes "operate, maintain, service, repair, inspect and clean."[386] In my view, it should be made clear in the Act, either by way of a definition or in the duty provision itself, that "use" is not limited to the operation of the relevant plant, and that the duty extends (in the case of a designer) to such activities in relation to the plant as its construction, erection, installation, commissioning, inspection, cleaning, maintenance and repair, or decommissioning, disposal and dismantling.

844. Common to each of the duties imposed in s.24 is the phrase "when properly used". Section 24(4) links that phrase with the information or advice that is available relating to its use. If the plant or substance is not used in accordance with that information or advice, then, for the purposes of s.24, the plant or substance is not to be regarded as properly used.

845. In my view, the expression "when properly used" should be removed from these provisions. I would recommend that a purpose test be applied in its place.

846. The new s.24(1) duty would require the designer of plant for use at a workplace to ensure, so far as is reasonably practicable, that the plant is so designed as to be safe and without risks to health when it is used for any purpose for which it was designed, or any other reasonably foreseeable purpose, and also in respect of other relevant activities of the type to which I refer in paragraph 843 (construction, repair, etc).

847. I would limit the duty on a designer to the design of the plant, and exclude its construction. I doubt whether it would ever be practicable for a person who is merely the designer of plant (ie. is not also the manufacturer) to ensure that the plant was constructed as required by the relevant duty. The respective duties imposed on the manufacturers, importers and suppliers of plant should, however, remain in respect of both the design and construction of plant.

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385 See r.105(2) *Occupational Health and Safety (Plant) Regulations 1995* (the Plant Regulations).

386 Regulation 105(1) of the Plant Regulations.

848. I would recommend no change to the terms of s.24(1)(b).

849. Section 24(1)(c) requires the dutyholder to –

> *"take such action as is necessary to ensure that there will be available in connexion with the use of the plant at the workplace adequate information about the use for which it is designed and has been tested, and about any conditions necessary to ensure that when put to that use it will be safe and without risks to health."*

850. In my view, the provision should be stated in clearer terms. It should require the designer, whenever requested (by the manufacturer, importer, supplier or the end-user of the plant) to provide, or arrange for the provision of, adequate information about:

(a) the purpose, or purposes, for which the plant was designed and has been tested – as required by s.24(1)(b); and

(b) any conditions necessary to ensure that when the plant is used for any purpose for which it was designed, or any other reasonably foreseeable purpose, or in respect of the other relevant activities (construction, repair, etc), it will be safe and without risks to health.

851. More particular duties concerning the provision of information are imposed on designers, manufacturers, importers and suppliers under the *Plant Regulations* (in respect of plant) and the *Equipment (Public Safety) (General) Regulations* (in respect of "prescribed equipment").[387]

852. In light of my recommendation that a purpose test be imposed, s.24(4) should be repealed.

853. The duties to be imposed on manufacturers, importers and suppliers would be in similar terms. In relation to importers and suppliers, the requirement to provide "adequate information" would operate both at the time when the plant was supplied, and thereafter whenever a request was made for the information.

854. I would extend the duty presently imposed by s.24(2) to persons who commission plant. They, along with those who erect or install plant, would be required to ensure, so far as is reasonably practicable, that nothing about the way in which the plant is erected, installed or commissioned makes the plant unsafe or a risk to health when used for any purpose for which it was designed or, again, for any reasonably foreseeable purpose.

855. My general comments about s.24(1) apply to s.24(3). As I have already said, a duty should be imposed on designers of substances, in addition to the duties of

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387 See also the duties imposed on manufacturers and importers by rr.204-11 of the *Occupational Health and Safety (Hazardous Substances) Regulations 1999.*

manufacturers, importers and suppliers. The duty should also, in my view, extend to the handling, processing, storage, transport and disposal of the substance.

856. The new s.24(3) duty would require the dutyholder to ensure – again so far as is reasonably practicable – that the substance is safe and without risks to health when:

(a) it is used for any purpose for which it was designed (in the case of a designer) and manufactured (in the case of the other dutyholders), or for any reasonably foreseeable purpose;

(b) when it is handled, processed, stored, transported, or disposed of.

857. Section 24(3)(b) requires no amendment.

858. Designers and manufacturers of substances would (whenever requested) be required to provide, or arrange for the provision of, adequate information about:

(a) the results of any relevant tests which have been carried out on, or in connection with, the substance;

(b) the purpose or purposes for which the substance was manufactured; and

(c) any conditions necessary to ensure that when it is used for any such purpose, or any reasonably foreseeable purpose, or when the substance is handled, processed, stored, transported or disposed of, the substance will be safe and without risks to health.

859. Importers and suppliers of substances would be required to provide such information both when the substance was supplied, and thereafter whenever requested to do so.

The designers of packaging

860. The duties imposed in relation to the design of plant and substances, should, in my view, extend to the design of safe packaging used for any thing or substance that is supplied to or used at a workplace. The designer would be required to have regard to the contents, weight and dimensions of the package, and the risks associated with a person handling the package or being exposed to the contents of the packaging in the event that the packaging is breached.

The suppliers of services

861. In the course of the consultations it has been suggested that a duty equivalent to that imposed by s.24 on suppliers of plant to workplaces should be imposed on suppliers of services.

862. To a large extent, safety issues in relation to service suppliers arise in connection with the delivery of the services. These issues are dealt with by s.22, which requires such a supplier to ensure that in the delivery of the services other persons are not exposed to risk.

863. But to the extent that safety issues arise in connection with the design or development of services which are to be delivered in, or in connection with, workplaces, legislative consistency would seem to demand the imposition of a mirror duty on suppliers of services.

PART 5: CONSULTATION, PARTICIPATION AND REPRESENTATION

Chapter 20: Workplace

Introduction

864. This chapter is concerned with representation and consultation at the workplace in relation to occupational health and safety. I first consider whether the Part IV structure - designated work groups, HSRs and health and safety committees - is the most effective means of involving employees and employers in health and safety matters. I then consider whether any changes need to be made to OHSA to address any shortcomings in the current consultation scheme.

865. The object, of course, is to maximise the participation of employees and employers in OHS consultation. In 1972 the Robens Committee said[388]:

> *"[T]he promotion of safety and health at work is first and foremost a matter of efficient management. But it is not a management prerogative. In this context more than most, real progress is impossible without the full co-operation and commitment of all employees."* (emphasis added)

866. The Victorian Government echoed these sentiments in 1985 when the OHSA was introduced[389]:

> *"Overseas experience shows that, without employee involvement in them, initiatives aimed at improving work health and safety have only a limited chance of success. Throughout debate on the Bill there was widespread agreement on the need for such involvement."*

867. As I noted in the Discussion Paper (para 289), there is universal agreement that employee participation is a necessary condition of the effective regulation of health and safety at the workplace.

868. Before I turn to the provisions for representation in OHSA, it is important to deal with the interaction between industrial relations and occupational health and safety.

OHS as an industrial issue

869. Occupational health and safety is, by definition, an industrial issue, since it is necessarily concerned with the conditions of work. As one employer said to me, "Health and safety is the first industrial issue I want to get right."

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388 Robens, A., 1972, p.18.

389 Hansard, 30 May 1985, p.913.

870. There is a widespread perception amongst employers that unions misuse the provisions of OHSA to achieve other industrial objectives. It is said that enterprise bargaining negotiations are often preceded, or accompanied, by a flurry of complaints about safety issues, leading to the inference that the sudden focus on OHS is merely a device to pressure the employer in the negotiations.

871. It was no part of my terms of reference to investigate whether or to what extent this perception is well-founded. The unions to whom I have spoken reject any suggestion of improper exploitation of OHSA.

872. What matters for present purposes is to record that the perception exists and that, like the perception of anti-employer bias in WorkSafe prosecutions, its existence is very much to the detriment of OHS in general and the consultation processes in particular. Put simply, the perception of "industrial abuse" of OHS engenders resentment and antagonism on the part of employers, and a degree of cynicism about what they perceive to be "manufactured" OHS issues.

873. It is important, in my view, that VTHC and its affiliated unions be aware of this perception and be alert to any opportunity to dispel it. Likewise, the Authority has a role to play in reaffirming to employer stakeholders the validity and integrity of union involvement in OHS issues.

874. In workplace health and safety there are no "two sides". "Management" and "labour" must not be polarised when it comes to health and safety. One of the functions of the Authority is to "foster a co-operative consultative relationship between management and labour in relation to the health, safety and welfare of persons at work".[390] As was recognised by the Robens Committee[391]:

> *"[T]here is a greater natural identity of interest between 'the two sides' in relation to safety and health problems than in most other matters. There is no legitimate scope for 'bargaining' on safety and health issues, but much scope for constructive discussion, joint inspection, and participation in working out solutions... If progress is to be made there must be adequate arrangements for both management and workpeople to play their full part."*

875. As the general duties set out in Part III of the OHSA make clear, health and safety at a workplace is the responsibility of every person at that workplace: it is a concern common to all, whether they be in management or at work on the shop floor.

The limited scope of Part IV

876. As discussed in Chapter 13, the existing OHS scheme is based on the traditional employer-employee relationship. The scheme appears to assume that all persons who

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390 Section 20(1)(o) ACA.

391 Robens, A., 1972, p.21.

are at work are employed by a (readily identifiable) employer on a permanent, full-time basis, and perform all of their work at the one workplace.

877. In 1985, these assumptions may have been reasonable. But work arrangements have changed, and there has been a move away from the traditional employer-employee relationship to more varied forms of work relationships.

878. It is of fundamental importance that all persons who work at a workplace – and not just the "employees" of the "employer" - be able to participate in and be consulted about health and safety matters at that workplace.

879. Often enough, a non-employee who works at a workplace has only a relatively fleeting presence at that workplace. But, for the time that he or she is at work at that workplace, the consultation scheme at the relevant workplace should be responsive and flexible enough to involve that worker in consultation about health and safety, or in the resolution of a health and safety issue that may arise in connection with the work he or she is required to perform.

880. It is important to remember that the scheme set out in Part IV is not mandatory. The establishment of a designated work group (the foundation stone of the current scheme) is dependent upon a request being made by an employee to his or her employer,[392] or the employer initiating negotiations with its employees.[393]

881. In the absence of a request from an employee or any initiative from the employer, Part IV will not apply to the workplace. Nor, for that matter, will s.26 of the OHSA apply. That section, in providing for the resolution of health and safety issues, presupposes that a designated work group has been established.

The Robens Committee recommendations

882. Here, as in other areas of inquiry, the recommendations made by the Robens Committee in 1972 serve as a guide in determining how consultation, representation and participation at the workplace in relation to health and safety might best be achieved in legislation.

883. The Robens recommendations were as follows:[394]

- There should be a statutory duty on every employer to consult with his employees, or their representatives at the workplace, on measures for promoting safety and health at work, and to provide for arrangements for the participation of employees in the development of such measures.

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392 Section 29(1)

393 Section 29(4)

394 Robens , A., 1972, p.22

- The form and manner of such consultation and participation should not be specified in detail, so as to provide the flexibility needed to suit a wide variety of particular circumstances and to avoid prejudicing satisfactory existing arrangements.
- Guidance should, however, be given in a code of practice outlining model arrangements, including advice on joint safety committees and the appointment of employees' safety representatives.
- The code should deal with such matters as the qualifications, training, duties and rights of employees' safety representatives, arrangements for joint inspections, the objectives, composition and procedures for joint safety committees, and so on.
- Above all, the code would stress that simply talking together about safety and health is not enough. It is essential to ensure the active follow-through of the measures discussed.

884. It says much for the perspicacity of the Robens Committee that each of those propositions is as directly relevant today as it was 30 years ago.

Representation at the workplace

885. The OHSA contemplates representation of both employer and employees at the workplace. At a number of Victorian workplaces (mostly the larger, unionised workplaces) there are elected health and safety representatives (HSRs) who represent the members of the respective designated work groups. (I consider the concept of HSR in more detail later in this chapter.)

886. Although WorkSafe has no record of the numbers or distribution of HSRs, it is generally accepted that the majority of Victorian workplaces do not have HSRs. There are various possible reasons for this low level of coverage. First, the size of the workforce at a particular workplace may be small enough to enable the employer to consult directly with his/her employees, rather than through a representative. In a working environment where employees are encouraged to raise health and safety issues directly with management (commonly, though not exclusively, in small to medium businesses, the owner himself/herself), there would be no reason for the employees to request the establishment of a designated work group, upon which the election of HSRs depends.[395]

887. Secondly, the workplace may be constituted by a single room in which one person is at work, and at which that person's "employer" is rarely, if ever, present. Such a working arrangement gives rise to real questions as to how that worker's interests in relation

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395 One very large, national employer explained the non-appointment of HSRs on this basis. The relevant union, which has substantial coverage, evidently regards the position as satisfactory.

to occupational health and safety can be adequately represented; how he/she can raise any health and safety issue with the employer; and, to the extent that there is any consultation at the workplace level, the manner in which the employer will consult on those and other health and safety issues.

888. Thirdly, the lack of workplace representation in relation to OHS may reflect a lack of awareness, on the part of employer and employees alike, of the importance of OHS issues and of the necessity for effective consultation. Or, worse still, it may reflect active hostility on the part of the employer to the raising of OHS issues, such that the employees are – explicitly or implicitly – discouraged from any form of organised representation or OHS advocacy.

889. In the absence of any research or survey evidence, it is not possible to reach any conclusions about the actual explanations for the lack of coverage by HSRs in Victorian workplaces. But, since three of the four possible explanations involve a complete absence of employee representation, this is obviously a matter of critical concern.

Management representatives

890. One of the duties imposed on an employer under s.21(4) of the OHSA is to:

> *"nominate a person with, or persons each with, an appropriate level of seniority (not being a HSR) to be the employer's representative or representatives under sections 26 and 31."*[396]

891. Section 26 deals with the resolution of health and safety issues; s.31 with the functions of HSRs, which involve consultation between the HSR and the employer's representative(s).

892. It is clearly necessary for effective issue resolution that any representative of the employer have "an appropriate level of seniority" (in other words, the necessary authority) to resolve any issue on behalf of the employer. It is also essential, in my view, that any employer representative nominated under s.21(4)(ca) have a good working knowledge of OHS, such that he or she is able to engage effectively in any consultation that is required, whether with an HSR or with the employees themselves.

893. Under s.32(2), an employer may refuse access to a person assisting an HSR if the employer considers that the person "by reason of a lack of knowledge of occupational health and safety is not a suitable person to assist." The same test must, logically, be applicable to any person representing an employer under either s.26 or s.31. Whatever his or her level of seniority may be, if that person lacked knowledge of

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396 Section 21(4)(ca). As with other duties, this duty is subject to "practicability", although it is not clear why that should be.

occupational health and safety he/she would clearly not be a "suitable" person to represent the employer under either s.26 or s.31.

894. There was strong support, from employers and HSRs alike, for OHSA to make it mandatory for any person who is to represent an employer in the resolution of - or consultation about - health and safety issues to be appropriately trained. It has repeatedly been pointed out to me that an untrained manager is at a significant disadvantage dealing with a trained HSR, and that this "knowledge imbalance" is inimical to effective consultation. The expertise of the HSR also has the consequence that the HSR ends up carrying out risk assessment and control functions which are properly the obligations of the employer.

895. I would recommend that provision be made in the Act to ensure that any person nominated by an employer to be a representative in relation to OHS has, as a minimum, the same level of knowledge of OHS as is attainable from the 5-day training course undertaken by HSRs.

Roving or regional safety representatives

896. A concept which bears serious consideration is that of roving or regional safety representatives. It is of particular relevance –

(a) to an industry - such as the clothing and textile industry - which has a multiplicity of very small workplaces;

(b) to remote workplaces; and

(c) to multi-site employers.

897. I have encountered some good working examples during the consultations. A division of the Justice Department which has enforcement functions throughout Victoria has employees at work in far-flung locations. Regional health and safety representatives have been appointed, whose function is to conduct regular visits to places in the region, as well as being available to deal with urgent issues as they arise.

898. In consultations with the Master Builders Association, I was informed that a medium-sized builder has, as part of its enterprise bargaining agreement, accepted the appointment of roving OHS representatives. These representatives have the responsibility of visiting the various building sites at which the employer-builder has building works under way, and of conferring with building workers about health and safety issues as they arise.

899. These models of roving representation are designed to act as a substitute for the regular consultation which would occur in the relevant workplaces if each had elected its own HSR. The advantage, therefore, is regularity and reliability of contact. The

occasions on which issues of possible contravention would arise should, in fact, be reduced by regular contact with a trained health and safety representative.

900. In Sweden, the legislation has provided for regional representatives since 1974 (and in the construction and forestry sectors since 1949). There, the functions of regional representatives are:

- to act as itinerant safety representatives, who inspect and investigate occupational health and safety conditions in small enterprises, and request such changes as they consider necessary to achieve improvements in the working environment;
- to promote employee participation in occupational health and safety, including the recruitment, training and support of in-house HSRs; and
- to activate local health and safety work, within the overall framework for systematic management of the working environment in small enterprises.

901. Regional representatives are appointed to represent workers in firms with less than 50 workers where there is at least one trade union member.

902. The Swedish scheme has been the model for similar schemes in Norway (since 1981) and Italy (since 1997). In Norway, the scheme operates only in the construction industry and only in respect of workplaces that do not have "local" HSRs. In Italy, the legislation provides for the appointment by trade unions of territorial representatives who represent workers at enterprises which employ less than 15 workers. The legislation also provides for the establishment of joint trade union/employer bodies that support and promote representation.

903. In the Discussion Paper[397] I noted the "cultural" factors that contributed to the success of the Swedish scheme, namely:

- an exceptionally high level of union membership;
- a general acceptance of union representation;
- a tradition of dialogue between the "social partners";
- a favourable industrial relations climate;
- partial public funding of the system; and
- a wide acceptance of the goals of OHS legislation.

904. As the two examples referred to earlier demonstrate, the introduction of roving health and safety representatives can be of benefit to employers as well as to employees – in precisely the same way as employers benefit from the activities of elected HSRs in

397 Maxwell, C., 2003, para 354

individual workplaces. This is not, and should not be seen as, an adversarial concept. Rather, it has at its core the concept that a better-informed workplace is a safer workplace.

905. It follows, in my view, that the Act should be amended to facilitate the establishment of arrangements for roving representatives where the conditions of work make this appropriate.

906. One point should be made unambiguously clear. Such arrangements must be consensual, as in the examples I have referred to. I am confident that, with the endorsement of the Act and the support of the Authority, the advantages of the concept will be much more widely recognised. But nothing I have said should be taken as contemplating the unilateral imposition of roving representatives.

907. In some cases – for example, with a multi-site employer – arrangements would need to be made to enable workers to vote together to elect one or more roving HSRs. In other cases, the mechanism of worker election will not be suitable, whether because of remoteness or because of the size of the individual workplaces and their lack of awareness or organisation. In those circumstances, there needs to be a mechanism to enable a union to set in train a consultation with an employer about establishing – again by agreement – arrangements for roving representatives, provided of course that the relevant workers are members of the union, or are eligible to be.

"Consultation" under the OHS legislation

908. Under the OHSA, employers and HSRs are required to "consult" in specified circumstances, as follows:

- They must consult before they jointly direct - or one of them directs - that work shall cease because of an immediate threat to the health and safety of any person at a workplace.[398]
- HSRs must consult with their employer's representative(s) before they:
  - (a) accompany an inspector during an inspection of the workplace;[399]
  - (b) require the establishment of a health and safety committee;[400] or
  - (c) with the consent of the employee, attend any interview between an employee and an inspector concerning health and safety.[401]
- An employer must, if practicable, consult an HSR "on all proposed changes" to:

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398 Section 26(2)
399 Section 31(1)(b)
400 Section 31(1)(c)
401 Section 31(1)(d)

(a) the workplace;

(b) the plant or substances used at the workplace; or

(c) the conduct of work at the workplace, that may affect the health or safety of any member of the relevant designated work group.[402]

Creighton and Rozen refer to this provision as vesting in HSRs "potentially the most important of all the rights" vested in them by the OHSA.[403]

- An HSR must, before issuing a provisional improvement notice, consult with the person to whom it is to be issued;[404]
- If an HSR requests the establishment of a health and safety committee, the employer must consult with the HSR about its composition and functions.[405]

909. The NSW Act imposes a general duty on an employer to consult with its employees to enable them to "contribute to the making of decisions affecting their health, safety and welfare at work."

910. In New South Wales, the requirements for workplace consultation are set out in ss.13-19 of the Act, and rr.21-32 of the regulations.[406] In addition, there is a code of practice- "OHS Consultation" - which is "a practical guide for meeting the duty to consult".

911. In particular, consultation is required under s.15 of the NSW Act -

(a) when risks to health and safety arising from work are assessed, or when the assessment of those risks is reviewed; and

(b) when decisions are made about the measures to be taken to eliminate or control those risks.

912. OHSA imposes no such duty. There are, however, a number of regulations, made under OHSA and DGA, which require an employer to consult with an HSR when hazard identification, risk assessment or risk control processes are being undertaken.

913. For example, r.12 of the *Occupational Health and Safety (Confined Spaces) Regulations 1996* provides:

> *"If practicable, an employer must consult with the HSR of a designated work group when undertaking hazard identification, risk assessment or control of risk processes under these Regulations which relate to work in a confined*

402 Section 31(2)(c)
403 Creighton, B. & Rozen, P., 1997, p.149
404 Section 33(1A)
405 Section 37(2).
406 NSW *Occupational Health and Safety Regulation 2001.*

space that may affect the health or safety of any member of the HSR's designated work group."[407]

914. None of the factors set out in the s.4 "definition" of practicability[408] has any relevance in determining whether consultation is "practicable". The only relevant question is whether it is feasible for consultation to occur. For example, if the HSR is absent from the workplace, then clearly the required consultation would not be possible.

915. A further example is r.307 of the *Occupational Health and Safety (Major Hazard Facilities) Regulations 2000*, under which an operator of a major hazard facility is required to develop a safety role for its employees. In developing or reviewing the employees' role, the operator must, if practicable, consult with the HSR of each designated work group to which the employees belong.[409]

A general duty to consult

916. In my view, the Act should be amended to impose on every employer a general duty of consultation. The employer[410] should be required to consult with all persons who work in, or in connection with, that employer's business or undertaking.[411] The duty to consult should be included in Part III of the Act, together with the other general duties.

917. The duty should apply whenever the employer undertakes any of the following activities:

- when identifying hazards at any workplace of the employer;
- when assessing risks to health and safety arising from the work performed at any workplace of the employer;
- when decisions are being made about the measures to be taken to control risks to health and safety arising from the conduct of the undertaking;
- when decisions are being made about the adequacy of facilities for the welfare of the workers at any workplace of the employer;
- when decisions are being made about the procedures for:

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407 See also r.717 *Occupational Health and Safety (Plant) Regulations 1995*; r.12 *Occupational Health and Safety (Manual Handling) Regulations 1999*; r.322 *Occupational Health and Safety (Hazardous Substances) Regulations 1999*; r.213 *Occupational Health and Safety (Lead) Regulations 2000*; r.302 *Occupational Health and Safety (Prevention of Falls) Regulations 2003*; r.205 *Occupational Health and Safety (Asbestos) Regulations 2003.*

408 As to which, see Chapter 10.

409 See also r.301, *Occupational Health and Safety (Major Hazard Facilities) Regulations 2000,* r.314 *Occupational Health and Safety (Mines) Regulations 2002* and r.307 *Dangerous Goods (Explosive) Regulations 2000*, which imposes a duty to consult in relation to safety management systems.

410 Or "proprietor" – see Chapter 13.

411 See Chapter 13 for the proposed new definition of "worker".

- resolution of health and safety issues arising at any workplace of the employer;
- consultation between the employer and workers at any workplace of the employer;
- monitoring of conditions at any workplace of the employer;
- monitoring of the health of the workers in the undertaking;
- keeping of information and records relating to the health and safety of the workers in the undertaking;
- the provision of information, instruction, training and supervision to workers with respect to health and safety at any workplace of the employer;

- as to the composition and functions of any health and safety committee established under s.37;
- when any changes to any workplace of the employer, the plant or substances used at the workplace or the conduct of work at the workplace are proposed that may affect the health or safety of persons who work at the workplace;
- when the employer proposes to establish any additional workplace of the employer;
- in any other case prescribed by the regulations.

918. The reference to "workplace of an employer" is a reference to any workplace:

(a) at which the undertaking of the employer is conducted; or

(b) under the control or management of the employer.

919. If there are persons who work at the employer's workplace who are not employees of that employer (eg. they are contractors, or employees of contractors, or labour-hire employees), the principal, or host, employer would need to reach agreement with those workers - and their employers – about a clear protocol for the health and safety interests of those workers to be represented, for them to be consulted. Their employer (eg. the labour-hire provider) will be required to have in place a system to comply with its own consultation obligations with respect to the workers in its undertaking.

The meaning of "consultation"

920. What is meant by "consultation" in these various contexts? Section 14 of the NSW Act seeks to give content to the concept of "consultation". Under that Act, consultation must involve at least -

(a) the sharing with employees of relevant information about occupational health, safety and welfare;

(b) employees being given the opportunity to express their views and to contribute in a timely fashion to the resolution of occupational health, safety and welfare issues at their place of work; and

(c) the views of employees being valued and taken into account by the employer.

921. The Queensland legislation also seeks to explain the concept of "consultation":

> *"Consultation is about fostering cooperation and developing partnerships between government, employers and workers to ensure workplace health and safety."*[412]

922. In my view, the OHSA should state in clear terms what is expected of a person – whether an employer or an HSR - who is under an obligation to consult. It is possible to do this without prescribing <u>how</u> consultation is to be undertaken. What the legislation can do is identify the essential elements of consultation.

923. Consultation is not the same as, and does not require, consensus or agreement. What it must involve, however, is <u>dialogue</u> between the parties to the consultation. Dialogue means (at least):

- a two-way exchange of information and views;
- a consideration by the party required to consult of the views expressed by the other party; and
- those views being taken into account before action is taken, or a decision made.

924. I recommend that a provision along the following lines be introduced into Part III of the Act:

> *The purpose of consultation is for the employer:*
>
> - *to share with the workers information about occupational health and safety;*
> - *to give workers the opportunity to express their views and to contribute in a timely fashion to:*
>   - *the resolution of health and safety issues arising at their workplace; and*
>   - *the making of decisions about matters that relate to their health, safety and welfare at their workplace;*
> - *to take into account and value the views expressed and the contributions made by workers.*

412 Section 18 Queensland Act.

925. As I have said, the "form and manner" of consultation should be a matter for the particular workplace, within those general parameters. As the Robens Committee recognised, there must be flexibility in allowing employers and employees to develop consultative processes which are adapted to the needs of particular workplaces.

926. In my view, Part IV should facilitate the development of consultation procedures appropriate to the particular workplace. An employer should be required to negotiate and – if possible - agree with employees on a consultation procedure. Part III of the Act should include a provision as to how consultation could be undertaken – for example –

(a) with a health and safety representative or representatives elected under Part IV of the Act;

(b) with a health and safety committee or committees established under Part IV; and/or

(c) in accordance with arrangements agreed between the employer and workers to enable the employer to comply with the duty to consult, which arrangements may involve the election by the workers of HSRs and/or the establishment of HSCs.[413]

927. It should be noted that compliance with the consultation procedure agreed between the employer and workers would not automatically constitute compliance with the statutory duty to consult.

Resolution of workplace health and safety issues

928. Related to these obligations to consult is the existing requirement of workplace parties to negotiate in relation to -

(a) the composition of designated work groups; and

(b) any variation of the composition of a designated work group;[414] and

(c) the resolution of workplace health and safety issues.[415]

929. Part III of the OHSA contains the general duty provisions (ss.21-25). It also contains "provisions for dealing with health and safety issues".

930. Section 26 bundles up issue resolution[416] with cease work directions.[417] The original Occupational Health and Safety Bill contemplated that an HSR would have the power

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413 See s.16 of the New South Wales Act.
414 Sections 29(2) and (9) OHSA.
415 Section 26 OHSA.
416 Section 26(1).
417 Section 26(2).

to issue provisional improvement notices and provisional prohibition notices. The latter power was described by the Minister as an -

> *"extremely legalistic approach to what should in effect be a simple matter of common sense able to be worked out between employers and representatives."*[418]

931. A later Bill provided, in place of the provisional prohibition notice, that –

> *"[a]n employee may refuse to work or do particular work where the employee has reason to believe that to work or do the particular work would expose the employee or another person to danger to health or safety."*

932. In the event, it was s.26(2) which dealt with the cessation of work that involved an immediate threat to the health and safety of any person. Incongruously, however, s.26(2) is not in Part IV of the Act (which confers the power to issue provisional improvement notices) but in Part III. In his second reading speech, the Minister described it as a "workable compromise" between the positions put to him by unions and employers.[419]

933. The mislocation of s.26(2) gives rise to an anomaly in s.36, which provides for the disqualification of HSRs. Section 36(1)(a) provides that an employer may apply to have an HSR disqualified on the ground:

> *"that the HSR has performed any function or duty <u>under this Part</u> with the intention only of causing harm to the employer or the employer's undertaking[.]"*

934. "This Part" in s.36(1)(a) means Part IV, not Part III. The result is that, if an HSR were to abuse the power under s.26(2), an employer could not rely on that conduct as a ground for disqualification. This exclusion was presumably unintended.

935. In my view, s.26 should be split into two sections, one to deal with issue resolution and the other to deal with cease work directions. Both of the new sections should be in Part IV, rather than with the general duty provisions in Part III.

936. There are a number of problems with the way in which s.26 is currently drawn. These problems arise largely from the bundling together of issue resolution and cease work directions.

937. One problem is s.26(4), which provides that if an issue is not resolved within a reasonable time <u>or if there has been a direction that work shall cease</u>, any one of the parties <u>to the attempt at resolution</u> may require an inspector to attend at the workplace. But a cease work direction can only be given under s.26(2) if it is <u>not</u> appropriate to attempt to resolve the relevant issue in accordance with s.26(1).

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418 Hansard, 30 May 1985, p.914.

419 Hansard, 30 May 1985, p.914.

938. It follows that the parties will not have attempted to resolve the issue before the cease work direction is given by one or both of them. Furthermore, s.26(1) contemplates that a party to an attempted resolution may be an employer's representative or the members of the relevant designated work group. Neither of those "parties" is referred to in s.26(2).

939. Section 26(5) is also problematic. An inspector who attends when required to do so "may take such action under this Act as the inspector considers necessary." It would, in my view, be preferable for the provision to state simply and clearly that an inspector may exercise any of the powers conferred on an inspector by the Act or the regulations.

940. In the next section I propose to look at the provisions contained in Part IV of the OHSA. In particular, I will consider the key concepts of designated work groups (s.29), HSRs (ss.30-36) and health and safety committees (s.37). In addition, I will consider the related provisions that deal with discrimination against HSRs, and employees generally (s.54).

Designated work groups

941. The concept of the designated work group was a compromise solution. It had originally been proposed that unions would select HSRs -

> *"to represent employees in all matters relating to occupational health and safety which may arise in their particular workplace."*[420]

942. According to the then Minister's second reading speech, employer organisations argued that all employees should have the right to participate in the selection of representatives.

> *"The earlier versions of the Occupational Health and Safety Bill purported to give trade unions the right to "appoint" or (latterly) to conduct elections for "one or more" HSRs at any "workplace" where any of their members worked as employees. This would have meant that in a workplace where six unions had members, all six of those unions would have had the right to appoint or to elect at least one representative each. This gave rise to a concern at the possibility that some workplaces would be "swamped" with HSRs."*[421]

943. The DWG mechanism was incorporated into the Bill to address employers' concerns about "swamping". It required -

> *"negotiations between unions and employers in workplaces where unions have members, and negotiations between occupational health and safety inspectors and employers in*

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420 Hansard, 30 May 1985, p.913.

421 Creighton,B. & Rozen, P., 1997, p.138.

> *workplaces where there are no unions, to determine designated work groups. Once these groups are determined, the unions or inspectors, as the case may be, may conduct elections for representatives."*[422]

944. The Minister went on to say that the provisions represented a "proper compromise between the irreconcilable concerns of unions and of employers in this matter". Once selected, the representatives would have a "most important role to play in assisting employers and employees to resolve health and safety issues."

945. A DWG serves both as an electorate for an HSR and – once the representative is elected – as the "jurisdiction" in which he or she may perform a function or duty under Part IV. In other words, the Act at present prevents an HSR from exercising any powers outside the boundary of the relevant DWG.

946. Under the Queensland Act, a workplace HSR may exercise an "entitlement" only for the workplace or the part of the workplace within the representative's area of representation. That area may be the workplace or, if the workplace has more than one representative, the area of representation negotiated with the representative's employer under s.70 of the Act.

947. The NSW Regulation contains the concept of "workgroup", being "the group of employees that is represented by a particular OHS committee or OHS representative."[423]

Abolish the designated work group

948. In my view, the concept of the designated work group has outlived its purpose. It now has the potential to operate in a way which is detrimental to safety.

949. For example, at a workplace that has more than one DWG, any issue that arises in one DWG cannot be taken up by an HSR in another DWG in the event that the relevant group's representative is absent. It seems wholly unsatisfactory for an HSR to be unable to respond to a request for assistance on an OHS issue from elsewhere in the workplace.

950. The potential for such gaps in coverage should also be addressed by providing in the Act for the selection of a deputy HSR, who would act when the elected representative was unable to exercise the powers of an HSR, whether because of absence or for any other reason.[424]

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422 Hansard, 30 May 1986, p.913.

423 r. 21, NSW *Occupational Health & Safety Regulation 2001*; see also s.24 Commonwealth Act and s.27 of the South Australian Act.

424 See s.33 Commonwealth Act, and Creighton, B. & Rozen, P., 1997, p.143.

951. The DWG was never part of the Robens model. As I noted in the Discussion Paper,[425] the concept seems to be founded on the – increasingly anachronistic – assumption that workers are permanently employed at a fixed workplace during "normal" working hours.

952. In my view, the concept of the DWG should be abolished.

953. The electorate for HSRs should comprise all persons who work in the undertaking of an employer, not just "employees" (as defined under s.4 of the OHSA) in a designated work group. If more than one HSR is to be elected for a workplace, then each representative might be (but need not be) elected on the basis that he or she represents the persons who work in a particular part of the workplace.

954. Alternatively, each of the elected representatives might represent all persons who work in the undertaking of the employer, and perform his/her functions and duties in any part of the workplace(s). As I have said, it is important that the Act not be too prescriptive as to how consultation is to be undertaken.

955. The Queensland Act refers to "worker" rather than "employee". Section 11 defines "worker" to mean a person who does work, other than under a contract for services, for or at the direction of an employer, whether or not he or she is paid for the work. Accordingly, a subcontractor who works under a contract for service is not a worker under the Act. Section 10 provides that a person is an "employer" if –

- the person conducts a business or undertaking for gain or reward; and
- in the conduct of the business or undertaking, the person engages someone else to do the work, other than under a contract for services, for or at the direction of the person.

956. In Chapter 13 I recommend that the concept of "employee" be replaced with the concept of "worker".

Health and safety representatives

957. HSRs play a critical role in workplace health and safety. One of the employers I consulted with described the HSR as the "link between the people on the floor and management; an essential line of communication." There was strong consensus amongst stakeholders that the institution of HSR should remain.

958. The provisions in the Act that deal with HSRs are ss.30-36. Section 30 is concerned with their election; s.31 with their "functions"; s.32 with their assistants; ss.33-35 with provisional improvement notices; and s.36 with their disqualification. Section 54 deals with discrimination against employees, including HSRs.

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425 Maxwell, C., 2003, para 307.

959. It is important, in my view, that the role and functions of an HSR be clearly stated in the Act. Section 31 in its present form is headed "Functions etc. of health and safety representatives". The section, in truth, deals with the powers of HSRs, and not their functions. I would recommend that the Act state expressly that the role of an HSR is to represent the workers by whom he/she was elected. The functions of an HSR should, in my view, be identified in the Act as follows:

- to keep under review the measures taken by the employer to comply with the Act and the regulations;
- to investigate any matter that may be or give rise to a risk to health and safety at any workplace of the employer; and
- to attempt to resolve with the employer, or the employer's representative(s), any issue concerning health and safety that arises at any workplace of the employer.

960. Some employers have expressed concern that HSRs sometimes hinder rather than facilitate communication between the employer and its employees. As was recognised by the Robens Committee[426]:

> *"The appointment of safety representatives and joint safety committees are not the only methods of seeking to increase the involvement and commitment of workpeople. Some firms have arrangements whereby all employees in a particular working unit meet periodically for discussions about safety. This approach, sometimes referred to as 'total involvement', lays stress on participation by every individual employee."*

961. Subject to s.30(7), which sets out the circumstances in which a person shall cease to be a HSR, HSRs are elected for an indefinite term. It is curious, therefore, that s.30(7)(d) refers to an HSR "failing to be re-elected". In my view, a person should be elected as an HSR for a term of three years, at the end of which he or she would be eligible for re-election, subject always to ss.30(7) and/or 36.

962. As I have already said, provision should be made for the election of a deputy HSR who would act in the absence of the elected representative. If an HSR made such a nomination, he/she would be required to notify the employer of the nominee within seven days of the nomination being made.

963. WorkSafe inspectors have stressed that HSRs are their "eyes and ears" at workplaces. Some HSRs, on the other hand, complained that the inspectors did not provide them with enough support during visits to their workplace.

964. It is vitally important that HSRs receive appropriate support and assistance from inspectors, and from the Authority. In particular, it would seem appropriate for the Authority to maintain regular contact with HSRs, by providing them with relevant

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426 Robens, A., 1972 p.19

OHS information in bulletin form. To enable this to occur, there should be a requirement in the Act that, where any worker is either elected as an HSR or ceases to be an HSR the employer, within 28 days, should inform the Authority of that event. This would enable the Authority to monitor the extent to which workers in Victorian workplaces are represented by HSRs. Inspectors would also be informed in advance of a workplace visit as to whether there would be an HSR with whom they could make contact as part of their inspection.

965. I have already referred to ss.31(1)(b), (c), and (d) in my discussion of "consultation" above. In my view, an HSR should not be required to consult with the employer's representative(s) before he or she does any of the things contemplated by those provisions. I refer, in particular, to s.31(1)(c), which requires an HSR to consult with the employer's representative or representatives before he or she requires the establishment of a health and safety committee under s.37.

966. Where an employer has been requested by an HSR to establish a committee, the employer is then required to consult with the HSR as to the composition and functions of the committee. Whilst the composition and functions of a health and safety committee are properly the subject of consultation after a request, I see no purpose in also requiring consultation before the request is made.

967. The duty to consult imposed on an employer under s.31(2)(c) should be removed from this section and be incorporated in the general duty to consult. That duty should not, in my view, be subject to practicability. No relevant change to the workplace should be made without consultation with the appropriate HSR (or any deputy) or, if there is no HSR, with the employees themselves.

968. A person would cease to be an HSR upon –

- ceasing to be a worker in the undertaking;
- resigning as an HSR;
- failing to be re-elected; or
- being disqualified under s.36.

969. Section 31(2)(d) requires an employer to permit HSRs to take such time off work with pay as is necessary or prescribed for the purposes of:

- performing their functions or duties; and
- taking part in any course of training relating to occupational health and safety which is approved by or conducted by the Authority.

It is to the training of HSRs that I now turn.

Training of HSRs

970. The training of HSRs is referred to indirectly in ss.31(2)(d) and 31(4) of the Act. I have already referred to the first provision. In that regard, I note that one of the functions of the Authority is to promote education and training and approve courses in OHS.[427] The other provision prohibits an employer from preventing or obstructing the attendance of an HSR at a course of training.

971. It was generally accepted by those with whom I consulted that the training of HSRs is critical to their ability to perform their functions as representatives of the health and safety interests of their fellow workers. In my view, the Act should endorse the need for such training. I would propose that an employer be required to ensure that an HSR, as soon as practicable after his/her election to that role, undertakes a course of primary OHS training which the Authority has approved or conducts, unless he/she has previously undertaken such training.[428] At least once in each subsequent year during which the worker continues to be an HSR, he/she should undertake a course of refresher OHS training, again which is approved or conducted by the Authority.

972. The employer should be required to pay the costs associated with the primary course and the refresher courses (if any), and should – as at present – be required to permit the HSR to take the necessary time off work with pay to attend and take part in the courses. The course costs are modest, and the benefits for all workplace parties are enormous.

Provisional improvement notices

973. Section 33 confers power on an HSR to issue a provisional improvement notice ("PIN") to any person who, in the opinion of the HSR, is contravening the Act or regulations, or has contravened in circumstances that make it likely that the contravention will continue or be repeated. (The conditions are identical to those in s.43(1), governing the issue of an improvement notice by an inspector.)

974. The power to issue a PIN is an important part of the compliance function performed by HSRs. But, as I noted in the Discussion Paper[429], notices have been criticised as being overly legalistic, technical documents that are difficult to complete.

975. The requirements for a PIN should be simplified, so as to reduce the burden on HSRs and prevent attack on technical grounds. The focus should be on the substance of the alleged contravention, rather than on any shortcoming in form.

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427 Section 8(1)(f) OHSA.

428 For example, if an HSR were re-elected, he/she would not undertake another course of primary OHS training.

429 Maxwell, C., 2003, para 450

976. As to s.35, I would recommend a change to sub-section (3). At present, when an inspector has been called out by an employer to inquire into the circumstances relating to a provisional improvement notice, he/she may:

(a) affirm the notice;

(b) affirm it with modifications; or

(c) cancel the notice.

Sub-section (4) provides that, where an inspector affirms a provisional improvement notice (with or without modifications), the notice is deemed to be a notice issued by the inspector under s.43.

977. In the Discussion Paper I set out some operational concerns that arise from s.35,[430] as follows:

> *"455. Furthermore, an experienced OHS lawyer has argued that:*
>
> *"the section does not provide the process to be followed by the inspector after making a determination under the section. The inspector should obviously inform the parties of his or her decision and provide a written notice, in the form of an inspection record, providing the details and reasons for his decision. An affirmed or modified notice is deemed to be an improvement notice issued by the inspector and the requirements of section 43 should arguably be followed to support that notice. The person receiving the notice should be given written notice of the right of appeal and the seven-day time limit within which the appeal should be brought".*[431]
>
> *456. It would be desirable for the precise process to be followed by an inspector upon affirming (or cancelling) a PIN to be clearly set out in the Act. One way of dealing with the issue could be to remove the deeming provision and require that an inspector automatically cancel any PIN he or she is called out to inquire into and, where appropriate, replace the PIN with an improvement or prohibition notice or both."*

978. To address these concerns, I would recommend that the inspector be empowered either:

(a) to cancel the provisional improvement notice; or

(b) to issue an improvement notice under s.43, in which case the PIN automatically ceases to have effect.

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430 Maxwell, C., 2003, paras 455-6.

431 Sherriff, B. *Practical Guide to Victorian Occupational Health and Safety Legislation*, Anstat, Melbourne, 2001 , pp. 4-22.

Disqualification of HSRs

979. The only change I would propose to s.36 is to delete the word "only" from sub-section (1)(a). For similar reasons to those which apply to s.54 (see below), the provision as it stands is effectively unenforceable.

980. As amended, s.36(1)(a) would still only apply where the HSR exercised his/her power in order to cause harm to the employer or its business. Proof of that intention is, in my view, a proper basis for disqualification.

Health and safety committees

981. I do not propose any changes to s.37.

Discrimination against employees, including HSRs

982. It was repeatedly said in consultations that the Act provides inadequate protection to an HSR against action taken by the employer by way of retaliation or retribution for the HSR having raised a health and safety issue.

983. Section 54(1) of the OHSA currently prohibits an employer from –

(a) dismissing an employee;

(b) injuring an employee in the employment of the employer; or

(c) altering the position of an employee to the detriment of the employee.

984. This prohibition is only contravened, however, if the discriminatory action by the employer is taken "**by reason only** that the employee performs or has performed any function or duty as a health and safety representative or as a member of a health and safety committee."

985. Plainly, the words "by reason only" have a very restrictive effect on the applicability of this prohibition. An employer will not contravene the ban unless it can be shown that the employee's health and safety activity was the **sole** reason for the employer's discriminatory action. The existence of any other plausible reason for the employer's action is sufficient to make the action lawful.

986. Given the importance which the OHSA attaches to the role of HSRs and health and safety committees, consistency of policy would seem to require that if discriminatory action against an employee is in any substantial way related to action taken by the employee as HSR or as a member of a committee, that discriminatory action should be unlawful. HSRs and health and safety committees should be able to perform their statutory functions secure in the knowledge that they are immune from reprisals for anything done in good faith in that capacity.

987. In my view, s.54(1) should be amended to remove the "by reason only" restriction. It should be sufficient to make the discriminatory action unlawful that one of the reasons for the action was safety-related conduct.

988. The *Equal Opportunity Act* 1995 provides a useful comparison. Under that Act, a person who treats another person differently on the basis of "an attribute" (e.g. marital status or religious belief) will contravene the Act "whether or not the attribute is the only or dominant reason for the [discriminatory] treatment, **as long as it is a substantial reason**."

989. Section 54 incorporates the concepts of "injury" in employment and "detrimental alteration of position". The High Court considered s.298K(i) of the *Workplace Relations Act* 1996 (Cth) in *Patrick Stevedores No. 2*.[432] That section incorporates the concepts of "injury" in employment and "prejudicial alteration of position". In relation to each, the Court said:

> *"[P]ar (b) covers injury of any compensable kind; par(c) is a broad additional category which covers not only legal injury but any adverse affection of, or deterioration in, the advantages enjoyed by the employee before the conduct in question".*

990. I would also recommend that the prohibited conduct be extended to include not just "discrimination" but also "harassment" and "victimisation" of employees[433].

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432 (1998) 195 CLR 1 at 18.

433 See ss.86 and 97, for example, of the *Equal Opportunity Act 1995* (Vic).

Chapter 21: Union right of entry

991. Since consultation and participation are essential to the achievement of good health and safety outcomes, the widespread lack of representation of workers' health and safety interests represents a major failure of the Victorian scheme.

992. That this should be the case after nearly 20 years of the OHSA means, in my view, that special measures are now required. The Act is committed to protecting the health, safety and welfare of all persons at work, however and wherever they work, however small or remote the workplace, and however short a person's working presence at the workplace may be.

993. If, as all parties have told me, HSRs play an essential role in identifying and articulating health and safety concerns amongst employees, and in providing an efficient point of contact and consultation for employers, then every workplace should have one.

994. In Chapter 20 I have recommended that the Act should impose a general duty on an employer to consult with all persons who work in the employer's undertaking (ie. the duty would not be limited to the employees of the employer). An employer would be required to have in place a consultative structure that would enable the workers to participate (either by themselves or through an HSR) in the management of health and safety at their workplace.

995. The achievement of that ideal will take quite some time. In the meantime, the Act should provide an alternative mechanism for representing the interests of workers on OHS issues.

The proposal for a right of entry

996. In a submission to the State Government in May 2003, the Victorian Trades Hall Council proposed that unions be given a right of entry to workplaces to deal with OHS issues, along the lines of the provisions enacted in New South Wales in 2000. The proposal was that unions have the right to enter places of work where their members, or a person eligible to be a member, worked. I raised this issue for consideration in the Discussion Paper[434].

997. During consultation there has been steadfast opposition from employers to the concept of a right of entry for union officials. Many see it as a means for unions to gain entry to non-unionised workplaces for the purposes of recruitment of members. Other see the potential for such a right to be abused as an industrial relations weapon.

998. These concerns having been raised, I have sought to investigate the experience in NSW since the right of entry was introduced.

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434 Maxwell, C, 2003, paras 342-8.

The New South Wales experience

999. All reports indicate that the unions have exercised the right of entry conservatively. My limited enquiries have not revealed any outspoken opposition from NSW employer groups. Indeed, unofficial employer comments have acknowledged the benefits which properly-qualified union officials can bring to workplaces where OHS issues are poorly understood or ignored.

1000. In NSW, the power of entry may only be exercised by a union official who is –

(a) authorised under the State's *Industrial Relations Act*; and

(b) in possession of an authority issued by the Industrial Registrar for that purpose, which authority is produced to the occupier of the premises.

1001. Thus authorised, the union official may –

> *"for the purpose of investigating any suspected breach of the occupational health and safety legislation, enter any premises the representative has reason to believe is a place of work where members of that [union] (or persons who are eligible to the members of that [union]) work."*[435].

1002. At present an estimated 1,000 union officials hold written authorities under the New South Wales legislation entitling them to enter workplaces. Yet there have been only four applications to the New South Wales Industrial Relations Commission for the revocation of such an authority. (In addition, there may have been instances where employers have lodged dispute notifications with the Commission in respect of the conduct of union officials).

1003. Of the four revocation applications, only one has succeeded. The second was dismissed, and the other two were withdrawn. One application was based on an allegation that the authorised official had exercised his right of entry under the NSW OHS Act in order to avoid the requirement under the NSW *Industrial Relations Act* that 24 hours' notice of entry be given.

1004. If the right of entry had been misused, as Victorian employers fear would occur in this State, I can only assume that this would have been reflected in a far higher number, and frequency, of applications for revocation of authorities to enter. That there have been so few would suggest that the concerns of Victorian employers are largely unfounded.

1005. But, as with any system conferring statutory rights, there is always the possibility of abuse by some. The possibility of misuse should not divert attention from the benefits which will flow from the proper exercise of the right. I turn now to consider why the right of entry is potentially so important.

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435 S.77.

Why the right of entry matters

1006. As I have already noted, in the majority of Victorian workplaces the interests of workers on health and safety issues are unrepresented. In some workplaces, so I have been told, workers are apprehensive about reporting serious health and safety issues to the employer for fear of losing their jobs. This can even apply to elected HSRs, notwithstanding the protection which s.54 affords.

1007. Since proper risk prevention will very often involve the employer committing to additional expenditure, it is hardly surprising that some employers regard OHS advocacy as most unwelcome. Unsurprising or not, the existence of an antagonistic attitude to OHS on the part of some employers only reinforces the need for some external source of support.

1008. The most compelling illustrations of the importance of right of entry were those given to the Reference Group.[436] Senior Victorian union officials told the Reference Group about their experience, and that of their unions, in New South Wales. One senior OHS specialist, who holds an entry authorisation under the New South Wales Act, told of an inspection he had made at a construction site in Sydney, following a report from members of the union that there were serious OHS failures at the workplace. The workers, he said, had not felt able to report these matters to their employer for fear of losing their jobs and potentially being "black-listed".

1009. Within a few minutes of beginning the inspection, the union official had identified several life-threatening OHS failures. As he later described in writing what he observed –

> *"Ventilation and exhausts were poor … Electrical safety was dangerous, in one case easy access to 11,000 volts in very wet areas; no maintenance logs were available – as they should be – on certain mobile plant; some such plant was so dangerous it was an embarrassment; emergency phones were occluded, poor condition and emergency numbers were not available; reverse signals (light/beepers) were missing on some vehicles; some of these machines (e.g. front end loaders, graders) were in such poor condition they were essentially 'illegal'."*

1010. The employer's representatives were suspicious of the official at first but, upon having these immediate risks pointed out, responded constructively and agreed to fix them immediately. At the conclusion of the visit, the employer's representatives issued a standing invitation to the union official to be in contact, and attend at the workplace, at any time.

1011. Another senior union official described the effective use of the right of entry by her union for entry to "sweatshops", small workplaces with workers working long hours,

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436 The role of the Reference Group is described in Chapter 1.

often in cramped conditions. Such workplaces are characterised by a large proportion of non-English-speaking workers, by job insecurity and by a complete lack of any system for the identification, let alone the voicing, of OHS concerns. According to the official, in such workplaces –

> *"unless there is a right of entry, those workers have no protection at all under the OHS legislation. It simply has no meaning for them".*

1012. The official also argued for a right of entry without notice:

> *"With employers like that, if you give them notice they will have packed up and left by the time you arrive for the inspection. They are surprisingly mobile."*

1013. As everybody accepts, genuine OHS protection for workers is meaningless without knowledge and participation. As discussed elsewhere, the Authority has a crucial role in promoting representation and participation, and in spreading awareness of what the OHS legislation means for employers and employees. But there is, in my view, considerable force in the comment of a senior union official that –

> *"The right of entry is fundamental if an agency of change – something like a pervasive OHS "gravity force" – is to evolve."*

1014. In 2003 Victoria enacted the *Outworkers (Improved Protection) Act* 2003, which provides for entry and inspection by union officials of any premises –

- occupied by an employer or contractor who is bound by a Federal Award (or a common rule order that is based on a Federal Award) that relates to outwork; or
- where outworkers work who are, or are eligible to become, members of the union.

1015. The right of entry is exercisable only by a person who holds a permit issued under s.45 of the Act, and who suspects that a contravention of the Act has occurred, or is occurring.

1016. A similar scheme exists at the Commonwealth level. The *Workplace Relations Act* 1996 (Cth) provides that a union official to whom a right of entry permit has been issued by the Industrial Registrar can, during working hours, enter a workplace where people who are members of that union are working, for the purpose of investigating a suspected breach of that Act.

1017. That right of entry is limited in a number of respects, as follows:

- a union official must give the employer 24 hours' notice of his or her intention to enter the employer's premises;
- a union official is not entitled to enter or remain on an employer's premises unless he or she is able to produce the permit;

- a union official is not allowed to enter any part of the employer's premises used for residential purposes except with the occupier's permission;
- permits expire when the union official ceases to be a union official or automatically after 3 years;
- union officials, in exercising their right of entry, must not intentionally hinder or obstruct an employer or employees or otherwise act in an improper manner.

OHSA should confer a right of entry, subject to conditions

1018. In my view, OHSA should confer a right of entry on authorised representatives of unions. As in the NSW OHS Act, the right of entry would be exercisable for the purpose of investigating any suspected breach of the OHS legislation.

1019. The right of entry should, however, be subject to a number of limitations, or conditions, as follows. These conditions should ensure that the right of entry is exercised for, and only for, the purpose of improving OHS in the relevant workplace.

1020. **First**, the right of entry would not carry with it any enforcement role. If, after consultation between the employer and the union official, the employer refused to remedy a matter giving rise to a health and safety risk, the official would then be able to require the attendance of an inspector to inquire into the circumstances giving rise to the risk.

1021. It would be solely for the inspector (i.e. the Authority) to decide whether any coercive enforcement action (i.e. an improvement notice, a prohibition notice or a prosecution) was necessary. The authorised representative would have a right to seek review of a decision made by an inspector to take no action. This right would correspond with the right of review which I have recommended be conferred on HSRs.[437]

1022. Consistent with what I have already said of the purpose of his/her entry, an authorised representative should, however, have the same powers as are conferred on an HSR by s.26(2) to take preventive action if there is an immediate risk to the health and safety of workers.

1023. **Secondly**, the right of entry would be exercisable only in respect of those workplaces at which a person was working who was, or was eligible to become, a member of the relevant union.

1024. **Thirdly**, each union should have a quota of such representatives. The purpose of the representative's entry into a workplace would be limited to occupational health and safety. In that regard, the right of entry under OHSA would be different from that conferred by industrial or quasi-industrial legislation – for example, the *Workplace*

437 See Chapter 38.

Relations Act 1996 (Cth) (Cth IR Act), the *Industrial Relations Act* 1996 (NSW) (NSW IR Act), and Victoria's *Outworkers (Improved Protection) Act* 2003 (Outworkers Act).

1025. **Fourthly**, it would be a condition of authorisation that the person have undertaken a minimum level of OHS training or education. It is critical to the integrity, credibility and effectiveness of this proposed mechanism that such representatives have a sound working knowledge of OHS. Confining eligibility to trained officials would enhance the OHS benefits they would bring to workplaces, and render even more remote any risk of abuse of the powers.

1026. **Fifthly**, the right of entry should, ordinarily, be exercisable only after the giving of notice. Under the industrial legislation, the permit holder is only entitled to enter the premises, and exercise the powers conferred, if prior notice has been given to the relevant employer (or the occupier of the relevant premises). Under the Cth WR Act for example, the person is only entitled to enter premises if he/she has given the occupier of those premises at least 24 hours' notice of his/her intention to do so.[438]

1027. The period of notice under the NSW IR Act is either 24 or 48 hours' notice, depending on the power to be exercised. The *Outworkers Act* requires at least 24 hours' notice. Under both the NSW IR Act and the *Outworkers Act*, the requirement for notice may be waived on the application of the permit holder.[439] Under the NSW OHS Act, by contrast, an authorised representative who is authorised to enter premises under the Act may do so without notice, but generally must notify the occupier of the premises of his/her presence as soon as reasonably practicable after entering the premises.[440]

1028. In a case where there is a real risk to the health and safety of workers at a workplace, it is vital that the authorised representative be permitted to enter the relevant premises without delay to take preventive action, if such action is warranted. The right of entry would be exercisable without notice to the employer, or the occupier, as the case may be, but with the requirement that the representative notify them of his/her presence as soon as possible after entry.

1029. **Sixthly**, the Act should provide for the expiry of a permit after a period of three years, or upon the permit holder ceasing to be an officer or employee of the union. Provision should also be made for the revocation of permits where the holder has deliberately hindered, obstructed or harassed an employer or a worker at the premises, or has acted for an improper purpose. Under the *Outworkers Act*, an application for revocation can be made to the Magistrates' Court by an employer, a

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438 Section 285D(2).

439 Section 298(4) NSW Act, s.44(1) Vic Act.

440 Section 78 NSW OHS Act.

registered organisation of employers or an information services officer (whose function resembles that of an inspector under OHSA).

1030. As to the issue of permits, I would recommend that this be done by the Magistrates' Court, on the application of the Secretary of the relevant union.

1031. Each union should be required to notify the Authority of those of its officers who have been issued with a permit and are authorised to enter premises under the Act. (This corresponds with what I have recommended in the previous chapter regarding notification of appointment of HSRs).

1032. Finally, the right of entry would not be exercisable in relation to any part of premises used only for residential purposes, except with the permission of the occupier of those premises.[441]

441 Section 80 NSW OHS Act.

Chapter 22: Stakeholder engagement

Introduction

1033. In an earlier chapter[442] I considered the need for a tripartite structure to involve employer and employee associations at a peak level in the formulation of health and safety standards. I recommended that the OHSA be amended to provide for the establishment of an OHS advisory committee as the peak consultative forum for OHS.

1034. I now turn to consider other ways in which the Authority can engage those associations in both the formulation and the implementation of health and safety standards[443]. In particular, I consider:

(a) the other stakeholder forums and groups which the Authority consults on industry-specific OHS issues;

(b) the ways in which the representative associations can "take the lead" in the implementation of health and safety standards by educating, training and assisting their constituents in systematic and consultative approaches to the management of risks to health and safety at the workplace; and

(c) the extent to which the Authority engages government departments and agencies, as major employers in this State, as stakeholders in the regulatory process (see the following chapter).

1035. Only one recommendation for legislative change arises out of this chapter and the next. Regulation by legislation is only one of the ways in which policy objectives can be delivered. I have already referred (see Chapter 8) to the principles, or "design features", of "good" regulation, and to the UK Better Regulation Task Force's *Principles of Good Regulation* leaflet, which outlines the alternative means available to policy makers to implement their policy objectives.

A culture of engagement

1036. It is fundamental to the success of the regulation of occupational health and safety in Victoria that there be a culture of engagement between the Authority, as regulator, and the many stakeholders in the regulatory process, including the public sector. This was recognised by the Swedish Government in 2001:[444]

> *"The Government has begun work to formulate overall objectives for better health in working life. Objectives directed at getting more people into the labour market affect working life as a whole. This forms the basis for the strategies of the actors responsible to contribute to better*

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442 Chapter 7

443 See Term of Reference 2

444 Swedish Government, "Budget Bill 2002": fact sheet on the Swedish Government's Budget Bill for 2002, presented to Parliament on 20 September 2001, retrieved December 2003, from: http://www.forsvar.regeringen.se/pressinfo/pdf/BP2002_Fo_eng.pdf

> *health in working life. It is vitally important that the social partners participate in the formulation of the objectives if sufficient impact is to be made in practice."*

1037. In its Corporate Plan for 2003-04, the Authority has said:

> *"We recognise the importance of engaging with our stakeholders to deliver our plan and meet our objectives. To date we have lacked a cohesive organisational approach to stakeholder engagement. This year we will clearly articulate and implement a comprehensive stakeholder engagement strategy to ensure our approach is consistent, comprehensive, co-operative and meets our needs and those of our stakeholders."*

1038. In 2003, at the request of the Minister for WorkCover, the Authority established a senior public sector roundtable to oversee strategy development to improve the OHS performance of key budget sector agencies. The roundtable met for the first time in August 2003, and will continue to meet on a quarterly basis.

1039. This is a very significant development. For the first time, the Secretaries of Departments - in particular those which are the largest employers - are engaging directly with WorkSafe and with the relevant unions in relation to OHS in Victoria. A mechanism like the roundtable will foster the type of "co-operative consultative relationship" that is contemplated by the Compensation Act[445].

1040. With the introduction of *Strategy 2000*, WorkSafe Victoria directed its prevention efforts towards interventions at industry level through the establishment of industry programs: manufacturing and agriculture; construction and utilities; transport and storage; public sector and community services; and major hazard facilities.

1041. The Authority has not yet undertaken a full evaluation of the industry program approach. Engagement at industry level should be cost-effective, as it draws together the practical industry-specific experience of employers and workers, and takes advantage of networks developed by employer associations and unions within industry sectors. Many other jurisdictions within Australia and overseas have adopted this approach in recent years. I consider elsewhere[446] the important part that is played by industry associations in the Authority's Small Business Consultancy Program.

1042. In 2002 the Authority commissioned an independent review of the operation and effectiveness of its high level stakeholder forums (including WAC, HSWG and MHAC – see Chapter 7). On the basis of this review, the Authority has moved to clarify its model for stakeholder engagement, develop a more open and participatory style of

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445 Section 20(1)(o) ACA.

446 Chapter 25.

consultation, and ensure that this model and style are consistently applied across all WorkSafe programs. The new model will be implemented progressively in 2003/4.

1043. It is beyond the scope of this Review to survey or evaluate the wide range of activities currently being pursued by the Authority with representative organisations. But the Forklift Safety Campaign is one example of the newer approach to stakeholder engagement at industry level.

1044. In February 2003, WorkSafe's Transport and Storage division conducted a forklift safety forum, which brought together 180 participants representing employers, employer associations, trade unions and HSRs across a wide range of transport, manufacturing, storage and retail workplaces. The practical solutions generated in this workshop were distilled into a guidance note, entitled *Forklift Safety: Reducing the Risk*, released in May 2003. Ten thousand copies were downloaded from the Authority's website in the first week, and a further 30,000 hard copies were subsequently distributed.

1045. WorkSafe conducted 2,790 visits targeting forklift hazards, issued 1276 improvement notices and 185 prohibition notices. Although one should be cautious in correlating injury statistics with particular interventions, there has been a 36% reduction in forklift injuries this year, compared with annual statistics over the previous five years. The guidance note has been picked up by forklift suppliers, prompting one to develop a "microwave speed limiter", which won one of the 2003 WorkSafe Awards.

1046. The Forklift Safety project illustrates the effectiveness of a strategy which combines industry guidance with a high-visibility media campaign and targeted enforcement activity. Industry participation in workshops enabled the state of knowledge to be mapped efficiently and rapidly, and facilitated the "take up" of the guidance note in workplaces.

1047. In the Discussion Paper[447], I noted that there are a number of industry forums and committees established outside OHSA, which provide for stakeholder involvement in occupational health and safety. One of those stakeholder groups is the Transport Industry Safety Group.

1048. This Group was established in 1997 to develop and facilitate an industry approach to occupational health and safety, following coronial inquests into fatalities in the transport industry. The group consists of representatives of the Transport Workers Union (Victorian Branch), the Victorian Road Transport Association, the Bus Association of Victoria, Vic Roads, the Victoria Police, and the Authority.

1049. It was evident from my meeting with the Group, and from its publications, that there is a high level of commitment and co-operation between the stakeholders in relation

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447 Maxwell, C., 2003, para 224

to health and safety for all persons who are involved in – or affected by – the transport industry. One such publication was the *Transport Industry Guide to Meeting the OHS Duty of Care*, which the Authority published in 1997, at the initiative of the Transport Industry Safety Group. The foreword to the 1997 Guide said:

> "*This guide is produced as an advisory document in the interests of providing information and guidance on occupational health and safety matters for employers, employees and others who may be involved in the transport industry, and encourage their on-going commitment towards health and safety.*
>
> *The guide is aimed primarily at employers, prime contractors, employees and sub-contractors and may be used with appropriate training and consultation to improve workplace and public road-users safety. The guide will also be of assistance to customers, consignees, consignors and those associated with the transport industry.*"

1050. A second edition of that guide was published in 2001. The preparation of a third edition is currently under way.

1051. Another forum is Foundations for Safety. It is Victoria's primary forum for dealing with occupational health and safety issues in the construction industry. It brings together regulatory agencies (WorkSafe Victoria and Office of the Chief Electrical Inspector), accident research expertise (Monash University Accident Research Centre), construction workers' unions and employer associations representing principal contractors and specialist trades sub-contractors.

1052. The forum meets four times a year, and establishes working groups to deal with various health and safety initiatives. A product of the work of one of those groups is the *Industry Standard for Electrical Installations on Construction Sites*, which was published in March 2002. The Standard was developed to provide guidance to all who have responsibilities for ensuring the safety of electrical installations on Victorian constructions sites. A working group consisting of representatives of the CEPU, Electrical Trades Union, the National Electrical and Communications Association, Office of Chief Electrical Inspector and WorkSafe Victoria drafted the Standard. A draft was provided to the Foundations for Safety forum in March 2001. The Authority undertook the final editorial work before it was endorsed by the members of the Foundations for Safety forum.

1053. I referred earlier to the options that are available to policy makers to deliver their policy objectives. Another of the options is "self-regulation and voluntary codes of practice" which, as the UK Task Force noted, "have the advantage of involving stakeholders themselves in the process of regulation, and may be cheaper and more flexible to use than government-enforced rules."

1054. The Robens Committee recognised that a "very great contribution to the development of … industrial self-regulation can be made by industry-based organisations." It saw "practical safety work undertaken on a voluntary basis at industry level as one of the most fruitful avenues for development in the future."

1055. The Committee went on to say:

> *"We have no doubt that a very great deal could be done to develop further collaboration between the [peak business body] and the [peak union body] in promoting safety and health activity at industry level, and we believe that both could profitably devote additional resources to this cause. We were particularly encouraged to hear towards the end of 1971 that the two bodies had started talks to examine the need for new initiatives on safety and health. We hope that they will continue this dialogue and will look for imaginative measures to open up a new chapter in co-operation in this field."*

Time limits on consultation

1056. Understandably, and appropriately, the Authority goes to great lengths to consult with employers and unions, and relevant industry associations, in the course of developing new regulations, codes of practice and guidance notes. Consultation of this kind is obviously necessary, both to make sure that the Authority has drawn on the full range of informed opinion, and because the instrument in question is likely to be much more effective if its contents have been able to accommodate the views of stakeholders.

1057. I have, however, formed the clear impression that the Authority's consultations often become very lengthy and drawn out, in large measure because the Authority is reluctant to conclude the process until a point of consensus has been reached. In my view, there is a danger that in seeking consensus the Authority sacrifices its important leadership role, and that lengthy consultation comes to symbolise indecisiveness on the Authority's part.

1058. Quite simply, consensus on a particular issue may be unachievable, but that cannot be allowed to immobilise the Authority or lead to long delays. There must always be consultation, but it should have a time limit. The Authority should listen very carefully to the views of stakeholders, and then make its considered decision.

1059. To this end, I recommend that the Act be amended to establish a timetable for consultation on any draft regulation, code of practice or guidance note. In my view, there should be a minimum consultation period of 10 weeks and a maximum period of 18 weeks.

Chapter 23: Public sector as OHS exemplar

1060. One of the alternatives to legislation, as outlined by the UK Task Force in its *Principles of Good Regulation*, is advertising campaigns and education. In the view of the Task Force –

> *"Government can influence the behaviour of individuals and firms through information, advice and persuasion – perhaps reinforced by other incentives and penalties."*

1061. I have no doubt that this is the case. (I deal in Chapter 24 with incentives for compliance, and in Chapter 26 with the Authority's role in providing education and information.) I would go further, however, and suggest that government (as employer and dutyholder, and as policy maker) can, and should, be an exemplar of OHS best practice. By taking the lead in the systematic management of occupational health and safety, government can influence the behaviour of individuals and firms upon whom duties are imposed by the OHS legislation.

Government initiatives and the National Strategy

1062. In recent years governments have recognised the need to improve the OHS performance of public sector departments and agencies.

1063. In August 1998, the NSW Government launched a campaign entitled "Let's Get Serious About Safety", with the objective of improving the safety of all workplaces in the State. As part of the strategy, the NSW Government required all public sector agencies to improve their workplace safety.

1064. A memorandum, "Improving Occupational Health and Safety Management in the NSW Public Sector", was issued by the NSW Premier to Ministers in 1998. The memorandum refers to the increased cost of workers' compensation premiums for agencies (from $230 million in 1992/93 to $372 million in 1998/99) and to the indirect costs associated with workplace illness and injury, including "loss of skills and expertise for agencies, and loss or reduction in career opportunities for employees." It states:

> *"These costs have become a significant budgetary pressure for many agencies, and divert resources that could otherwise be used on core business activities and service delivery.*
>
> *...*
>
> *Ministers of all agencies are to ensure that a commitment to improve agency OHS management and workers' compensation performance is included in all Chief Executive Officer (CEO) Performance Agreements."*

1065. In March 2001 the Victorian Government initiated an Occupational Health and Safety Improvement Strategy, the objective of which was to improve occupational health and

safety performance in the Victorian budget sector[448] and thereby reduce the premium costs for departments and agencies.

1066. At a national level, on 24 May 2002 the Workplace Relations Ministers' Council endorsed the release of the National OHS Strategy 2002-2012. The Commonwealth, and each of the States and Territories, together with the ACCI and the ACTU, accepted responsibility for the development and implementation of the strategy: "We all share a responsibility for ensuring that Australia's performance in work-related health and safety is continuously improved."

1067. One of the five "national priorities" outlined in the National Strategy is to "strengthen the capacity of government to influence OHS outcomes", as follows:

> *"Governments are major employers, policy makers, regulators and purchasers of equipment and services. <u>They have a leadership role in preventing work-related death, injury and disease in Australia</u>.*
>
> *This national priority aims to sharpen the effectiveness of governments in securing better OHS outcomes and providing good examples of good practice.*
>
> *Outcomes expected from this priority*
>
> - *Continual improvement in governments' OHS performance as employers.*
> - *Whole-of-government approaches are taken that ensure OHS implications are considered and accounted for in all of the work of government.*
> - *Where practicable, governments, project managers and contractors improve OHS through use of the supply chain.*
> - *Practical guidance on measuring and reporting OHS outcomes is available for public sector agencies.*
> - *Continual improvement in governments' performance as OHS policy makers and regulators."* (emphasis added)

1068. According to the Strategy, one of the indicators of its success will be governments developing and implementing more effective OHS interventions –

> *"The best results are achieved by identifying and applying best practice interventions that include the best mix of information, assistance, regulation, compliance, enforcement and incentives."*

1069. The Strategy is based on a number of "national prevention principles", two of which are as follows:

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448 Budget sector comprises government departments and agencies which source 50% or more of their funding from the budget.

> *"Governments, in their capacity as major employers, policy makers, regulators and procurers, have considerable influence over the achievement of better OHS outcomes in Australia.*
>
> *"Effective national action requires major national stakeholders, including all governments, to be committed to coordinated, consistent and cooperative approaches to OHS improvement."*

"Taking safety seriously"

1070. In July 2002 the NSW Government released the second edition of *Taking Safety Seriously 2002: A Systematic Approach to Managing Workplace Risks in NSW Public Sector - Policy and Guidelines*.[449] The document provides information about "ways to improve health, safety and injury management in the NSW public sector".[450] It is described as a "whole-of-government initiative to help government corporations and agencies establish and maintain safe and healthy workplaces."[451]

1071. In his foreword to the booklet, the NSW Premier said:

> *"This booklet contains the policy and guidelines, which will assist public sector agencies to understand their roles and responsibilities under these changes.*
>
> *"In addition, implementation of the policy and guidelines will assist the NSW Government sector towards achieving the minimum national targets set by the National Occupational Health and Safety Commission. These are a 20% reduction in workplace fatalities and a 40% reduction in workplace injuries by 30 June 2012, with half that achieved by 30 June 2007.*
>
> *"I encourage all agencies to utilise these guidelines and to recognise occupational health and safety as an integral part of their day-to-day business operations."*

1072. The booklet is divided into five chapters. Chapters 1 and 2 introduce the concepts of systematic health and safety management, and set out the legislative framework in NSW and the obligations imposed on employers including the NSW Government. Chapter 3 describes how "government employers can meet their obligations using an OHS management system",[452] whilst observing that the NSW OHS legislation requires "government corporations and agencies to approach OHS management systematically."[453] Of particular note is the following observation:[454]

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449 Premier's Department, New South Wales, 2002, *Taking Safety Seriously 2002: A Systematic Approach to Managing Workplace Risks in NSW Public Sector – Policy and Guidelines,* retrieved from Premier's Department website, January 2003: http://www.premiers.nsw.au/our_library/workplace_safety/taking *safety*_seriously.pdf. The first edition was released in 1999.

450 See NSW Premier's Dept Circular No. 2002-51, dated 16 October 2002

451 Premier's Department, NSW, 2002, p.4

452 Premier's Department, NSW, 2002, p.20.

453 Premier's Department, NSW, 2002, p.20. On systematic OHS management, see Chapter 14 of this Report.

454 Premier's Department, NSW, 2002, p.21 (emphasis added).

> *"Successful development and integration of an OHS management system depends on commitment from all levels of an agency, but particularly from senior management. Senior management is responsible for corporate areas such as finance and human resources and is no less responsible for effective OHS practice."*

1073. Some examples are given in the booklet of the ways in which management commitment can be shown, as follows:

- having a clear, well-publicised and actively-promoted OHS policy, endorsed by the current CEO, which outlines responsibilities for all;
- specifying occupational health and safety activities in the performance agreements of senior management, and regularly reviewing management performance in relation to these activities;
- fostering an open, consultative environment that encourages staff to raise OHS concerns, and making the necessary arrangements to ensure that these concerns are genuinely considered and resolved; and
- having OHS as a standard agenda item for meetings of the executive and other senior management.

1074. The booklet notes that "some agencies have introduced incentive schemes, such as staff and departmental award schemes, as part of an overall demonstration of management commitment."[455] In that regard, it refers to an incentive scheme to reward staff of the Royal Botanic Gardens who devise innovative safety solutions. That scheme was funded by the Chairperson's donation of his honorarium. Chapter 3 concludes with the following:[456]

> *"The guidelines in this chapter are intended as a blueprint for the development, review and modification of OHS management systems within NSW Government agencies. Agencies need to remember that OHS is dynamic just as other core business activities can be and that strategies and priorities may change as new staff are appointed or business operations, community or industrial conditions, or legislation change.*
>
> *Effective OHS management is a challenge which requires constant vigilance by all government staff, but particularly by senior managers who are responsible for ensuring the health and safety of staff and others who visit the agency's premises.*
>
> *The rewards for improving OHS can be significant."*

1075. Chapter 4 of the booklet outline five case studies which "show how effective workplace safety management systems can benefit government agencies, and they provide a

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455 Premier's Department, NSW, 2002, p.23.

456 Premier's Department, NSW, 2002, p.48.

blueprint for continuing improvement in OHS in the NSW public sector."[457] The five case studies are:

- Home Care Service of NSW (which "describes the challenge of providing safe workplaces for home care in 50,000 private residences across the state");
- The Royal Botanic Gardens and Domain Trust (which "shows how OHS issues can be dealt with more effectively through consultation, management commitment and encouragement for workers to look after each other's safety");
- The Roads and Traffic Authority (which "describes how safety is ensured among independent contractors and sub-contractors working on behalf of the RTA");
- NSW Agriculture (which "illustrates how safety can be managed in diverse and remote worksites such as district offices, research stations, agricultural colleges, and veterinary laboratories");
- Northern Sydney Area Health Service ("which deals with a specific and difficult safety issue – occupational violence arising in the health services area").

1076. Chapter 5 provides tools to assist government agencies in the implementation of an OHS management system, including a model OHS policy, an OHS plan, and an incident investigation tool. In an Appendix is the Model Occupational Health and Safety Policy, which states the commitment of the CEO of the agency to "maintaining the best possible standard of occupational health and safety for everyone working at and visiting the agency's workplaces."[458]

Government procurement

1077. The first of the national prevention principles quoted above refers to governments as "procurers". Again, influence can be exerted by governments on dutyholders by making improved OHS performance a condition of eligibility for them to participate in government contract/tender processes. I say something more about this in the next chapter, on "Incentives for Compliance".

The importance of leadership

1078. Consistently with its commitment to the Strategy, the Victorian Government must assume a leadership role "in securing better OHS outcomes and providing good examples of good practice". Exemplary OHS performance means more than

457 Premier's Department, NSW, 2002, p.49.
458 Premier's Department, NSW, 2002, p.49.

compliance. It involves going beyond what is required by the OHS legislation and looking to set high standards for the community by example.

1079. The importance of such leadership cannot be overestimated. If the public sector can be seen by all dutyholders (and by small business in particular) to be aspiring to exemplary OHS performance, this will foster and encourage in the minds of dutyholders a culture of continuous improvement, to secure the health, safety and welfare of the persons who work for them.

1080. The converse is equally true, and equally important. If the private sector gets any sense that Government – as an employer – demands less of itself than it (through WorkSafe) demands of private sector employers, the effect will be corrosive. There is simply no satisfactory answer to the challenge voiced more than once during the consultations, "If Government itself cannot achieve reasonable OHS standards, how can they expect me to comply?"

1081. The example set by New South Wales, as described above, is salutary. Not only does this kind of leadership have a demonstration effect, but it also provides quantifiable financial benefits for governments.

1082. The implementation of the NSW initiatives has been subjected to an exhaustive audit and evaluation. Although the results have not been published, I understood that the evaluation has identified very substantial premium reductions as being attributable to the improvements in OHS performance.

PART 6: COMPLIANCE

Chapter 24: Incentives for compliance

1083. This Chapter is concerned with positive incentives that may be offered in order to encourage, reward and reinforce compliance or – more importantly – best practice in OHS.

1084. Four key questions must be addressed, as follows:

(a) should the system reward compliance?

(b) if so, what should the rewards be?

(c) what level of compliance should be rewarded?

(d) who judges whether that level has been achieved, and by reference to what standards?

The need for incentives and rewards

1085. Why should incentives be offered for dutyholders to comply with legislation? After all, it is the legal obligation of dutyholders to comply and, if they do not, they may be liable to criminal punishment.

1086. A number of answers have been suggested, as follows:

- Robens:

> *"The most fundamental conclusion to which our investigations have led is this. There are severe practical limits on the extent to which progressively better standards of health and safety at work can be brought about through negative regulation by external agencies. We need a more effectively self-regulating system."*[459]

- Gunningham and Johnstone:

> *"The essential reasons for preferring carrots to sticks are that people and organizations usually respond better to incentives, they are less demanding of enforcement resources and they avoid unnecessary antagonism between regulator and regulatee".*

- Johnstone:

> *"It is overly simplistic to conceive compliance as being simply about regulators comparing the way in which actual behaviour conforms to legal rules and standards and punishing aberrations. Health and safety legislation imposes ongoing, continuing and repetitive obligations. It is conceivable that it*

459 Robens, A., 1972, p.12.

> *may take time for dutyholders to organise themselves to reach the required standards."*

1087. Compliance is therefore a continuous process, involving continuous improvement. It also involves negotiation - every day - between the regulator and dutyholders.

1088. Effective negotiation requires the regulator to develop relationships with dutyholders. Reliance on enforcement alone has the tendency to create an adversarial or confrontational atmosphere. Incentives can balance out the relationship and create a sense of partnership between the regulator and dutyholders in working towards a common goal.

1089. The OHS scheme requires commitment by dutyholders to the goals of compliance in order to achieve maximum compliance outcomes.[460] According to Haines -

> *"legal obligations have no impact on corporations if corporate decision-makers fail to take them on board as part of everyday management. Corporate responsibility requires corporate responsibility management".*[461]

1090. Dutyholders operate in the "shadow of the law", but are largely left to their own devices to secure safe and healthy work environments. Outcome and performance-based standards are generally accepted as the best means of encouraging meaningful compliance with the regulatory aims of the health and safety scheme.[462]

1091. There is, therefore, a substantial element of self-regulation in the scheme as envisaged by Robens. The disproportion of inspectors to workplaces illustrates the point. There are 300 inspectors for at least 300,000 workplaces in Victoria. This limits the utility of the "command/control" model of regulation, as the fear of detection and enforcement is not a powerful motivator.

1092. Best practice in health and safety requires dutyholders to adopt a proactive and vigilant approach to eliminating and minimising health and safety risks. That is, it requires dutyholders to adopt a "coordinated and global approach" to continuous improvement in health and safety. This cannot be achieved solely by the threat of punishment. In fact, enforcement alone may encourage evasion and minimum standards compliance[463].

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460 Haines, F. and Gurney, D., "The shadows of the law: contemporary approaches to regulation and the problems of regulatory conflict", paper presented at the Current Issues in Regulation Conference, Melbourne, 2 – 3 September 2002, p. 2.

461 Parker, C., "Is there a reliable way to evaluate organisational compliance programs?", paper presented at the Current Issues in Regulation Conference, Melbourne, 2 -3 September 2002, p. 2.

462 Haines, F. and Gurney, D., 2002, p. 2.

463 Haines, 1997 in Johnstone, R., 2003(b), "From Fiction to Fact – Rethinking OHS Enforcement", paper presented at the conference Australian OHS Regulation for the 21st Century, National Research Centre for Occupational Health and Safety Regulation & National Occupational Health and Safety Commission, Gold Coast, July 20 – 22, p. 13. Retrieved September 2003 from the National Research Centre for OHS Regulation website: http://www.ohs.anu.edu.au/publications/pdf/WP11.Johnstone.pdf

1093. Incentives may be able to encourage or engender a "compliance culture" or "safety culture" which is vital to the success of the scheme. As commentators have said:

> *"The legislative approach does not address the workplace OHS culture, except perhaps in a negative way by encouraging minimum compliance and avoidance of inspection/audit by the regulatory authority".*[464]
>
> *"The goal is to accomplish substantive compliance with regulatory goals by any viable means using whatever regulatory or quasi-regulatory tools might be available... Much of our knowledge about policy instruments and in particular about what works and when is tentative, contingent and uncertain."*[465]
>
> *"The emphasis is on drawing on the creativity of dutyholders, through encouragement and prompting from a wide range of sources, in devising the most efficient and effective means of achieving a given regulatory outcome."*[466]

The views of those consulted

1094. I raised the question of incentives in many of the consultations I conducted. The response was uniformly supportive.

1095. Employers large and small agree that there should be recognition of, and reward for, advances which they make towards the elimination of risks in the workplace. In one of the earliest meetings with member employers of the Australian Industry Group, one employer said that –

> *"one of the problems with OHS regulation at present is that it is all stick and no carrot."*

This view was supported by many of those present.

1096. The same point has been made with equal force by other employers who say:

> *"We have made a big effort to achieve safety compliance. But we get no recognition from WorkSafe. We still get inspected just as often."*

1097. In my view, the case for introducing a range of incentives/rewards is compelling. Of course, in theory it should be sufficient that the law requires compliance, subject to penalties for breach. In practice, however, human behaviour is influenced – positively – by the prospect of reward or recognition. The prospect of a reward for achieving an OHS target will almost always improve attitudes to safety, and encourage habits of compliance.

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464 Gunningham, N. and Johnstone, R., 1999, *Regulating Workplace Safety: System and Sanctions*, Oxford University Press, Oxford, p.35.

465 Gunningham, N., 1999, *CEO and Supervisor Drivers: Review of* Literature *and Current Practice,*a report commissioned by the National Occupational Health and Safety Commission, p. 23. Retrieved from the NOHSC website, September 2003: http://www.nohsc.gov.au/Pdf/OHSSolutions/CEOSupervisorDrivers.pdf.

466 Haines & Gurney, 2002, p. 3.

1098. In its 2001 report to the National Occupational Health and Safety Commission, KPMG Consulting identified the two key elements of the rationale for incentives, as follows:

(a) without strong managerial support, policies aimed at preventing injuries will not be implemented within an organisation; and

(b) by identifying the drivers that motivate CEOs and supervisors, regulators will be able more effectively to promote health and safety.[467]

1099. It seems that insufficient attention has been paid by regulators to encouraging the development of pro-safety motivation at managerial level. Gunningham, for example, has remarked on the –

> *"striking disjuncture between the... main motivators of CEO/business owner responsibility, and of supervisor responsibility, and current [regulatory] initiatives."*[468]

1100. Nor, in my view, does it matter if incentives "encourage compliance for the wrong reasons". Overwhelmingly, the public interest lies in encouraging compliance, however it is achieved.

Strong enforcement is essential

1101. Of course, a system of rewards will only ever be one part of the compliance framework. Rigorous enforcement, and a real threat of prosecution for breach, must always play a fundamental part in ensuring compliance. As Parker has argued –

> *"The goal is that companies themselves will evaluate their own design, implementation and outcomes of their compliance management systems. It is only through this process of self-evaluation that companies will develop the capacity to detect, prevent and correct their own breaches... However, they will only be motivated to do so because they know that regulators (and stakeholders) have powerful, sophisticated evaluative capacities to hold them accountable for their attempts at compliance management (and, of course, their breaches of legal responsibilities).*[469]

(The issue of self-evaluation is discussed further below.)

1102. The critical importance of strong enforcement in laying the foundations for any regime of incentives was demonstrated in the 2001 report to NOHSC by KPMG.

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467 KPMG Consulting, *Key management motivators in occupational health and safety: Research for the* CEO *and Supervisor Drivers Project,* commissioned by the NOHSC, 2001, p. 16. Retrieved from NOHSC website December 2003: http://www.nohsc.gov.au/PDF/OHSSolutions/KPMG_MAIN_V1.pdf 16.

468 Gunningham, 1999.

469 Parker, C., 2002, *Is there a reliable way to evaluate organisational compliance programs?* Paper presented at the Current Issues in Regulation Conference, Melbourne, 2 -3 September.

According to that report, the following OHS consequences were the most significant in motivating CEOs/supervisors:

(a) threat of company fines for breaches of OHS legislation;

(b) threat of personal prosecution;

(c) time and cost of legal defence if prosecuted;

(d) the expense of insurance claims;

(e) threat of work being stopped if safety standards not met;

(f) lost time from workplace injuries;

(g) poor publicity company may receive after accident.

1103. KPMG also concluded that the following OHS requirements were the most significant in motivating CEOs/supervisors -

(a) health and safety codes of practice;

(b) health and safety requirements set by government;

(c) company policy on health and safety management;

(d) documented safety procedures;

(e) advice given by health and safety inspectors;

(f) industry association guidelines;

(g) contracts requiring health and safety standards.[470]

Small employers

1104. The Australian Bureau of Statistics estimates that there are around 300,000 small businesses in Victoria. These firms are –

> *"characterised by simple management structures..; a high chance of failure; and high levels of work-related injuries and disease"*[471].

1105. Research by Walters (2002) identifies a general lack of resources available to small employers for health and safety, which has the effect of –

(a) limiting the development of management safety resources such as competency, information, training and safe plant and equipment;

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470 KPMG Consulting, 2001, *passim*.

471 Gunningham 1999, p.26.

(b) restricting access of workers to the autonomous representation of their interests, such as provided by health and safety representatives and trade unions;

(c) limiting access to external services with health and safety competencies.

1106. Smaller employers are also less frequently inspected and less often subject to enforcement action by the regulator. The deterrent effect of the enforcement regime may therefore be less potent for SMEs, though publicity strategies undoubtedly increase the exposure of the regulator's enforcement message.

1107. Data for the 2001-02 financial year indicates that, of 37,908 workplaces visited by WorkSafe inspectors, 17,084 (45%) were small business. Based on this percentage, around 22,500 small business workplaces were visited that year. Taking multiple visits into account, this is probably more like 15,000, representing around 7% of small business in Victoria.

1108. Small business operators generally are "fiercely independent and want to avoid any form of government interference".[472] Overseas evidence indicates that their compliance rates with regulation are lower than for larger firms,[473] though the data is not clear.

1109. The realisation of regulatory objectives is likely to require somewhat different strategies from those traditionally applied to larger enterprises.[474] There is an increasing body of research which suggests that the current performance-based model of health and safety legislation is geared to the larger employers, with small employers ill-equipped to identify, let alone eliminate, hazards.

What should the rewards be?

Financial incentives

1110. Employers made it clear during the consultations that, of all the possible types of incentives, financial incentives were likely to be the most attractive. It is hardly surprising that this should be so. The cost of compliance with OHS obligations is a matter of central importance to all employers, even those most strongly committed to OHS compliance. Cost is a key factor, both in decisions about establishing and

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472 Elliott and Shanahan Research, *Development Research for a* Community *Education Campaign,* 1995, cited on NOHSC webpage "Research on OHS and Small Business", retrieved January 2003: http://www.nohsc.gov.au/smallbusiness/researchreports/sbmw3.htm.

473 Bickerdyke & Lattimore, *Reducing the Regulatory Burden: Does Firm Size Matter?*, Industry Commission Staff Research Paper, AGPS, Canberra, December 1997, pp. 70-71.

474 Gunningham, 1999. See further paragraphs 1302-1314 below.

implementing safety management systems and in responding to breaches identified by inspectors.[475]

1111. For the vast majority of employers who pay workers compensation insurance, the size of the insurance premium is an even more compelling consideration. In the public sector, for example, the spiralling cost of premiums has itself been an important catalyst for review and improvement of OHS systems.

1112. Given that employers are, for obvious reasons, pre-occupied with the costs of doing business, it makes obvious sense to offer some form of cost relief – that is, financial incentives – for compliance with OHS. At present, the only financial advantage which flows from improving OHS performance is a premium reduction in the long term.

1113. But this seems quite inadequate as an incentive, for two separate reasons. First, there is a long time lag between the improved performance and the financial return, since premium reduction will not come until the employer's claims record has improved for a sufficient period to affect the so-called "experience factor" in premium calculation. Secondly, and in any event, an employer's claims record is – at best – an imperfect measure of the employer's performance in establishing and implementing good OHS systems.

1114. In short, if financial rewards are to be offered for good OHS performance, they must be available within a reasonable time of the employer having achieved the requisite standard, and must be referable to the establishment and implementation of safety systems, rather than to a reduction in incidents.

1115. The research evidence is somewhat equivocal. Gunningham (1999) investigated whether management considered that improvements in safety delivered cost advantages. He found little evidence suggesting that management was motivated to improve OHS performance in the belief that "safety pays". On the other hand, KPMG found that CEOs and supervisors were strongly motivated by considerations of the potential adverse financial impact of poor OHS performance eg. increasing insurance claims, work disruption (see para 1102 above).

Experience–rated premiums

1116. According to the Industry Commission (1995) –

> *"the cost of workers' compensation and the way insurance premiums for workers' compensation are set can influence the actions taken at the workplace to prevent injury and disease."*[476]

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475 Hence the importance of clarifying the application of the cost factor in the practicability matrix – see Chapter 12.

476 Industry Commission, 1995, *Work Health and Safety: Report of the Inquiry into Occupational Health and Safety,* Industry Commission/AGPS, Canberra. p.179.

Furthermore -

> *"the evidence from the United States suggests that there is a strong link between the level of workers' compensation premiums and workplace health and safety. These studies also find that experienced-rated premiums are a powerful inducement to business to invest in safety."*[477]

1117. Clayton (2003) questions the strength of the United States experience and criticises the -

> *"increasing, almost doctrinaire, championing of the cause of ever-more-sharply focused experience-rated premium regimes"*

as the preferred basis for achieving the prevention of occupational injuries and illnesses[478].

1118. In 2000, a VWA survey found that the desire to keep workers' compensation premiums down was as much a motivator for small and medium sized firms as it was for large firms. At the same time -

> *"The actual impact of financial incentives is not crystal clear. Experienced-based premium systems theoretically drive improvements in health and safety but can also be distorted by suppression of claims to achieve budgeted premium..."*[479]
>
> *"A survey by Victorian WorkCover (1994) also found that a significant percentage of firms question whether they can reduce their premiums by investing in safety. The survey found that more respondents agreed (39%) than disagreed that 'there is no incentive under WorkCover for me to spend money on accident prevention'"*[480].

1119. As noted earlier, the only mechanism by which WorkCover premiums reflect the employer's health and safety performance is through an "experience rating". The experience rating is based on the actual and estimated costs of any compensation claims made.

1120. It is likely that, as a result of the current premium review being conducted by VWA, greater weight will be given to the individual employer's claims experience in determining the premium rate, in order to strengthen the incentive for employers to improve their prevention strategies. The anticipated benefit is that –

> *"the premium system can serve as the herald of a powerful financial message, the result of which will be to spur*

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477 Industry Commission, 1995, p.180.

478 Clayton, A., "The prevention of occupational injuries and illness: the role of economic incentives", Working Paper No 5, NOHSC, August 2002.

479 National Occupational Health & Safety Commission, "Positive Performance Indicators for OHS Part 1", retrieved from the NOHSC website 25 November 2003: http://www.nohsc.gov.au/OHSInformation/NOHSCPublications/fulltext/docs .

480 KPMG Consulting, 2001, p.155.

> *employers to institute risk management and other activities to prevent or reduce the incidence and severity of injuries, and perhaps illness, in their workplaces."*[481].

1121. KPMG concluded in 2001 that experience rating of premium was an important policy instrument for sharpening commercial incentives for safety, because it determines the extent to which firms bear the cost of their injuries, or are able to spread these costs across other firms in the their industry or State.[482]

1122. As I have noted elsewhere, under current premium arrangements employers do not bear the total costs of workplace injury. The Industry Commission (1995) estimated that employers bear only 40% of the total costs of workplace injury; the remaining 60% is borne by workers and the community. This apportionment is clearly relevant to any proposal to discount premium.

1123. Clayton describes experience-rated premiums ("ERPs") as "a very blunt and problematic instrument"[483]. He argues that -

- ERPs may have a positive impact on workers' compensation claims, but that does not necessarily equate to a positive impact on the rate of accidents, injuries or illnesses;
- ERPs are unlikely to work as a good incentive mechanism for the prevention of occupational diseases, as the incidence of disease is very poorly represented in claims data;
- ERPs create few incentives for small business, as the premiums for small business are stabilised. As Hopkins (1995) argued -

  > *"As the probability of an accident in any one small firm is low, simply as a result of its size, a small business may go for years without a claim. As a result an accident is a rare and unpredictable event from an employer's perspective... Workers' compensation is simply a form of insurance against a chance event. In addition, most schemes are designed such that small employers' premiums are determined mainly by the nature of their work and number of employees, and only minimally by actual claims experience."*[484]

- ERPs may encourage the suppression of claims rather than promote risk reduction.

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481 Clayton, 2002, p.17.

482 KPMG Consulting, 2001, p.166.

483 Clayton, 2002.

484 Hopkins, A. cited in Wright, M. and Marsden, S., *Changing Business Behaviour – Would Bearing the True Cost of Poor Health and Safety Performance Make a Difference?* Health and Safety Executive, UK, 2002.

Systems-based incentives

1124. A different approach would be to provide financial rewards based on the adoption of health and safety management systems, that is, on investment in preventive measures.

1125. KPMG concluded that this approach would have "particular merit," both -

(a) for small firms that are unable to benefit from experience rating; and

(b) for large firms, so that they receive a benefit for prevention measures in advance of these measures being reflected in their claims performance and, therefore, in their experience rating discount[485].

1126. There are several variations of this model elsewhere in Australia. In South Australia, the scheme is called the "SafeWork Incentive for Large Employers". Employers who have implemented safe work practices at their workplaces are able to receive discounts of up to 50% of their industry levy rate. (Conversely, under the Supplementary Levy Program, an employer whose OHS performance is poor can be required to pay a penalty of up to 50 % of the employer's industry levy rate). The scheme "aims to encourage improvements in safe work outcomes for the future, rather than focusing rewards on past success."[486]

1127. The eligibility criteria for 2004-06 are as follows:

- all of the employer's business locations must have met at least the second of the three levels in the Safety Achiever Business System performance standards, which are based on Australian/New Zealand Standard 4804. The second level requires there to be an "OHS system fully operational" and "management commitment and business integration".
- Employers must have a base levy of more than $100,000 in the financial year 2002-03.

1128. To meet the eligibility criteria, employer registrations under common managerial control may be grouped together to form one 'employer'. Employers who choose to participate in the scheme agree to do so for two consecutive financial years, and cannot withdraw until the end of the agreement period.

1129. The other option is to remain in the Bonus/Penalty Scheme under which employers who maintain lower claims costs, by putting safe work practices in place and

485 KPMG Consulting, 2001.

486 WorkCover Corporation South Australia, *Annual Report 2002-2003*, p.14.

providing suitable employment for injured workers, are rewarded with a lower levy (which is currently 30% of the employer's industry levy rate)[487].

1130. The ACT is also trialling such a scheme, through its ACTSafe and Top 100 Retailers Incentive Scheme. Under the scheme, firms undertaking OHS education modules and risk assessments in the workplace receive a premium reduction.

Financial incentives in NSW

1131. The 1998 NSW Parliamentary Inquiry into Workplace Health and Safety recommended -

> *"the development of appropriate financial incentives within the workers compensation premium structure, such as bonus/malus schemes, to encourage the adoption of OHS management systems."*[488]

1132. In June 2001, a premium discount scheme was established. Employers with a NSW workers' compensation policy who implement WorkCover-approved workplace safety and injury management systems are entitled to discounts of up to 15% of their premium in the first year, up to 10% in the second, and up to 5% in the third.

1133. The entitlement to premium discounts is assessed in audits conducted by WorkCover-approved Premium Discount Advisers, who also play a consulting role to employers, assisting them to develop and implement management systems for their business. An employer must pass the first audit in the first six months of the workers' compensation policy year before it is entitled to receive a discount.

1134. WorkCover sets "benchmarks" which employers must meet in order to be entitled to receive the discount. The benchmarks for the first year (which "set a basic level of OHS & IM practices for employers to meet")[489] cover the areas of: (a) management responsibility; (b) consultation and communication; (c) risk management and process control; (d) training, learning and skills development; (e) records and records management; and (f) injury management. Meeting these benchmarks will not automatically mean that the employer has discharged its obligations under the NSW legislation.

1135. There has, to date, been no evaluation of the NSW scheme by way of a cost-benefit analysis, to determine whether it has led to an improvement in the health and safety of workplaces of participating employers, or has reduced the number of workplace accidents and claims made. I understand that such an evaluation is likely to be conducted later in 2004.

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487 WorkCover Corporation South Australia, *Annual Report 2002-2003*.

488 Parliament of New South Wales, Standing Committee on Law & Justice, (1998), *Final Report of the Inquiry into Workplace Safety*, November, Sydney.

489 WorkCover NSW, *Guide to the WorkCover Premium Discount Scheme,* September 2003, p.3.

1136. Early indications, however, are that there is positive support for the scheme from stakeholders, on the basis that a systematic, rather than a casual (or non-existent), approach to the management of health and safety leads to better OHS outcomes at the workplace. (The concept of systematic OHS management is discussed in Chapter 14). The NSW scheme has also created a positive environment in which employers are being encouraged to improve their health and safety performance. This applies not only to participants in the scheme, but also to employers outside the scheme who wish to meet the benchmarks required to pass the first audit and qualify for the premium discount for the first year.

1137. In its annual report for 2002, WorkCover NSW gave the following report on the scheme:

> *"By 30 June 2002, 120,914 employees were benefiting from the implementation of systematic occupational health and safety and injury management systems by 865 employers that have had premium discounts verified. A total of 100 employers have received the maximum discount of $75,000. The total discount is $21 million, $13 million above the projected discount total. The increase in the discount given out is a very positive outcome as it shows that more employers than first anticipated are participating in the Premium Discount Scheme. This indicates they are keen to improve their occupational health and safety and injury management systems."*[490]

1138. The majority of employers participating in the scheme as at 30 June 2002 came from the manufacturing (24%), health and community services (17%), property and business services (13%) and construction (11%) sectors.

1139. The annual report also refers to a limited three-year small business strategy that runs concurrently with the Premium Discount Scheme for employers with 20 or less full-time employees. As at 30 June 2002 a total of 1,817 small employers had subscribed to participate in the sponsored programs. The first discount (totalling $2.1 million) was received by 1,156 of those employers, representing a coverage of an estimated 16,384 employees.[491] In October 2003 the NSW Minister for Commerce reported to the Legislative Council of the NSW Parliament that $4.8 million had been provided to more than 1,600 small employers since the scheme commenced.[492]

1140. More recently, the Minister updated the Parliament on the Premium Discount Scheme:

> *"Since [June 2001], more than 2,200 employers have received discounts on their workers compensation premiums. The discounts provided have totalled more than $67.5 million and safer work practices have been provided*

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490 WorkCover NSW, *Annual Report 2001/2002*, p.32.

491 WorkCover NSW, *Annual Report 2001/2002*, p.33.

492 NSW Legislative Council Hansard, 15 October 2003, p.3807.

> *to more than 324,000 workers across the State. In particular, the scheme has been successful in targeting those employers with high claims costs or who are involved in high-risk industries. It is another example of the practical ways in which this Government is providing employers and workers with financial incentives to put in place measurable occupational health and safety and injury management systems."*[493]

1141. The Minister also referred to the awards created "to acknowledge the achievements of scheme participants, including employers, occupational health and safety committees and workers, and their premium discount advisers" and "encourage further participation in the premium discount scheme."[494]

1142. I recommend that serious consideration be given to the introduction of a premium discount scheme in Victoria. This topic can be conveniently considered within the current premium review. Naturally, the outcome of any cost-benefit analysis of the NSW scheme would be highly relevant.

Group incentive program

1143. The *Accident Compensation Act* 1985 has recently been amended to enable the Authority to provide incentives to employers to implement measures designed to prevent injuries and diseases at workplaces, and to improve occupational health and safety return-to-work outcomes.[495] A new function has been conferred on the Authority to enable this to occur.[496]

1144. The amendments are based on a review of the WorkCover premium system,[497] as to which the Minister for WorkCover said in his second reading speech:

> *"The review examined how to introduce fairer, outcome-focused premiums to all-size employers. The review concluded that there was a need to strengthen the premium-based incentives for small-to-medium employers to encourage and reward strong safety and return-to-work performance, and to introduce greater choice, efficiency and flexibility."*[498]

1145. The new s.238A(1) of the Compensation Act provides:

> *"Without limiting the powers conferred on the Authority, for the purpose of carrying out its functions under section 20(1)(ta), the Authority may-*

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493 NSW Legislative Council Hansard, 3 December 2003, p.5654.

494 p.5654.

495 The amending Act is the *Accident Compensation and Transport Accident Acts (Amendment) Act 2003*

496 Section 20(1)(ta) ACA.

497 As set out in Kearney A.T., *Victorian WorkCover Authority Premium Review Final Summary Report*, June 2002 and Victorian WorkCover Authority, *Fairer, Simpler Premium Package Information Paper*, July 2002.

498 *Hansard*, Legislative Assembly, 16 October 2003, p.1154.

> (a) *enter into agreements with any person or body and may agree to pay money under the agreement to any person or body;*
>
> (b) *require anyone seeking to enter into such an agreement to meet specified criteria or to successfully complete an approval or application process;*
>
> (c) *impose fees in relation to an approval or application process;*
>
> (d) *in agreeing to the payment of money under an agreement, base the amount to be paid on factors relevant to the calculation of premium under the Accident Compensation (WorkCover Insurance) Act 1993."*

1146. The following example is given in the section as to how it is contemplated the program will work:

> *"The Authority may agree to pay a representative of a group of employers an annual amount that represents the difference between the amount the group paid collectively in premiums in the previous year and the amount of premium that it is likely would have been paid in that year had the group of employers been a single employer. Under this scheme each employer would still have to pay the premium in respect of the year that he, she or it would normally have to pay."*

1147. Section 238A(2) provides that the Authority is not authorised to agree to waive or reduce the amount of premium an employer is liable to pay under the *Accident Compensation (WorkCover Insurance) Act* 1993, but the Authority may make payments in the nature of a refund of premiums.

1148. I have referred in Chapter 5 to the functions conferred on the Authority under the Compensation Act which relate to occupational health and safety, and to the need for them to be incorporated into OHSA. The new ss.20(1)(ta) (which confers the relevant function) and 238A (being the substantive provision) are provisions squarely concerned with the prevention of workplace injury and disease and with an employer's OHS performance.

1149. In my view, these provisions are part of the legislative framework dealing with occupational health and safety. Either these provisions should be in OHSA itself, or OHSA should contain complementary provisions which explicitly link improved OHS performance with the opportunity to secure (group) premium rebates.

Government procurement advantages

1150. Governments can apply supply chain pressure by making it a condition of eligibility for government contracts that firms achieve certain levels of OHS performance or certification before tendering.

1151. This approach can provide strong commercial incentives for firms to better manage safety. There is an obvious parallel with the Victorian Government's imposition of affirmative action obligations as a condition of eligibility for contracts for the supply of legal services.

1152. Obviously, such initiatives will only have a meaningful effect if there is active follow-up to track contractors' performance and, by that means, to signal to contractors that the Government takes safety performance seriously.[499]

1153. In the view of the National OHS Commission -

> *"Within this category is a range of tools government can use to influence purchaser-supplier and principal-contractor type relationships. Requiring particular OHS standards to be met by suppliers to government for example is a direct way of encouraging best practice. The same approach is taken by individual organisations in their tendering specifications."*[500]

1154. In NSW, implementation of OHS&R management systems has been a condition of tender for government construction projects since 1994. In order to do business with government, service providers must have an accredited corporate OHS&R management system.

1155. Initially the project threshold was $20m or more but this was reduced to $3m from March 1999. The NSW Department of Public Works requires all its Best Practice contractors (around 40 in the pool) to have an accredited corporate OHS&R Management System and to demonstrate implementation on projects.[501]

1156. I recommend that consideration be given to the implementation of similar tender conditions in Victoria. Although construction contracts are an obvious example, I see no reason for the OHS requirement to be limited to contracts of that type.

Non-financial incentives: reputational benefits

1157. I have formed the clear impression during the consultations that employers - particularly medium-sized and large employers - are placing increasing importance on establishing a reputation as "a safe employer".

1158. There are, of course, two sides to the reputational impact of OHS. There is the positive side, where public recognition can be accorded to employers for high level

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499 KPMG Consulting, 2001, p.83.

500 National Occupational Health & Safety Commission, "Positive Performance Indicators for OHS Part 1", retrieved from the NOHSC website 25 November 2003 : http://www.nohsc.gov.au/OHSInformation/NOHSCPublications/fulltext/docs/h2.

501 Risgalla, R., *Government construction procurement – using buying power to motivate improved OHS&R management performance"*, paper presented to "effective OHS incentives" NOHSC workshop, 16 October, Melbourne, 2001, p.3.

OHS compliance. And there is the negative side, constituted by the adverse publicity which is almost always associated with serious injury or death in the workplace.

1159. Research by Gunningham showed that, for larger organisations, corporate image and credibility ranked second as a motivator behind regulation-related motivators.[502] As Wright notes:

> *"The strongest motivator identified by research is the fear that the adverse publicity, loss of confidence and regulatory attention subsequent to a serious incident will cause curtailment of operations, imposition of additional costs, loss of corporate credibility and loss of business/interruption of operations."*[503]

1160. KPMG surveyed over 400 managers and concluded that -

> *"although concerns relating to corporate image (particularly negative publicity) were reported by many CEOs, these concerns were reported to have less impact compared with those relating to other issues such as moral responsibility, regulatory or organisational requirements, and commercial factors."* [504]

Nevertheless, 86% agreed that their safety record affected their personal reputation.

1161. Corporate image is particularly important to firms operating in high-risk industries, especially where the impact of an OHS incident would extend directly to members of the public. It is also important to firms which rely on community or government confidence to sustain or expand their business.[505]

Awards and positive publicity

1162. Awards are an opportunity for the regulator to reinforce good OHS performance. The benefits for the corporation are:

- positive publicity;
- tangible evidence of organisational performance which is also acceptable to the board of directors;
- recognition and reward for achievements; and
- economic benefits regarding competitive advantage, for tendering and public recognition.[506]

1163. At the same time, award schemes have their shortcomings, such as -

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502 Gunningham , N., 1999.

503 Wright 1999, cited in KPMG Consulting, 2001, p.12.

504 KPMG Consulting, 2001, p. 117.

505 KPMG Consulting, 2001, pp.114-115.

506 Gunningham, N. and Johnstone, R., *Regulating Workplace Safety: System and Sanctions*, Oxford University Press, Oxford, 1999.

- potential reluctance of employers to disclose commercially confidential information;
- the difficulty in defining award criteria so as to distinguish genuine change from mere paper compliance;
- the potential for entry bias, favouring enterprises with –
  - the greatest resources to devote to implementation and innovation; and
  - the greatest gains to be demonstrated.[507]

1164. None of these difficulties is, however, insuperable. The need to distinguish between genuine operational compliance and mere paper compliance is a challenge for any systems-based approach to OHS compliance. The solution lies in proper audit methodology, as discussed further below.

1165. As to the inherent bias in favour of larger enterprises, it should not be difficult to establish different categories by reference to the size of the enterprise – and to embody in the auditing standards for such awards a recognition that what constitutes good OHS performance for an SME is simply not the same as for a large public company.

1166. There should also be room for the OHS equivalent of the "most improved player" award. Such an award should be open to any enterprise which can demonstrate, by reference to objective criteria, substantial advances in its OHS performance over (say) a one or two year period.

1167. The Authority already has a substantial awards scheme. Any further development or elaboration of the scheme is, of course, a matter for management. It does seem to me, nevertheless, that this is an area deserving of high priority. For all the reasons I have given, the potential of awards to motivate and encourage improved OHS performance seems to me to be enormous.

1168. One particular aspect may require attention. One major employer, with an impressive top-to-bottom commitment to improving OHS, acknowledged that it would welcome recognition for its efforts and achievements but said:

> *"We don't put in for the WorkSafe awards, because the things they are looking for we did some years ago".*

1169. The point is an important one. Any system of awards must be broad enough to recognise best practice at all stages of the cycle of continuous improvement.

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[507] Gunningham and Johnstone, 1999.

Benchmarking and reporting

1170. A related topic concerns the establishment of OHS benchmarks for firms of particular sizes and types. There is, in my view, much to be said for benchmarking of this kind.

1171. First, it sets what could be loosely described as an "industry standard", to which industry participants can compare themselves and towards which they can individually strive. Secondly, benchmarking would facilitate employers reporting publicly on their performance relative to an industry benchmark.

1172. The 2001 Report of KPMG concluded that there was merit in OHS authorities assisting firms to benchmark their own performance against that of like firms.[508] According to the KPMG Report, the importance of performance management was a strong theme in consultations with CEOs.

> *"This indicates that measuring OHS performance through benchmarking programs promises to be a powerful motivator for CEOs to focus on OHS."*[509]

1173. Establishing benchmarks, while simple in theory, would doubtless be quite challenging in practice. But the establishment of benchmarks should flow naturally from an increasing focus on encouraging pro-active compliance across the board - that is, a focus on establishing a systematic approach to risk management (see Chapter 14).

1174. KPMG also concluded that there was merit in encouraging firms to include a report on their OHS performance within their annual reports. This has two obvious advantages, as follows:

(a) CEOs become more accountable to shareholders for the OHS performance of the firm; and

(b) CEOs can compare the performance of their firm against other similar firms, even if formal external benchmarking schemes are not established.[510]

1175. For these reasons, in my view, OHSA should be amended to require organisations which publish annual reports to include in their reports information about their OHS performance. Naturally, if industry benchmarks have been established, this kind of reporting will be much more meaningful.

1176. The obligation to report publicly can have a very strong incentive effect, as exemplified by the Toxic Release Inventory program established by the EPA in the United States. The program involved mandatory public (website) reporting of pollution emissions, by type and volume. Not surprisingly, the program was seen to

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508 KPMG Consulting, 2001, p.69.

509 KPMG Consulting, 2001, p.88.

510 KPMG Consulting, 2001, p.89.

provide a powerful "accidental" incentive for companies to reduce their emissions, in order to make their position more presentable publicly.

1177. There is already a national award for OHS reporting, as part of the Australian Reporting Awards.[511] The criteria for the OHS reporting award were developed in consultation with NOHSC and are important enough to be set out in full.[512]

CRITERIA FOR THE OHS REPORTING AWARD

OHS MANAGEMENT

The report should:

- Express a clear commitment by the organisation to OHS
- Demonstrate that OHS is embedded in general management systems
- Outline key OHS objectives and/or specific strategies
- Record future OHS targets
- Record the resources allocated to OHS
- Address, where appropriate, specific OHS issues
- Provide evidence of consultation with employees regarding OHS
- Address, where appropriate, the OHS management of contracts

OHS PERFORMANCE

The report should:

- Provide both negative and positive OHS key performance indicators
- Detail the organisation's response and preventive actions where a fatality is recorded
- Compare the current year's OHS performance with that of previous years and/or against industry "benchmarks"
- Record details of OHS training
- Where appropriate, record the outcomes of any OHS audits and the follow-up
- Where appropriate, record any regulatory interventions, including prosecutions, and subsequent action taken by the corporation

INDEPENDENT VERIFICATION

The report should:

- Record the results, where appropriate, of external audits and follow-up by the organisation
- Record any OHS awards or certificates the organisation has received
- Provide details, where appropriate, of the organisation's contribution to improving OHS within their industry

CONTINUOUS IMPROVEMENT

The report should:

- Provide details of any OHS innovation
- Where appropriate, give examples of problem-solving, consultative approach to creating solutions for identified OHS issues
- Demonstrate that the organisation has kept abreast of OHS best practice in its industry.

1178. An examination of these criteria confirms the potential benefit of public reporting in driving performance improvement.

1179. The Authority has been a sponsor of the OHS reporting award up to and including 2003, but has recently decided not to continue the sponsorship. For all the reasons I have given, this would seem a most regrettable decision and one which the Authority should reconsider urgently.

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511 Sponsored by the Australian Institute of Company Directors, the Association of Chartered Secretaries and the Association of Certified Practising Accountants.

512 The 2003 winner of the award was Henry Walker Eltin.

Assessing eligibility for safety incentives and awards

1180. Fundamental to this entire discussion is the question of the criteria by reference to which employers will be judged in order to decide whether they are eligible for rewards or recognition on the basis of their OHS performance. As I have indicated, I strongly favour systems-based criteria, ahead of statistical criteria based on changes in numbers of injuries or numbers of compensation claims. Not only are these statistics an imperfect indicator of OHS performance but they are vulnerable to manipulation, and reliance on them encourages under-reporting.

1181. The obvious starting point for assessing OHS management systems is the Australian and New Zealand Standard 4801 (2001). This is the standard which has been used by WorkSafe in connection with the SafetyMAP certification system (see Chapter 14). This is also the standard used in South Australia to assess eligibility for the "Safe Work Incentive for Large Employers" (referred to in para 1126 above).

1182. Careful consideration needs to be given to the standards which are applied to small and medium-sized businesses. It is, clearly, of vital importance that those enterprises, which are by far the most numerous, are given equal opportunity and encouragement to participate in any incentive-based scheme.

1183. Any set of eligibility criteria must be able to separate substantive improvements in OHS management from paper compliance with OHS management systems. It is the former, not the latter, which should be rewarded.

1184. As well as establishing clear standards by which eligibility for safety incentives can be judged, it is essential that there be established an independent and highly competent auditing function to undertake the requisite assessment. At present, it seems, this is an underdeveloped area:

> *"In practice, however, regulators…are short on techniques for evaluating the quality and performance of companies' implementation of these internal responsibility systems.*[513]
>
> *Auditing is one of the most widely used (and abused) ideas in the area of safety management today. It covers anything from a ten-minute exercise ticking boxes on a questionnaire, done by an administrative assistant whose boss is too busy to do it, to a three-week inquiry by a team of six high-powered managers from company sites or headquarters in other parts of the world."*[514]

1185. As the Reference Group agreed, the most difficult part of establishing any system of performance-based rewards or incentives will be to develop acceptable criteria for measuring performance and the associated audit skills needed to carry out the task of measurement. I am aware, too, that effective evaluation of OHS performance is very

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513 Parker, C., 2002, p. 2.

514 Andrew Hopkins cited in Parker, C., 2002, p.10.

resource-intensive, precisely because the evaluation must involve detailed examination of the workplace-in-action.

1186. But, for all the reasons set out earlier in this chapter, there are enormous potential OHS benefits from implementing a system of incentives and rewards. The "performance evaluation" issue should be treated as a top priority by the Authority. Improvements in methodology and skill will also enhance the Authority's ability to monitor compliance in the course of its daily activities.

Self-audit and inspection

1187. A key objective of any compliance strategy – whether incentive-based or penalty-based – is the promotion of self-reliance. The more an enterprise assumes responsibility for its own OHS compliance, rather than waiting for inspectors to call or – worse still – for accidents to happen, the better the OHS outcome:

> *"The more SMEs can be persuaded to do for themselves, the more committed they are likely to be to the outcomes and the more successful they are likely to be in achieving them. Self-inspections and self-audit show considerable promise in this context…and can make a considerable contribution."*[515]

1188. In two American States, incentive-based programs appeared to have achieved a degree of success in promoting self-reliance through self-auditing and inspection. The distinguishing feature of these schemes is that the incentive takes the form of an immunity from prosecution.

Minnesota

1189. The first example is of environmental, rather than OHS, regulation. In 1995, the Minnesota Pollution Control Agency commenced a pilot project referred to as the Environmental Audit Program. The program encourages business to self-inspect and to report the results to the regulator. To be eligible to participate in the program, a facility owner or operator must not have paid any penalties in the previous year as a result of environmental law enforcement action.

1190. If, during the course of the audit, the facility operator identifies a breach, it must disclose the breach to the regulator and provide a commitment to correct the breach as expeditiously as possible under the circumstances. In return, the regulator agrees not to include the breach in any enforcement action against the facility, and all penalties which might have been assessed will be waived, provided all corrective actions are completed as agreed by the operator.

1191. This limited immunity or amnesty does not apply to repeat offending, to criminal activities or to activities that cause serious harm to the environment or endanger public health. Participants also receive a "green star" award, provided they complete

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515 Gunningham, N., 1999.

all corrective actions and have not been involved in any major enforcement actions in the previous year. The green star can be displayed for two years after completing the audit and any required clean-up or corrective work.

1192. The major advantages of the program are said to be -

(a) reaching regulated facilities that would normally not be reached;

(b) increasing awareness of obligations;

(c) encouraging facilities to perform compliance determinations;

(d) more efficient use of enforcement resources;

(e) increasing awareness of prevention opportunities.

1193. There has been some favourable commentary on the scheme, as follows:

- *"[It] ..appears to have struck a useful balance between the public's need to hold business accountable for their performance and business' desire for certainty that they will not be devastated by acknowledging non-compliance."*
- *"..The ..experience illustrates that a regulatory system in which business largely self-certify their compliance requires a cultural shift among regulators, business managers, and the broader public."*
- *"The statute reduces company managers' fears that uncovering or reporting a.. violation will leave them liable to legal action and fines."*
- *"The agency is using the threat of traditional enforcement to remind small businesses and others that their choice is not between compliance and non-compliance but between a low-cost, low stress, collaborative route to compliance on the one hand and fines, liability and public notoriety on the other."*[516]

Maine

1194. OSHA Maine had a good enforcement record. It had maintained a high number of inspections, breach notices and fines levied, and it had won awards for its record of tough, vigilant enforcement.[517] But, despite these efforts, Maine led the nation in workplace accidents. Its work injury and illness rate was 63% higher than the national average. Injuries serious enough to cause lost work time were 71% higher than the rest of the country.

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516 Hukreide, R., "Environmental Improvement Pilot Project: Report to the Environment and Natural Resources Committees of the Minnesota Legislature", January 1999, p. 16. Retrieved from Minnesota Pollution Control Agency Environmental Audit webpage, 25 November, 2003: http://www.pca.state.mn.us/programs/audit_p.html.

517 The account of the Maine program is taken from "Motivating Job Safety", in J D Donahue (ed.) *Making Washington Work: Tales of Innovation in the Federal Government*, Brookings Institution, Washington, 1999, pp.114-127.

1195. So OSHA Maine changed its approach[518]. The 200 companies with the highest levels of workplace injuries, which collectively employed about 30% of the State's workforce, were identified. As Needleman points out[519]:

> *"Membership in the Top 200 was not necessarily a sign of poor safety performance, since large companies can have a high absolute number of injuries simply because of their size."*

1196. The targeted companies were given a choice, either to have standard inspections, with the usual enforcement consequences, or to launch their own safety programs –

> *"with OSHA experts operating more as health and safety consultants and less as health and safety cops".*[520]

1197. Most companies opted for voluntary health and safety campaigns. So began a whole new model of OSHA enforcement in Maine, featuring –

> *"a newly co-operative relationship between employers and OSHA, a relationship with more carrots, fewer sticks. Participating companies inspect their own premises for safety problems that include, but are not limited to, technical violations of OSHA rules. They write up and carry out an action plan to correct the problems, making mandatory progress reports to OSHA. Employees must be able to participate at all stages, and timetables are established for each obligation."*[521]

1198. The reasons given for the readiness of "the Maine 200" to undertake voluntary health and safety campaigns are illuminating:

> *"Many corporate safety officers relished the opportunity to design their own safety programs, and the 'choose your OSHA' offer gave them the chance to make their case internally. Even many of the business people who railed against heavy-handed federal regulators had a grudging respect for OSHA's technical expertise. But in the past they had been reluctant to tap into that expertise, since letting an OSHA staffer in the door would trigger the 'see it, cite it' routine and, almost inevitably, a torrent of fines and penalties. There was, of course, another reason for signing up: business people hate the bad morale and rising insurance costs associated with work-related injuries and illness. The 'choose your OSHA' approach tapped a reservoir of latent willingness to get serious about workplace safety."*[522]

1199. The Maine program also has its share of sceptics. It has been said, for example, that –

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518 As to the Maine 2000 program and other programs in the United States, see Needleman, C., "OSHA at the Crossroads: Conflicting Frameworks for Regulating OHS in the United States" in Frick *et al,* 2000, pp. 67 - 86.

519 Needleman, C., 2000, p.77.

520 Needleman, C. , 2000, p. 122.

521 Needleman, C., 2000, p. 122-3.

522 Needleman, 2000, p.122.

(a) there is no substantive evidence that enterprises in the Maine 200 did anything major to improve their OHS management. Most of the evidence of increased hazard identification came from only four unionised firms in the paper industry, not across the whole range of enterprises. There is no independent evidence of any increase in risk control;

(b) workers compensation claims decreased across the board in Maine over the same period. The greater decline that occurred in the participating enterprises had already started in those firms before the Maine 200 program and has been ascribed to a change in workers compensation law as well as to claims suppression; and

(c) the biggest problem was that the program was far more resource-intensive than traditional approaches, and actually made it harder for Maine OSHA to do its work.[523]

Penalty discounts

1200. US law sets out a clear standard for self-regulation systems. The *Federal Sentencing Guidelines* are applied to organisations when they are sentenced for federal criminal offences. Companies with good compliance programs are given decreased fines when they commit an offence.

1201. Organisations that do not have in place a compliance program can be placed on probation until they implement one. The Guidelines provide a clear set of standards which a compliance program must meet in order for the program to be judged "effective" and hence render the company eligible for mitigation.

1202. These standards are as follows:

(a) compliance standards and procedures reasonably capable of reducing the prospect of criminal conduct;

(b) specific high-level personnel assigned responsibility to oversee compliance;

(c) care taken not to delegate to individuals who had a propensity to engage in illegal activities;

(d) steps to communicate effectively its standards and procedures to all employees and other agents, eg. training programs and publications;

(e) reasonable steps to achieve compliance with its standards eg. monitoring, auditing and reporting systems;

(f) standards consistently enforced through disciplinary mechanisms;

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523 Needleman, 2000, *passim*.

(g) after an offence is detected, organisation takes all reasonable steps to respond appropriately and prevent further similar offences, including modification of the compliance program.

1203. Surveys have found that up to 20 per cent of companies surveyed introduced an internal system for ensuring regulatory compliance for the first time because of the Guidelines and up to 45 per cent added vigour to existing internal compliance systems because of the Guidelines.

1204. According to Parker –

> *"The real value of standards such as the Guidelines is that they create an easily accessible, well respected focal point for industry and the community to judge corporate self-regulation systems".*[524]

[524] Parker, C., 2002.

Chapter 25: The need for advice

1205. Most dutyholders are aware that they have safety duties under OHSA and related legislation. But few know what is required of them in order to discharge those duties.

1206. Some large employers can afford to employ health and safety specialists, who are engaged full-time in ensuring that managers and supervisors are aware of their obligations and that the various safety duties are carried out. A few unions – and VTHC – have their own health and safety specialists, who are likewise continually engaged in providing advice and assistance to their members in various workplaces about rights and duties.

1207. But for the majority of employers and the majority of workplaces, these resources simply do not exist. There is but the vaguest awareness, on the part of employer and employee alike, of what is required and how it is to be achieved. And even in the best-informed workplace, the question continually arises: **what constitutes compliance**?

1208. The question can arise in various ways, for example –

- an employer might be entering business for the first time and, knowing of the existence of the Act, wants information and advice about what its duties are and what, given the nature of the undertaking about to be embarked on, compliance will involve;
- a WorkSafe inspector comes to a workplace and identifies an aspect of the working environment which, in the inspector's view, is in breach of a provision of the Act or a regulation. The employer wants to know what it should do to rectify the problem;
- an HSR draws a safety issue to the attention of management. Remedial measures are taken but the HSR considers that the employer has not adequately controlled the risk. The OHS manager and the HSR agree that the logical person to say whether anything else needs to be done for compliance is a WorkSafe inspector;
- workers in a workplace with no elected HSR contact their union about what they regard as a serious health and safety issue, although not one which is creating an immediate threat to health and safety. The union health and safety officer attends and, having inspected the site of the problem, informs management that it is the view of the workers, and of the union, that there is a serious health and safety issue. The employer is unpersuaded. The workers and the union require urgent advice from an independent person about whether there is a breach of the Act and, if so, about what is required for compliance.

Can the inspectors be advisers?

1209. Throughout the consultations, employers have expressed their frustration at the refusal of WorkSafe inspectors to provide guidance or advice as to how they should go about complying with the Act. Of all the many issues raised during the review, this is the issue which has been raised most often, and most vociferously.

1210. The issue typically arises when an inspector visits a workplace. The inspector identifies a breach of the Act and the employer looks to the inspector for some guidance. On the face of it, the inspector is ideally placed to provide that form of assistance. As employers say –

> *"The inspector has formed the opinion that the workplace does not comply. That must mean that the inspector has in mind what compliance would look like. I want the inspector to tell me here and now what needs to be done, so I can get on with doing it."*

1211. When the potential for conflict between the inspector's duty to enforce and the giving of advice has been pointed out, a number of employers have said that they recognise the potential difficulty but are perfectly capable of understanding that compliance with the advice will not give them immunity from prosecution. They would much rather receive some advice than none.

1212. It seems to me to be of the first importance that dutyholders who wish to comply with their obligations – or recognise the necessity of complying – should be able to find out quickly and economically what compliance will involve.

1213. In its submission to the Review, the Authority agreed. The submission said:

> *"The availability of information about compliance is a critical factor in dutyholders' abilities to discharge their duties under the legislation.*
>
> *The VWA acknowledges that it can do more to provide information to dutyholders with practical guidance to help them meet their obligations under the Act and its regulations."*[525]

1214. The Robens Committee recognised the importance of the inspectorate providing practical advice and guidance in addition to enforcement:

> *"[A]s a matter of explicit policy, the provision of skilled and impartial advice and assistance should be the leading edge of the activities of the unified inspectorate. We do not mean by this that the inspectorate should attempt to provide services which employers can and should provide for themselves. Nevertheless, we think that there is considerable scope, even within limited resources, for the development of high-quality advisory and consultancy*

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525 VWA's submission to the Review, p.21. Access via VWA website: http://www.workcover.vic.gov.au./dir090/vwa/home.nsf/pages/OHSAct_review

> *services that would utilise and apply the great store of experience and expertise that has been built up within the inspectorates."*[526]

What the Act says

1215. Nothing in OHSA, or in the Compensation Act for that matter, deals with the provision of advice or guidance to dutyholders. The only mention of advice is found in OHSA s.8(1)(d), which defines as one of the Authority's functions –

> *"to provide advice to and co-operate with Government departments, public authorities, trade unions, employer organizations and other interested persons in relation to occupational health safety and welfare;"*

1216. Plainly, this provision is not concerned with providing assistance to the parties in a particular workplace. Its focus is on advice at "peak body" level. Who exactly the "other interested persons" might be is not made clear. The provision is a relic of the functions of the Commission which, as noted elsewhere,[527] was solely concerned with policy development and had no enforcement function at all.

What the Authority says

1217. In the Discussion Paper,[528] I said that the policy of WorkSafe was that inspectors were to enforce, not advise, and that some inspectors had expressed frustration at being prevented by this policy from giving advice on request. In fact, the WorkSafe policy is not so clearcut.

1218. In its submission to the Review, the Authority said –

> *"Face to face information and advice is provided by VWA inspectors as part of their compliance and enforcement functions. However, this advice appropriately falls well short of providing individual dutyholders with consultancy advice on exactly how an OHS issue should be resolved."*

1219. The submission accords with the content of the Field Operations Manual published by the Authority, under which inspectors carry out their functions. According to the Manual, what is required is a "balanced approach", in which –

> *"The primary role of an inspector is to enforce legislation administered by WorkSafe Victoria. At the same time as requiring compliance with statutory duties, inspectors are expected to provide information and support to dutyholders and other workplace/site parties such as health and safety representatives."*

1220. The Manual contains the same warning against inspectors becoming consultants -

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526 Robens, A. , 1972, p. 65.

527 See Chapter 7.

528 Maxwell, C., 2003, paras 101 and 375.

> *"The balanced approach does not, though, envisage that inspectors undertake a consultancy service to assist dutyholders. Employers are expected to engage consultancy services from the private market or employ specialist staff to assist meet their duties under the OHS Act."*[529]

1221. The Authority's current approach to the role of guidance/advice in inspections is consistent with the findings of the Industry Commission in its Inquiry into Occupational Health and Safety in 1995:

> *"The Commission considers that … advice should complement – and not detract from – the effectiveness of the overall enforcement effort and not detract from enforcement…There can be a conflict when inspectors act as both advisers and prosecutors…workplace inspections are not necessarily an effective vehicle for the provision of advice."*[530]

It is also broadly consistent with the practice of other Australian jurisdictions.

Why inspectors refrain from giving advice

1222. The Manual instructs inspectors to –

> *"provide information and advice to assist dutyholders to comply with Notices and Directions,* ***as well as*** *assist dutyholders more generally to meet these statutory obligations. The aim of this approach is to assist dutyholders to accept responsibility to identify and comply with these obligations."*

1223. The Manual authorises inspectors to give the following types of information and assistance to the workplace parties:

> *"•* *information on relevant codes of practice and publications;*
>
> - *information on issue resolution procedures;*
> - *demonstrating to the workplace parties how a risk assessment is done for relevant hazards, while making it clear that risk assessment is the responsibility of the dutyholder;*
> - *advice on employing or engaging appropriate health and safety expertise in line with Section 21(4)(c) obligations;*
> - *advice on how to achieve effective health and safety management, including -*
>   - *a planned and proactive approach;*
>   - *the commitment and involvement of managers at all levels;*

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529 The role of private sector consultants is discussed in paragraphs 1269-1273 below.

530 Industry Commission, 1995, *Work Health and Safety: Report of the Inquiry into Occupational Health and Safety,* Industry Commission/AGPS, Canberra, pp. 133-4.

- *meaningful and effective employee involvement;*
- *the identification and assessment of all risks and the control of hazards at their source;*
- *appropriate provision of training, information and supervision; and*
- *the integration of health and safety into broader enterprise systems and practices;*

- *practical guidance on how to prepare a Risk Control Plan (including distribution of WorkSafe Victoria's publication, A Guide to Risk Control Plans).*"

1224. An examination of this list reveals clearly why employers are not getting, and why inspectors feel unable to give, the kind of advice which employers want. Quite simply, the list – which appears to be expressed exhaustively – makes no reference whatever to inspectors assisting with the identification of solutions to particular workplace safety issues. Of course, referring an employer to a relevant Code of Practice may be sufficient for that purpose but, if it is not, there is nothing else in the Manual which contemplates the inspector participating in a discussion of how the relevant problem is to be fixed.

1225. At least from the time that Strategy 2000 was adopted, the Authority has quite deliberately moved to a greater emphasis on enforcement. This was, in part, a reaction to what many have described as the "consultancy culture" of OHS regulation in the 1990s. That culture is epitomised by the description of the function of inspectors in the September 1996 edition of the Authority's *Guide to the OHS Act*, as follows –

> *"[The] inspectors adopt a facilitative approach through the provision of advice to employers and employees. Inspections and enforcement remain a primary duty, but emphasis is increasingly given to providing assistance in solving problems relating to health and safety before injuries or illness occurs."*[531]

1226. But enforcement and advice are not mutually exclusive. And a greater readiness to give advice is quite different from offering consultancy services.

Inspectors should give advice

1227. Employers do not expect inspectors to be consultants. What they expect – in my view, reasonably – is that they be informed by inspectors of measures which may be appropriate to rectify an OHS contravention.

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531 Victorian WorkCover Authority, *Guide to the OHS Act 1985,* 7th revised edition, September 1996, p.2. Retrieved from VWA website, January 2004: http://workcover.vic.gov.au/vwa/publica.nsf/InterPubDocsA/. See also Duane, C. "Enforcement and Compliance Occupational Health and Safety, Victoria" *Paper Presented at the Current Issues in Regulation:Enforcement and Compliance Conference* convened by the Australian Institute of Criminology in conjunction with the Regulatory Institutions Network, 2 -3 September 2002, p. 3.

1228. The current operational policy as set out in the Manual reflects, in my view, a quite unnecessary – and ultimately counterproductive – degree of caution and hesitation on the Authority's part.

1229. There are, as I acknowledged in the Discussion Paper, a number of considerations which may explain this cautious approach, as follows –

- an inspector's decision can result in criminal liability; it might be thought inappropriate, therefore, for an inspector to be giving advice about what will constitute compliance;
- for an inspector to wear both a "black hat" (as investigator and enforcer) and a "white hat" (as consultant and adviser) may create confusion in the minds of affected parties about which of those functions is being performed at any particular time;
- in some cases, compliance is straightforward and unambiguous e.g. to place a guard on an unguarded machine. In many other instances, however, a hazard may be removed by a variety of means, and views will differ from one inspector to another about which is the best or most appropriate method. If one inspector were to give advice to an employer about a particular approach, which the employer followed, it is possible that a different inspector might subsequently take a different view and hold the employer liable for non-compliance, with consequent damage to the effectiveness and credibility of the scheme;
- if WorkSafe gave advice to an employer about steps required for compliance, and the advice was negligently given, such that an employee sustained injury notwithstanding that the employer had followed the advice, WorkSafe itself would be liable to the injured worker for that negligence.[532]

1230. These are all serious considerations, and not lightly to be dismissed. But, in my view, the case for inspectors playing a stronger advisory role is nevertheless a compelling one.

1231. By giving advice or guidance on the spot – in whatever form – an inspector is uniquely able to promote compliance. Just as importantly, the inspector's readiness to give advice will reinforce the positive attitude of the employer who has, by seeking the advice, demonstrated its desire to comply as soon as possible.

1232. Of course, the Authority must seek to promote self-reliance on the part of dutyholders.[533] As some have argued to me, "spoon-feeding" employers can create a

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532 Maxwell, C., 2003, para. 102.

533 See Chapter 24.

culture of dependency on the regulator and will discourage employers from developing their own skills, resources and systems.

1233. I understand this argument, but it seems to me that the advantages of inspectors being prepared to give advice far outweigh the disadvantages. Not only is advice conducive to prompt compliance, but it establishes a relationship between WorkSafe and dutyholders founded on the common purpose of achieving compliance.

1234. The recent review of the WA Act endorsed a greater role for inspectors in the provision of advice and guidance. The review recommended that inspectors should have a specific power to provide information and advice:

> *"While it could be argued that provision of advice is not a function or a duty of an inspector, there are circumstances where the inspector has an obligation to assist the parties…There is no reason, for example, why an inspector could not outline why a particular proposal has been judged to be deficient and what generally, in the inspector's judgement, may be needed to remove that deficiency…Of course the inspector would also remind the parties of the Act and their obligations to comply with the Act. Moreover, if the inspector is unsure, as may be the case from time to time, then all that can be provided is the known information. Alternatively, it may be appropriate to make additional inquiries."*[534]

Advice has no legal status or consequence

1235. Naturally, the status of any advice given must be clearly explained and understood by the person who receives it. The Act must make clear that an inspector's advice has no legal force and no legal consequence of any kind. Three distinct points must be made.

1236. First, for a dutyholder to follow a course of action suggested by an inspector does not guarantee that the dutyholder has complied with the Act. Secondly, the dutyholder's failure to follow the inspector's advice is irrelevant to any question of non-compliance with the Act.

1237. Thirdly, the provision of advice or guidance by an inspector should create no right of action against the inspector personally. The policy considerations which are regarded as militating against the conferral of immunity on inspectors for the exercise of their coercive powers have no application to this separate function of giving advice. The liability of the Authority should, however, remain.

1238. To avoid misunderstanding, inspectors should be armed with a standard form explanatory notice making each of these points, which can be handed out at the time the advice is given.

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534 Laing, R., 2002, *Review of the Occupational Health and Safety Act 1984*, 14 November, p. 279. Retrieved from the Department of Consumer and Employment Protection website, September 2003: http://www.safetyline.wa.gov.au/pagebin/wswanews0057.pdf.

1239. The obvious need for consistency of advice is addressed elsewhere.[535]

What the Act should say

1240. In my view, the Act should be amended to confer on the Authority a power, exercisable by inspectors as well as by the Authority itself, to give advice and guidance to dutyholders as to how to achieve compliance with the Act.

1241. As discussed more fully in Chapter 29, the Act already gives inspectors express power, when issuing an improvement notice under s.43(1) or a prohibition notice under s.44(1), to include –

> *"directions as to the measures to be taken to remedy any contravention, likely contravention, risk, matters or activities to which the notice relates."*[536].

1242. Such a direction may –

> *"(a) refer to any approved Code of Practice; and*
>
> *(b) offer the person to whom it is issued a choice of ways in which to remedy the contravention, likely contravention, risk, matters or activities."*[537]

1243. These directions are mandatory. Non-compliance with a direction constitutes non-compliance with the relevant notice, which is an offence under s.43(3) or s.44(3) (as the case may be).

1244. The power to give directions has stood unchanged since the Act was introduced in 1985. It reflects a clear legislative intention that inspectors should be in a position - that is, should be equipped and ready - to identify specific steps to be taken to remedy identified safety breaches. The unstated assumption, of course, is that inspectors will have the requisite degree of skill and know-how - or will have ready access to appropriate sources of skill and know-how - for them to be able to exercise the power of direction effectively.

1245. Plainly enough, if the express advisory function is conferred on inspectors, the need for appropriate skill levels will be all the more pressing. While there have been many calls from employers for advice from inspectors, there has also been a sprinkling of comments along the following lines–

> *"Even if the inspector could give advice, I wouldn't be asking for it. They simply don't understand how this workplace operates. They would barely be able to identify the risks, let alone the solutions."*

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535 See Chapter 27.

536 Section 45(1).

537 Section 45(2).

1246. The Authority's current Inspector Capability Project is addressing this all–important issue.

Advice and enforcement

1247. The power to give advice is an instrument for securing compliance with the Act, and it should be exercised as such. This means, in my view, that the circumstances which enliven the inspector's power to issue an improvement notice – the existence of an apparent or anticipated contravention of the Act – should likewise enliven the power to give advice.

1248. The power to issue an improvement notice is triggered when an inspector forms the opinion that any person –

> *"(a) is contravening any provision of this Act or the regulations; or*
>
> *(b) has contravened such a provision in circumstances that make it likely that the contravention will continue or be repeated".*

1249. The power is discretionary. The use of "may" rather than "shall" was undoubtedly deliberate. Parliament intended to reserve to the inspector the discretion not to issue a notice notwithstanding that an existing or impending contravention had been observed.

1250. An inspector should, in my view, be able in those circumstances to give advice or guidance, either in addition to or as an alternative to the issue of an improvement notice. The fact that a notice is issued, requiring the contravention to be remedied, should not inhibit the inspector from providing advice – so long as the Act makes unambiguously clear that to follow the inspector's advice does not guarantee compliance with the Act.

1251. The giving of advice may be equally appropriate in the emergency circumstance which calls for the issue of a prohibition notice – that is, where there is "an immediate risk to the health and safety of any person". Indeed, the urgency of removing the risk – for the sake both of employees and employer – might be thought to make it particularly appropriate for an inspector to give practical guidance on the spot.

1252. Equally, inspectors should be free to give advice where no question of contravention arises. For example, a question might be raised in an inspection – whether by an employer, an employee or an HSR – about appropriate procedures for risk assessment and control, or about how the employer should deal with the safety practices of contractors, or of labour hire employees, who come into the workplace for short periods. The inspector should be ready to provide such guidance as seems appropriate.

Proposed provision

1253. I have in mind a provision along the following lines:

Provision of advice

"(1) Where an inspector is of the opinion that any person –

(a) is contravening any provision of this Act or the regulations; or

(b) has contravened such a provision in circumstances that make it likely that the contravention will continue or be repeated –

the inspector may give the person such advice, guidance, recommendation or opinion as the inspector sees fit as to the measures to be taken to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention.

(2) An inspector may give to any person such advice, guidance, recommendation or opinion as the inspector sees fit on any matter relevant to compliance with the Act or the regulations.

Inspector's advice has no legal force

(1) Nothing in the preceding section shall impose on an inspector any duty to give any advice, guidance, recommendation or opinion.

(2) Nothing done or omitted to be done by an inspector in pursuance of the preceding section shall be construed as conferring on any person a right of action against the inspector in any civil proceeding.

(3) The fact that a person has acted in accordance with or in reliance upon advice, guidance, recommendation or opinion given or made by an inspector shall not affect any liability which that person would otherwise have under this Act or the regulations.

(4) The fact that a person has not acted in accordance with advice, guidance, recommendation or opinion given or made by an inspector shall not expose that person to any liability which that person would not otherwise have under this Act or the regulations."

Small business advisory service

1254. As part of its Small Business Safety Program, the Authority provides up to three hours of free OHS advice to any small or medium business (up to 50 employees), by providing an independent health and safety consultant to assist with health and safety matters. The consultancies are funded by the Small Business Funding Program, one of three grant funds administered by WorkSafe.[538] The Program was established to

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538 The other two funds are the Safety Development Fund (see para 1316 below) and the Information and Education Fund (see para 1322 below).

encourage greater understanding and compliance with the OHS legislation by small businesses, by providing advice to them on health and safety issues that arise at their workplaces.

1255. According to a recent survey commissioned by the Authority to evaluate stakeholders' perceptions of the implementation of the Small Business Consultancy program, 97% of the respondents found the assistance either very or quite useful, and 83% of those who had used this free service thought it was the best method of providing occupational health and safety advice to their business.[539]

1256. In earlier research commissioned by the Authority it was found that there was a "high level of commitment [among industry association respondents] to the continuation of the Small Business Safety Program and a willingness to see it expanded in the future to include a greater number of small businesses and possibly medium sized enterprises."[540]

1257. For a small business which is a member of an industry association, the consultancy is co-ordinated by that association. Industry associations have promoted the program to their members through direct mail campaigns, magazine and newsletter articles, trade workshops and personal contact. In the survey to which I have already referred, it was found that 79% of the small business respondents became aware of the consultancy service through their industry association. WorkSafe has approved funding for 1600 such consultancies.

1258. For those small businesses which are not members of an industry association, WorkSafe itself co-ordinates the consultancy. As at 7 July 2003, WorkSafe had approved 485 such consultancies.

1259. The consultancy service is provided by either a private OHS consultant or an in-house OHS specialist employed by the industry association.

1260. As to the direct involvement of WorkSafe in the program, I note what was said in the April 2003 study:[541]

> *"There was a strong aversion among both small business and Industry Association respondents to the [Authority] being involved in the Small Business Safety Program and there was a belief that any further involvement from the [Authority] would have an adverse effect on the success of the Program. There is currently a lack of trust between small businesses and the Authority. Some of the businesses still hold the opinion that WorkSafe is the 'industry police'."*

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539 Sweeney Research Pty Ltd, "WorkSafe Victoria: Small Business Safety Program", Study No.13282, May 2003. Retrieved from the VWA website September 2003: http://www.workcover.vic.gov.au/dir090/vwa/home.nsf/pages/so_smallbus_newintro/$file/SmallBusReport_2_v2.pdf

540 Sweeney Research, 2003.

541 Sweeney Research, 2003, p.ii.

1261. According to the survey, the program was "well received by both small businesses and Industry Association Advisers". Indeed, I was told during consultations that a number of small businesses engaged the consultant (at their own cost) to provide further assistance after they had received the first three hours free of charge. However, it was recognised that small businesses may still be unwilling to participate in the program because of:

- the time and cost of making the workplace safe;
- the complexity of the checklist, specifically the knowledge and detail required to complete the checklist;
- the amount of paperwork involved in the program; and
- anxiety about being targeted by WorkSafe.

1262. To access the program, small businesses are asked to complete a one page form, which is available in an electronic form on the Authority's website. An alternative means of accessing the program is through either one of a number of industry-specific checklists[542], or a more detailed generic checklist, all of which are also available in electronic form.

1263. The generic checklist is 12 pages in length[543], and is headed "Small Business Safety Assessment Tool". As its name suggests, the primary purpose of the document (as with the industry-specific checklists) is to enable a small business to self-assess its workplace for health and safety. If, having completed the checklist, the small business requires assistance, it is asked to send the self-assessment to the Authority, which will then determine the type of assistance the business needs (which may be the provision of a consultant under the program).

1264. I note the Authority's assurance on page 2 of the checklist that "information provided by employers under the Small Business Safety Program will not be provided to the [Authority's] inspectors." It is made clear, however, that employers who participate in the program will not be exempt from the Authority's program of "targeted intervention and response to complaints and incidents." On page 2 of the checklist the following appears under the heading "PLEASE NOTE":

> *"1. Under the Small Business Safety Program, the Victorian WorkCover Authority will provide once only access to three hours' consultation for individual small business employers. A 'small business' is defined as a business that has the equivalent of, or less than, 20 full time staff."*

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542 The relevant industries are travel, automotive, farm (dairy sector), licensed clubs, civil construction, hotel and motel accommodation and forest.

543 The travel industry checklist is 25 pages; automotive, 30 pages; farm (dairy sector), 20 pages; licensed clubs, 42 pages; civil construction, 15 pages; hotel and motel accommodation, 20 pages; and forest, 18 pages.

1265. In fact, as already noted, the free safety assistance is (as is stated elsewhere on the Authority's website) available to "any Victorian small or medium business (up to 50 employees)", and is not limited (as is stated on the generic checklist) to small businesses of up to 20 employees.[544]

1266. A number of suggestions were made by small businesses and industry association advisers as to ways in which the program could be improved, such as –

- provide follow-up to ensure businesses are taking the next step to implement changes to their workplaces;
- recognise small businesses that have undertaken the program;
- reward small businesses that have undertaken the program by offering tangible benefits such as reduced WorkCover premiums (see Chapter 24);
- offer practical advice;
- hold bi-annual meetings with Industry Associations to workshop ideas and share knowledge across the various industries;
- simplify the documentation.

1267. The program is one of the critical components in educating and informing small business employers about their health and safety responsibilities under the OHS legislation, and providing them with advice as to what they need to do in order to discharge those responsibilities. The involvement of industry associations is encouraging. As I have said elsewhere, the infrastructure of such associations must be utilised and supported as much as possible, to ensure that health and safety becomes part of the day-to-day operations of small businesses.

1268. It is not just about telling small businesses what their obligations are. There must be a positive environment of support, through practical advice, to encourage them to improve their OHS performance. Although the program is not part of the legislative framework, I recommend that the program be expanded to increase the coverage of small to medium businesses, and that the Authority capitalise on the existing commitment of industry associations to the program. The program is a good example of an extra-legislative measure that does not involve any "regulatory burden", and in fact eases the existing burden by making the OHS legislation more comprehensible.

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544 ABS *1321.0 Small Business in Australia*, (20 October 2002) defines 'small business' as a business employing less than 20 people, and 'medium business' as a business employing 20 or more people, but less than 200 people. Retrieved from ABS website, September 2003: http://www.abs.gov.au/Ausstats/abs@.nsf/0/97452f3932f44031ca256c5b00027f19?OpenDocument

Private sector consultants

1269. As I have said, the consultancy services provided to small businesses under the Small Business Consultancy Program are delivered by either private OHS consultants or in-house OHS specialists employed by industry associations.

1270. In its submission to the Review, the Authority said[545]:

> *"Many duty holders engage consultants to assist them to resolve OHS issues. While many consultants provide competent expert service to their clients, a number of duty holders have raised concerns about poor service that they have received. Examples of poor advice include duty holders paying several thousands of dollars for a range of material that appears to have been down-loaded from websites with minimal tailored information for the business; information provided that is unusable by the client. The VWA is aware that some OHS consultants have been sued for poor performance by those who have contracted them. This industry may benefit from some form of industry based accreditation scheme, similar to those operating in the accounting field, so that consumers can gain a level of confidence about the consultants that they may engage."*

1271. The Authority publishes on its website a directory of health and safety consultants. In my view, this directory – while helpful up to a point – is liable to mislead. The very fact that a particular consultant is listed on an official website might suggest that the consultant has some kind of official approval or accreditation, when that is not so.

1272. In my view, the Authority should no longer publish the directory. Instead, it should establish links, administratively as well as on the website, with the numerous professional associations which accredit their own specialists. Ideally, those organisations should supply the Authority with regularly updated lists of their accredited members, for display on the website.

1273. I am aware that the Authority does some limited accreditation of its own within the Compensation Division, but my clear view is that on the OHS side this is properly left to the professional bodies.

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545 VWA submission to the Review, p.21.

Chapter 26: Education and information

1274. Under Term of Reference 4,[546] I am asked to consider whether any legislative change is required –

> *"to ensure rights, responsibilities and duties are clearly understood by employers and employees and other dutyholders…".*

1275. It is axiomatic that the extent of compliance with OHSA is dependent on the degree of awareness in Victorian workplaces of what the Act requires. This means that –

> *"when it comes to workplace health and safety, an important role of the Authority is to inform Victorians about their rights and responsibilities."*[547].

1276. The task of increasing awareness of OHSA has two distinct elements. The first is to ensure that the language of the Act – and the supporting instruments – is clear, simple and comprehensible. The second is to maximise the dissemination of information about what the Act says and how it can be complied with.

1277. I shall deal with each of these topics separately.

Clarity and simplicity

1278. It is a necessary condition of effective regulation that the regulatory language be as simply expressed as possible. This is especially so where, as with OHSA, a breach of the regulatory obligations is an indictable criminal offence.

1279. Statutory language is notoriously inaccessible, even to lawyers. The community's demand for "plain English" statutes is entirely understandable, when arcane words such as "appurtenant"[548] and even "practicable" continue to be used.

1280. Generally, however, the language of OHSA (and also of DGA and EPSA) is reasonably clear and straightforward. In particular, the general duties in Part III of the Act are imposed in language which can be readily understood. There is no ambiguity about an obligation on an employer –

> *"provide and maintain a working environment that is safe and without risk to health".*[549]

1281. A striking feature of the consultations for this review has been the familiarity of participants with sections and sub-sections of OHSA. The facility with which contributors have made reference to particular provisions, and the degree of working

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546 The full Terms of Reference are set out in Appendix 1.

547 Victorian WorkCover Authority, *Compliance and enforcement policy*, p.3. Access via VWA website: http://www.workcover.vic.gov.au/dir090/vwa/publica.nsf/InterPubDocsA

548 See the definition of "plant" in OHSA s.4.

549 Though it is not clear what is added by the words "and without risk to health". According to the New Shorter Oxford Dictionary (p.2665), "safe" in the relevant sense means "not likely to cause harm or injury".

familiarity with their application, are quite remarkable. This must, in part, reflect the comprehensibility of the Act.

1282. Nevertheless, OHSA as a legislative document compares unfavourably with its interstate counterparts, in particular, the New South Wales Act (passed in 2000) and the Queensland Act (passed in 1995). Both of those Acts are presented, and expressed, much more crisply and succinctly than is OHSA. If Victoria were enacting OHSA legislation for the first time, I would be recommending an approach similar to that of Queensland or New South Wales, in preference to the present structure of OHSA.

1283. But this is an update, not a re-write. Moreover, a substantial body of experience and learning – particularly in written form – has been built up based on the Act as it stands. There is, for that reason alone, a powerful case for preserving the existing language, except where clarification will enhance compliance or where a need for substantive amendment has been identified.

1284. In the recommendations I make in this report, I have sought to avoid linguistic change except where clearly necessary. In relation to "practicability", for example, while these would be good reasons for using some other word, I have recommended that the existing language be retained, with the addition of interpretive sections to give greater clarity and certainty to the operation of that crucial concept[550].

Informing Victorians

1285. As noted above, the Authority recognises that it has an important role in informing Victorians about their rights and responsibilities concerning occupational health and safety. How that is done, and with what resources, is a matter for the Authority's Board and management.

1286. Those decisions must, of course, be made in accordance with the objectives set out in OHSA. The Act at present has remarkably little to say about what seems to me to be one of the most important of all the Authority's functions. The only relevant provisions are to be found in the long list of functions conferred on the Authority by OHSA and by the Compensation Act respectively. Thus, the Authority's functions include –

- "to collect and disseminate information on occupational health and safety and welfare."[551]; and
- "to provide information services to workers, employers and the general community."[552].

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550 See Chapter 10.

551 OHSA s.8(1)(i).

552 ACA s.20(1)(y).

1287. It is not unusual for this aspect of the functions of a public authority to be given rather little prominence. The same is true of the Environment Protection Authority, which is required simply –

> *"to provide information and education to the public regarding the protection and improvement of the environment."*[553]*,*

and of the Transport Accident Commission, which is required –

> *"to promote the prevention of transport accidents and safety in use of transport."*[554]

1288. But, as the administrator of OHSA, WorkSafe stands in a rather different position from EPA and TAC. This is because OHSA imposes obligations, and creates rights, which apply to every part of the operation of every workplace, and to every employer and every person at work, every day.

1289. The function of maximising awareness of those rights and obligations is not merely ancillary to the Authority's other functions: it is central and fundamental. Indeed, it seems obvious that the education function is every bit as important as the enforcement function. The greater the spread of good information about what the Act requires, and how to comply with it, the less – ultimately – the Authority should need to do by way of enforcement.

1290. At present, the enforcement activities of inspectors also have a very significant educative effect. In one workplace I visited, the employer recounted what had been a rather uncomfortable visit from a WorkSafe inspector, who had issued an Improvement Notice in respect of breaches of the Act regarding manual handling processes. The employer said to me:

> *"We did not much enjoy the inspector pointing out our shortcomings, but we certainly learnt a great deal about manual handling. We now recognise the need to pay attention to those issues in our workplace design and in the definition of duties for our employees."*

1291. This example illustrates an important point. The value of face-to-face interaction between the Authority and those with rights and responsibilities – dutyholders, HSRs and HSCs – cannot be overstated. A single visit is, I would think, more effective than a dozen brochures. Apart from the natural educative function of inspectors' visits, the Authority has available to it a range of avenues for increasing such direct contact. I will refer to some of these later in this Chapter.

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553 *Environment Protection Act 1970,* s.13(1)(l).

554 *Transport Accident Act 1986,* s.12(2).

Current information and education activities

1292. In *Strategy 2000,* the 1997-8 Roll-Over Protective Structure (ROPS) rebate scheme was hailed as "an example of a successful prevention program". This scheme provided a rebate for farmers who fitted a ROPS to their tractors so as to achieve compliance with s.903 of the *Occupational Health and Safety (Plant) Regulations*. (Whether it is appropriate to provide financial incentives to dutyholders who simply comply with the law is a matter discussed in Chapter 24).

1293. According to *Strategy 2000,* the success of the ROPS scheme demonstrated "the influence of publicity and public education campaigns". The Authority's education and information role was to be based on the lessons learnt from the success of this scheme:

> *"• Targeted industry OHS training and education will be a high priority;*
>
> - *We will focus on increasing the competencies of health and safety representatives;*
> - *As part of our targeted compliance we will publish poor OHS results;*
> - *We will also publicise prosecutions to change the community's perception of health and safety breaches – from accidents to criminal behaviour;*
> - *Safety Online will be a repository for workplace prevention knowledge and provide instant access to this knowledge – a vital tool in encouraging stakeholder 'ownership';*
> - *Prevention guidance material and OHS improvements will also be encouraged".*[555]

1294. It is not clear why the Authority's broad information and education strategy was modelled on a very simple intervention targeting a particular hazard in the agricultural sector. This is in no way to downplay the seriousness of the issues raised by the high numbers of fatalities and injuries that have occurred, and continue to occur, as a result of tractor roll-over accidents. But the question arises: is it appropriate to assume that a hazard-specific intervention can be used as the model for an education and information strategy which must be adaptable across the whole of the economy?

1295. One of the first ports of call for Victorians seeking information about workplace hazards and their obligations under OHS legislation is the Authority's website. Ideally, the website should give a visitor to it a broad understanding of the OHS issues, the role of the Authority and the scope and content of the legislation, and provide specific information which is accessible, practical and easy to understand.

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555 Victorian WorkCover Authority *Strategy 2000,* p.18. Access via VWA website: http://www.workcover.vic.gov.au/dir090/vwa/publica.nsf/InterPubDocsA

1296. On examination, however, the website content falls some way short of these objectives. From the Authority's home page, the reader can visit the "Employers" and "Workers" pages. The page entitled, "What are my obligations as an employer?" provides a summary of ss.21(1), 21(2), 21(4) and s.22 duties. The summary is manifestly inadequate, in that it makes no reference to "practicability" at all[556]. The page makes only brief reference to important matters such as the employer's duty to consult with health and safety representatives; the obligations of manufacturers and suppliers in relation to plant and substances; incident notification requirements; and compliance with notices or directions issued by inspectors.

1297. The "Employers" page does not mention - let alone provide any guidance on - the difficult s.21(3) provision dealing with independent contractors. The page is not linked to sources of more substantial guidance, such as the *Guide to the Occupational Health and Safety Act*. A new employer might reasonably – but incorrectly – assume that the page provided a complete and adequate summary of his or her duties and that there was no need to download a copy of the Act itself or to seek the more accurate and detailed advice that can be found elsewhere on the site[557].

1298. In a similar vein, the "Workers" page fails to provide employees with essential information about their rights under the Act. It is silent on the Part IV provisions providing for consultation and participation. There is no mention of the right of workers to request the formation of a DWG and to elect a health and safety representative. There is nothing about the employer's duty to consult with elected HSRs or the functions and powers of the HSR. This would seem an inexplicable omission, especially given the Authority's *Strategy 2000* pledge to "focus on increasing the competencies of health and safety representatives". The page should at least provide a link to the interactive website for HSRs developed by VTHC through the Authority's Information and Education Fund (see below).

1299. Again, the "WorkSafe Online" page provides, without any preamble to orient the reader, an enormous range of guidance under the headings of "Industries", "Legislation & Legal Matters", "Guidance Material", "Information & Education" and "Safety Basics". It is not clear why the various materials are collected under each of the particular headings or why, for example, "small business" guidance sits under "Industries" rather than "Safety Basics". (Indeed, the vital importance of small business guidance would seem to justify separate and more extensive treatment). There is no explanation of the difference between an "alert" and a "guidance note," nor as to why "anthrax" is included among the "Safety Basics".

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556 For a discussion of the central importance of the test "so far as is practicable", see Chapters 10-12.

557 Access via "Employers" page on the VWA website: http://www.workcover.vic.gov.au/dir090/vwa/home.nsf/pages/_Employer_Homehttp

1300. The "Information and Education" page is designed to keep the reader up-to-date with health and safety practices, but offers only a disparate assortment of links to other pages: "Becoming an Inspector"; "Fatalities Program"; "Glossary of Terms"; "Haz Subs Training Kit" (which would mean little to a person unfamiliar with OHS terminology), "InjuryMAP"; "Safety Development Fund"; "Strategies" (which links to *Strategy 2000,* "the case for change" and "Focus 100"); "Safety School" and "Training Providers". No rationale is offered for the particular selection of links offered.

1301. In short, the available material does not seem to measure up to the *Strategy 2000* objective of providing "instant access to knowledge". A reader cannot be expected to find either general or specific information if no map or compass is provided. The "WorkSafe Online" page essentially comprises a mixture of information and guidance on legislation as developed by the Authority in recent years. Some of these publications are very good indeed, and have been taken up enthusiastically by dutyholders, but the website itself adds surprisingly little value.

Educating small business

1302. Research undertaken by the National Centre for Vocational Education Research has found that small businesses need to be engaged through the provision of localised expertise and support via strategic facilitation of existing networks and associations. Rather than formal, accredited vocational education and training courses, small businesses want guided learning delivered within the workplace and specific diagnostic advice.[558]

1303. According to an ABS survey, 82% of small businesses claim not to have expended funds on training and those employed by small businesses are much less likely to have had access to education and training than their counterparts in large workplaces. In sum, small businesses need, and are best supported through, the facilitation of "rich localised learning".

Using available networks to reach small business

1304. One network which is immediately available to the Authority is the network of field officers employed by the members of Group Training Victoria. These officers – numbering about 250 – are employed to visit small businesses throughout Victoria, to assess their suitability for the placement of apprentices.

1305. One of the critical issues in the assessment of any small business for this purpose is whether it is OHS-compliant. Each training firm owes a duty to apprentices to ensure that any workplace in which they are placed is safe. Typically, I have been told, the field officer will be pressed by the small business proprietor for information and

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558 Billett, S., Ehrich, L. & Hernon-Tinning, B., *How small business learnt about the goods and services tax: Lessons for vocational education and training,* National Centre for Vocational Education Research, Australian National Training Authority, Adelaide, 2003, pp. 57 – 59.

"handy hints" about a range of compliance issues, and field officers have come to be regarded as trusted repositories of such information.

1306. Group Training Victoria has, more than once, invited the Authority to make use of these field officers for the purpose of distributing basic OHS information to small business. For reasons which remain quite unclear, this invitation has not been taken up. It strikes me that this is an ideal opportunity for the Authority to gain access to the least-informed section of business. I understand that the State Revenue Office is developing a "tool kit" on State taxes which these GTV field officers will distribute. A WorkSafe "tool kit" should be prepared so it can be distributed at the same time.

Small Business CD: "Managing Safety in Your Workplace – A step-by-step guide

1307. In 2003, the Authority distributed to 200,000 employers a guide for small- to medium-sized businesses. The guide, in the form of a CD-ROM, introduces the viewer to OHS concepts and legal obligations and provides solutions to common hazards on an industry-by-industry basis.

1308. A survey exploring the dissemination of OHS information to small business associations via direct mail suggested a very limited 10% penetration rate, with most associations only "scanning" unsolicited OHS mail. Even though small business respondents themselves stated that direct mail was the best method for informing them of workplace health and safety information, direct mail does not necessarily attract the attention of its target audience.[559]

1309. As with the Authority's website, the content of the CD-ROM does not appear to be underpinned by a considered policy framework. For example, the CD-ROM makes no reference to the all-important consultation requirements under the Act. The presenter, George Negus, simply tells the employer that it is a legal requirement to "talk to your staff" – by getting them all together, by speaking to them in groups or approaching them individually. Similarly, the concept of practicability is presented as merely common sense matter of eliminating the risk, or reducing it "as much as possible". The absence of clear integrated guidance on the general duties is also evident.

1310. At the same time, the CD correctly identifies the importance of using existing networks, by recommending that the employer share information about hazards and solutions with other people in his or her industry, and seek assistance from other industry participants and from industry associations.

1311. It is too early to tell whether SME employers have found the CD helpful or relevant – or indeed, whether they have the level of interest or the necessary computer skills and

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559 Mayhew, C., "Small business occupational health and safety information provision", *Journal of Occupational Health and Safety – Australia and New Zealand,* vol. 13, no. 4, 1997, p. 367.

hardware to use it. Research conducted by VECCI in recent years indicated that SME employers on the whole have very low levels of capability in accessing information in electronic form. "They know how to use the accounting package to get their BAS statement done, and that's about it".

1312. As pointed out in paragraph 1302, the findings of the National Centre for Vocational Education Research would tend to suggest that these employers would much prefer face-to-face advice and support via "travelling trainers", informal information-sharing activities with trusted industry players and "just-in-time" training on specific OHS issues.

The European Experience

1313. Some assistance can be drawn from the various approaches adopted across Europe to promote compliance by SMEs. In *Health and Safety in Small Enterprises,* Walters provides detailed information on strategic approaches and results across Europe. UK strategies are described in detail, reflecting the extent of HSE activity and its positive record in devising practical outreach methods. Strategies described include:

- Involvement of SME networks in policy formulation; Internet discussion groups; SME representation on HSC;
- Information support: award-winning publications and interactive IT and self-assessment tools; Internet new business service;
- Extensive partnership activity, for example HSE/Small Business Service partnership and the Good Neighbour Scheme, centred on larger firm mentoring with possible supply chain pressure incentives;
- Use of intermediaries (accountants, banks training providers);
- Working with specific groups, for example encouraging "passport" OHS training of contractors' employees and industry-specific guidance on effective health and safety management.[560]

1314. In *Working Safely in Small Enterprises in Europe*, Walters surveys evidence in four EU countries (UK, Sweden, Italy and Spain) which confirms the importance of participative OHS arrangements in achieving sustainable change in OHS standards. Other European initiatives include:

- subsidy programs in France which operate alongside the loans incentive program (one for "short diagnoses" and another for initiatives to implement significant work organisation change);
- schemes involving reductions in working time and repetitive work;

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560 See also the Health and Safety Commission Business Plan 2002-2003, which encourages all parts of the HSC to "think small first". Retrieved from Health and Safety Executive website November 2003: http://www.hse.gov.uk/aboutus/plans/hscplans/busplan0203.pdf.

- the EU small business grants program, coordinated by the European Agency for Safety and Health at Work.

Safety Development Fund

1315. The Authority manages the Safety Development Fund which –

> *" supports employer and employee groups to develop and implement innovative health and safety initiatives. Not only do recipients qualify for financial support, WorkSafe Victoria will also provide access to relevant industry programs and supporting information.*
>
> *The fund provides support for two types of projects:*
>
> - *Those that implement innovative high impact solutions to OHS problems, or*
> - *those that implement existing best practice solutions.*"[561]

1316. The aims of the Safety Development Fund (SDF) are to:

- facilitate lasting change in workplace health and safety;
- reduce the incidence and severity of work-related injury and disease;
- implement initiatives to eliminate workplace hazards and effectively manage workplace health and safety;
- support co-operative problem-solving in the workplace; and
- promote a wider understanding of "best practice" systems and solutions.

1317. The SDF seeks to achieve co-operative, sector-wide improvements to workplace health and safety. It is mandatory that SDF projects be jointly developed and managed by employer and employee representative associations.

1318. While it is still too early to evaluate the overall success of the program, individual projects appear to have achieved very encouraging results. For example, SDF funding for the Private Aged Care "No Lift" Project – a collaborative initiative by the Australian Nursing Federation, the Aged Care Association of Victoria and the Victorian Association of Health and Extended Care – enabled thirty private nursing homes to purchase mechanical lifting equipment and undertake "no lift" training programs for staff.

1319. An independent evaluation of the first six to twelve months of the project revealed: substantial reductions (60%) in overall injury rates, days lost and WorkCover claims costs; significant cost savings and return on investment; improved staff morale and job satisfaction; and safer work practices. These are outstanding results.

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561 Victorian WorkCover Authority website, "Safety Development Fund" webpage: http://www.workcover.vic.gov.au/vwa/home.nsf/pages/SafetyDevFund

1320. References to SDF projects have come up regularly in the consultations. Invariably the comments have been enthusiastic. The model of collaborative effort, shared knowledge and industry-wide solutions seems hard to improve on. It seems to me to be vitally important that the work of the SDF continue and expand. If, as has been suggested, fewer projects have been put forward for funding in recent times, WorkSafe – in conjunction with the proposed OHS advisory committee (see Chapter 7) – should be actively soliciting new projects, and publicising the availability of SDF funding.

Information and Education Fund

1321. The Information and Education Fund (IEF) was established to provide opportunities for stakeholders to assist the Authority in education, information and communication projects. Of particular interest were projects which would contribute to achieving the objectives of *Strategy 2000* or fill an information gap that could not be filled as readily by other means.

1322. According to the application guidelines, the IEF -

> *"recognises education, information and communication are important mechanisms for increasing people's awareness, understanding and capability in creating safe and healthy workplaces".*

1323. The Authority is currently refining guidelines for assessing applications for funding under this program.

1324. As the IEF is a relatively new initiative, only a small number of projects have been undertaken, and their success is yet to be evaluated. Examples of projects that have received, or are continuing to receive, funding include:

- the interactive website for HSRs developed by VTHC;
- the Victorian Farm Safety Training Centre run by the University of Ballarat; and
- the "Sleep Safe – Work Smart – Heart Health" program led by the Institute of Breathing and Sleep at the Austin & Repatriation Medical Centre and the Transport Workers Union.

1325. It is anticipated that the IEF will focus on industry-specific information and training projects delivered by industry associations and unions – particularly in relation to new regulatory requirements and psychosocial hazards.

Development of face-to-face advisory and diagnostic services

1326. The Authority's advisory service provides free telephone advice of a general nature on workplace health and safety and rehabilitation/compensation issues. More specific advice to small business could, for example, be provided via the Small Business Advisory Council's eleven business service centres throughout the State, as these centres already provide face-to-face assistance to small business owners and work closely with industry sector specialists.

1327. As I have said, the emphasis needs to be upon face-to-face communication. As Wyatt commented (in an evaluation of the dissemination and implementation of WorkSafe Australia-funded OHS research), small business owners –

> *"don't read. They hate reading. They hate paperwork. That's why they are in a trade. Someone has to come to them".*[562]

1328. Research suggests that only 30 – 40% of small business owners belong to an employer association – and that those with no history of industrial relations problems are least likely to join. Thus, the use of sector-specific employer associations as a conduit for the dissemination of information and training may fail to reach the majority of small business owners within any given industry[563].

Legislative implications

1329. While the Authority has recently pursued a strategy of encouraging industry networks and facilitating grass-roots solutions via the SDF, IEF and industry forums, its overall education and information strategy appears to lack co-ordination and a clear sense of purpose. There is a preponderance of low-level activity but little apparent strategic focus. This is despite a marketing budget of $20 million (two to three times larger than other government departments).

1330. I would recommend amendments to the Act so as to give greater prominence to the Authority's educative role amongst its various functions. The new provisions might read as follows:

> *"The education and information functions of the Authority are –*
>
> *(a) to inform persons of their rights and obligations under this Act;*
>
> *(b) to promote an understanding and acceptance of the health and safety principles in this Act;*
>
> *(c) to conduct, promote and co-ordinate the sharing of information between persons and bodies so as to achieve the objects of this Act;*

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562 Wyatt cited in Mayhew, C., 1997, p. 367.

563 Mayhew, C., 1997, p. 367.

(d) to promote public education and discussion about occupational health and safety issues;

(e) to devise in co-operation with educational and other bodies, courses in occupational health, safety and welfare and facilitate community access to these courses;

(f) to promote education and training and approve courses in occupational health and safety; and

(g) to promote events or activities relating to occupational health, safety and welfare, including conferences, publications and forums."

PART 7: ENFORCEMENT - ADMINISTRATIVE

Chapter 27: The role of the inspectors

1331. It is impossible to overstate the importance of the role of the inspectors in occupational health and safety. First, the effectiveness of the legislation in eliminating/mitigating risks depends critically on the performance of the inspectors. They are the arms and legs of the regulator, the embodiment of the Authority's compliance activities.

1332. Secondly, since the inspectors are the public face of the Authority, their performance is the basis for public judgments of how the Authority itself is performing. In short, what the inspectors do – and how they do it - directly affects the level of public confidence in the system.

1333. Quite simply, the inspectors operate at the sharp end of the legislative scheme. It is for them (in the first instance) to decide what does, and what does not, constitute compliance with the requirements of the Act and the regulations. It is they who must engage in the crucial debates with dutyholders about what is, and what is not, "practicable having regard to...". It is they who, with no guidance from the legislative scheme, have to decide when the cost of removing a hazard is disproportionate to the risk (see Chapter 12).

1334. Equally important is the power which inspectors have to confirm, or override, a provisional improvement notice issued by a health and safety representative (s.35(3)). How inspectors deal with health and safety representatives in connection with the exercise of their overriding power bears directly on the future discharge by health and safety representatives of their important functions.

1335. Being a good inspector is, therefore, an extraordinarily difficult job. The inspector has to be, variously, an expert at hazard identification and risk assessment; an expert at systems engineering; an expert at micro-economics; competent at statutory interpretation; and have skills as a diplomat/negotiator/mediator. He/she also has to have a fairly thick skin, given that site inspections are often unpopular events with dutyholders.

1336. It is, therefore, vital that inspectors be well-trained (and kept up-to-date), well-instructed about their tasks, well-advised about the legal parameters within which they operate, well-resourced, and well-supported by their managers and peers.

1337. Above all, inspectors need to feel confident about their powers and about the back-up available to them from the Authority when required. It is also essential that, once an inspector has made a decision, he/she participate fully in any review of the decision,

and be kept informed about decisions made with respect to any prosecution based on that decision.

1338. I am not, of course, in a position to make any empirical assessment as to how well these various objectives are being met currently. There has, however, been sufficient feedback in the course of my various consultations – both from inspectors and from workplace parties – to suggest that there are some serious shortcomings under each of these headings.

The administrative arrangements

1339. WorkSafe currently employs about 300 inspectors appointed under the various health and safety statutes.[564] There are approximately 300,000 workplaces in Victoria. Since 2000 the inspectors have been administratively organised within five key industry programs:

- manufacturing and agriculture;
- construction and utilities;
- transport and storage;
- major hazards; and
- public sector and community services.[565]

1340. There are also groups of specialist inspectors (separate from the industry programs) who are, variously, investigators, ergonomists, occupational hygienists, management systems experts, compliance co-ordination advisers and dangerous goods experts.

1341. There is no Chief Inspector to oversee the activities of the inspectorate. Industry program directors co-ordinate their work in accordance with program objectives, and the Operations Support Division sets and monitors the operational framework of the inspectorate. Inspectors work out of a number of metropolitan, suburban and regional offices.

The independence of the inspectorate

1342. The Robens Committee referred to "the sturdy independence expected of an inspector". But what does this mean?

1343. To speak of "independence" in relation to an inspector means, in my view, that the inspector must be able to exercise his/her powers "without fear or favour". That is, a decision whether or not to issue a prohibition notice (or an improvement notice) must be made impartially, without bias or favouritism.

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564 Section 38 OHSA; s.12 EPSA; s.11 DGA.

565 Victorian Workcover Authority, *Strategy 2000*. Retrieved from VWA website September 2003: http://www.workcover.vic.gov.au/dir090/vwa/publica.nsf/InterPubDocsA.

1344. The inspector must be independent of the person under inspection. There can be no conflict between duty and interest – as there would be, for example, if an inspector held shares in a company which he was inspecting.

1345. But independence does not mean – and, in my view, cannot mean – that the inspector is independent of the Authority, if this means being free of direction from or control by the Authority. It could never have been intended that an inspector was to be an autonomous public official, the exercise of whose powers would be subject to no restriction other than the (universal) requirement that statutory powers must be exercised in accordance with law and for the purposes for which they are conferred.

1346. I am aware that inspectors jealously guard their independence. They have said as much to me in discussions. But I do not understand this to mean that they see themselves as – or wish to be – independent of the Authority in the pure sense, that is, answerable to no-one. On the contrary, inspectors understand and accept that they are accountable to the Authority and subject to its direction and control.

1347. Properly understood, the concern which inspectors express is a quite specific one. They object to what they see as interference by management in their decision-making.

1348. The term "interference" conceals two quite separate points. The first is that reasonable minds can differ on the matters about which opinions have to be formed before an inspector's powers can be exercised. The second – and different – point is that the intervention by management could be for either permissible or impermissible reasons.

1349. As to the first, it is just as likely that one inspector will take a different view from another as it is that a representative of VWA management will take a different view from that of the inspector. There is nothing improper or inappropriate about this. It simply reflects the inescapable fact that much of what the inspectors do is an exercise of judgment, about matters to which there is no single "correct" answer.

1350. As to the second point, an example of a permissible intervention would be where an inspector had made a decision which was clearly wrong (for example, because it was based on a misunderstanding of the risks associated with particular machinery or a particular substance). Not only is it appropriate for the Authority to wish to override the decision – and withdraw the notice – but in my view any coherent statutory system for OHS must afford the Authority such a power.

1351. An example of an impermissible intervention would be where an inspector had formed the requisite opinion and issued a prohibition notice, and management then intervened to "withdraw" the notice, not because of a disagreement about the substantive basis of the decision but because the dutyholder had threatened to make a

protest at a high political level if the notice was not withdrawn. [I hasten to add that no-one has suggested that this has occurred!]

1352. Another concern which inspectors have – and which I share – is that management intervention in their decisions is ad hoc, unsystematic and non-transparent. How and by whom such intervention is managed at Authority level appears to vary according to the vehemence of the complaint.

Inspectors as officers of the Authority

1353. The solution to these difficulties is in two parts. First, the Act must be amended to make it clear that inspectors are officers of the Authority and exercise their powers on behalf of the Authority. Secondly, there needs to be a transparent, systematic process for internal review of inspectors' decisions. (I deal with internal review in Chapter 38).

1354. As to the capacity in which inspectors act, the provisions of the Act should reflect the fact that the powers which the inspectors exercise are powers conferred on the Authority as regulator, not on the inspectors as individual statutory officers. That being so, the Authority quite properly must be in a position to direct, and review, the exercise of those powers.

1355. At present, the Act authorises the Authority to appoint –

> *"any officer or employee of the Authority to be an inspector for the purposes of this Act."*[566]

Thus, an inspector is a person employed by the Authority on whom are conferred, by virtue of the appointment, the powers of inspector. The position of an inspector as an officer of the Authority may be contrasted with, for example, the position of the Inspector-General of Taxation. The latter is appointed by the Executive Council, and is separate and independent from the Commissioner of Taxation.

1356. On ordinary principles, a person carrying out functions under the Act as "an officer or employee" of the Authority does so as its servant or agent. As a matter of law, therefore, the employee's act would be the act of the Authority. Statutory corporations, like other corporations, can only act through their agents.

1357. The same is also true of a statutory officer such as the Commissioner of Taxation and a statutory authority such as the Environment Protection Authority. Each acts through authorised officers.

1358. In the case of the Commissioner of Taxation, the *Income Tax Assessment Act* confers a multitude of powers on the Commissioner. Thus, s.264(1) provides:

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566 Section 38(1).

> *"The Commissioner may by notice in writing require any person... –*
>
> *(a) to furnish him with such information as he may require; and*
>
> *(b) to attend and give evidence before him or before any officer authorised by him..."*

1359. Naturally, the Commissioner himself does not – cannot – make decisions to issue such notices in relation to individual taxpayers. Those decisions are taken by two classes of persons, namely –

(a) those to whom the Commissioner has delegated his powers, under the general power of delegation;[567] and

(b) persons authorised in writing, either by the Commissioner or by his various delegates, to exercise those powers.[568]

1360. Whether the power is exercised by a delegate, or by an authorised officer, it is the Commissioner's power which is being exercised – even though he may be wholly unaware of the fact of its exercise.

1361. In the case of the *Environment Protection Act* 1970 (Vic), enforcement powers are conferred on the Authority comparable to those which inspectors have under OHSA. For example, an abatement notice may be issued under s. 28B(1) –

> *"where the Authority is satisfied that any waste being discharged into the works of a sewerage authority..."*

1362. As with the Commissioner of Taxation, it is the Authority – not an individual officer - which has the power to require persons to provide information.[569]

1363. To achieve the same result under OHSA, all that is required is an amendment along the following lines –

> *"For all the purposes of this Act, any act or omission of an inspector is an act or omission of the Authority, and any opinion formed by an inspector for the purposes of this Act is to be taken to be the opinion of the Authority."*[570]

1364. It would, of course, be possible to amend the OHSA so as to substitute the words "the Authority" for "an inspector" wherever they occur. I do not, however, think that this change is either necessary or desirable. First, such a sweeping change would suggest that there had been a substantive curbing of inspectors' powers, when no such thing would have occurred. Secondly, it would involve a departure from the uniform

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567 *Taxation Administration Act* 1953 s.8(1).

568 See the discussion in *O'Reilly v The Commissioners of the State Bank of Victoria* (1983) 153 CLR 1 at 9-11 and 32-3.

569 See for example s.22(1)(a).

570 In relation to the formation of an opinion, see *Secretary, Department of Social Security v Alvaro* (1994) 50 FCR 213 at 224.

legislative model throughout Australia, thereby suggesting a difference in substance which would not in fact exist.

The need for consistency

1365. It is essential that there be consistency in the exercise of powers as between one inspector and the next. There are at least two reasons for this. First, if enforcement is consistently rigorous, then it should follow that the level of compliance will rise. Secondly, and just as importantly, consistency is vital to the Authority's credibility as OHS regulator and to the maintenance of public confidence in the OHS scheme.

1366. That there is too great a degree of inconsistency at present is of major concern to the Authority and to workplace parties. To increase consistency is therefore a key priority for the Board and for the management of WorkSafe.

1367. It seems to me that there are two necessary conditions for consistency, namely, clarity and knowledge. As to clarity, the Authority must provide direction to inspectors, as clearly and as comprehensively as possible, about the approach which they are expected to adopt, both as a matter of general process and in relation to inspection of workplaces of particular kinds. As to knowledge, the internal mechanisms of the Authority must be designed to establish, and maintain, a high degree of awareness on the part of inspectors of the content of those directions.

1368. As to the first of these, the Authority should look to publish a much larger body of material on how the Act is to be interpreted and applied. In particular, the Authority should publish clear statements of its own interpretation of the key provisions of the legislation. These "safety rulings" – as they might be called – should not be pronouncements "from on high". On the contrary, the development of the content of this material should be a process in which the inspectors – and stakeholders – are actively involved.

1369. In conjunction with such public rulings, the Authority should develop much more detailed practical guidelines for inspectors about what is regarded as constituting compliance –

(a) in different types of workplaces;

(b) in relation to different types of hazards.

1370. An obvious subject both for a public ruling and for detailed internal guidelines would be the test of practicability. The Authority should give detailed guidelines to inspectors about how the practicability "matrix" - involving severity, probability, knowledge and cost - should be applied in a whole range of different situations. Once again, this is an exercise in which inspectors should be actively involved.

1371. A further aid of this kind would be the publication of actual case studies, to demonstrate how particular hazards were (or were not) effectively addressed in particular workplaces. Such examples would be of benefit to dutyholders as well as to inspectors.

1372. As to the second limb – making sure inspectors are made aware, and kept aware, of this information – there seems to be a need for much more intensive professional development of inspectors on the job. There should be regular workshops in which particular aspects of inspectors' powers are discussed, by reference to case studies. There should be an opportunity for peer review and discussion - for example, of the content of notices.

1373. In addition, and crucially, inspectors need to have an accessible source of prompt, reliable legal advice. When issues arise in the course of a workplace inspection – for example, when the dutyholder's lawyer contests the inspector's view – the inspector should be able to seek definitive guidance from the lawyers in the Authority, always assuming that such advice can appropriately be given by someone who has not inspected the site.

In-house legal adviser

1374. Even if the Act is clarified in the ways I have recommended, there will continue to be issues about interpretation of provisions of the Act and of the many regulations. This means that it is not only the inspectors who have need of prompt and reliable legal advice. Legal questions can arise for WorkSafe management at all levels. This calls, in my view, for the creation of a specialist position of in-house legal adviser.

1375. There is in the prosecutions unit of WorkSafe very substantial expertise and experience in interpreting and applying the Act in the context of investigations and prosecutions. The in-house adviser I have in mind would not be duplicating that function any way. Rather the adviser would be expected to provide interpretive advice and guidance to all other sections of the Authority, as required.

1376. The first task for such an adviser would be to consolidate and organise the very substantial body of legal opinions which the Authority has, over the years, obtained from barristers and solicitors in private practice, as well as from lawyers employed by the Authority. This valuable body of material, to the extent that it is still relevant to the Act in its current form, should then form the basis for the development of the safety rulings, about which I will say more in the next section.

1377. I would also see the legal adviser as having at least a monitoring role in relation to the proposed system of internal review of inspectors' decisions. Inevitably, applications for review will raise questions of interpretation of the Act and about what does and does not constitute compliance with the general duties. It will be a necessary part of making the internal review mechanism work successfully that those responsible for

making the review decisions be furnished with an appropriate set of interpretive guidelines, to ensure consistency of decision-making.

1378. The legal adviser should be responsible for providing legal advice – on demand – to inspectors. If, as I have been told, many of the enquiries from inspectors concern operational rather than legal matters, those enquiries can be referred to the appropriate division. But to the extent that questions of law (or procedure) arise, the legal adviser will quickly develop a specialist expertise. At the same time, the adviser will be alerted to areas where either the Authority needs to clarify its own position or where inspectors may require additional training or instruction.

Safety rulings

1379. My proposal for the Authority to publish "safety rulings" is based on the long-standing practice of the Australian Taxation Office, to publish taxation rulings and taxation determinations. These rulings set out the Commissioner's interpretation of particular provisions of the tax law, for the benefit both of ATO staff throughout Australia, in their day-to-day decision-making, and of taxpayers and their advisers.

1380. Leaving aside the special category of "private binding rulings", taxation rulings have no legal effect. The Commissioner would be expected to administer the Act in accordance with a published ruling, but is always free to make an assessment decision, or argue a position in court, which differs from that stated in a ruling.[571] Of course, the position adopted in a tax ruling is based on an analysis of how the relevant provision has been, or is likely to be, interpreted by the Courts. But taxpayers and their advisers are well aware that if the issue should come to be tested in court, nothing said in the ruling will affect the court's decision on the question of law.

1381. I have raised this proposal in a number of the consultations and there has been, without exception, strong support for it. Clearly, the provision of rulings would go some way towards meeting the demand for answers to the question: "what do I need to do to comply?"

1382. I recommend that the Act be amended to give the Authority express power to issue rulings of this kind.

1383. It would be both necessary and appropriate for such rulings to be published, in the first instance, in draft form, and for comment to be invited from all interested parties.

The challenge of technical compliance

1384. An issue of particular concern to inspectors is the difficulty of drafting a notice under the Act which complies with all the technical requirements. Anecdotally, inspectors

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571 *Bellinz v. Federal Commissioner of Taxation* (1998) 84 FCR 154

are nervous about their notices being vulnerable to attack on formal rather than substantive grounds – either on an appeal or by someone within WorkSafe.

1385. Of course, inspectors must exercise their powers in accordance with law. At the same time, it seems undesirable for the already-difficult job of an inspector to be complicated in any way by a concern that "the form has not been filled in correctly". This topic arises also in relation to compliance, but I raise it here because of its implications for inspectors and their decision-making.

1386. In my view, the Act should be amended to safeguard notices against challenge on grounds of technical (as opposed to substantive) non-compliance. I deal with these issues in more detail in Chapter 29.

Chapter 28: Functions and powers of the inspectors

Inspectors' role: vital but undefined

1387. As I have said, the function of the inspectors is critical to the effectiveness of the OHSA scheme. Yet the Act which gives them their powers is wholly silent about their role, functions, qualifications, privileges, and immunities.

1388. In my view, the Act should deal expressly which each of these matters. It should also deal more clearly and more comprehensively with the powers of inspectors, and identify more precisely the purposes for which those powers are to be exercised.

1389. Giving clarity and definition to the functions and powers of inspectors is essential, for a variety of reasons. First, it is a basic requirement of legislation which creates criminal offences that the powers of enforcement officers be clearly defined. Secondly, inspectors must be clear about the role they are to play, and about the scope and limits of the various powers conferred on them. This is a necessary precondition for inspectors having the confidence which, as I said in the previous chapter, is vital if they are to maximise their effectiveness in promoting compliance.

1390. Thirdly – and it is a corollary of the first two points – clarification of the position and powers of inspectors will operate in the best interests of employers and employees alike. A higher degree of certainty amongst workplace parties about what inspectors are authorised to do, and about what they may reasonably be expected to do, can only enhance the efficacy of workplace interaction between inspectors and those parties.

Appointment and qualification

1391. Under s.38(1) as it stands, to be eligible for appointment as an inspector a person must first be an "officer or employee of the Authority". Typically, however, inspectors will be appointed not from the ranks of current employees but from outside the Authority. Of course, upon appointment an inspector will become an employee of the Authority, but it seems to me to be artificial and unnecessary to make employment by the Authority a pre-condition of appointment as an inspector.

1392. In my view, s.38(1) should be amended to enable the Authority to appoint "any qualified person" to be an inspector. The question of appropriate qualifications will be considered in the next section of this chapter.

1393. At present the appointment which is made under s.38(1) is an appointment –

> *"to be an inspector for the purposes of this Act".*

In short, the appointment is only for the purposes of OHSA. Yet the Authority also administers - and most inspectors in practice enforce - EPSA and DGA.[572]

1394. At present, inspectors have to be separately appointed under each of those other legislative schemes. This is, in my view, unwieldy and unnecessary. The power of appointment under s.38(1) should be amended so as to enable the Authority to appoint persons as inspectors for the purposes of each piece of legislation administered by the Authority.

Qualifications for appointment

1395. The Act at present says nothing about qualifications for appointment as an inspector. I understand that, over the years since the Act commenced, views have fluctuated as to whether any particular qualifications were required and, in particular, as to whether academic qualifications (whether in occupational health and safety or in a relevant scientific discipline) or trade qualifications were more appropriate.

1396. The Authority publishes on its website a statement of the kinds of qualifications, skills and experience which the Authority looks for in considering applicants for appointment as inspector. For example, "tertiary qualifications in OHS will be viewed very favourably". Potential inspectors should be able "to influence and encourage positive behaviour in the workplace".

1397. Section 40 of the Cth Act permits Comcare to appoint as an investigator -

(a) a member of the staff of Comcare; or

(b) a person having knowledge of, and experience in, matters relating to occupational health and safety.

1398. The Qld Act permits the Chief Executive to appoint a person as an inspector if –

(a) the Chief Executive considers that the person has the necessary expertise or experience to be an inspector; or

(b) the person has satisfactorily finished training approved by the Chief Executive.

1399. In early December 2003, the Minister announced that, over the next two years, all inspectors currently employed by the Authority would undertake a specialised diploma course, to be known as the Diploma of Government (Workplace Inspection). According to the Minister's public statement at the time, the purpose of this training initiative was to –

"ensure all inspectors are on the same page".

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572 And *Road Transport (Dangerous Goods) Act 1995* (RTDGA), though only a select number of inspectors are appointed under that legislation at the present time.

1400. The Minister went on –

> *"Up until now there have been a variety of ways people became inspectors. Some come from a scientific background, some have come through the trades, while others may have already been working in occupational health and safety.*
>
> *Another problem was that people have joined WorkSafe as inspectors at different times, meaning they have been trained to different degrees and under different strategic approaches.*
>
> *WorkSafe inspectors do a difficult job and they do it well. The aim of the project is to ensure greater consistency in the decision making process."*[573].

1401. In my view, the Act should be amended to limit eligibility for appointment as inspector to "qualified persons". The Act should identify the types of qualifications which would be regarded as suitable for this purpose. For example, the Act might require that a candidate for appointment have completed the new Diploma, or "a course of training equivalent to it". The latter formula would give the Authority the necessary degree of flexibility in accepting equivalent qualifications. There should also be scope for treating particular types of experience as equivalent to qualifications.

Functions of inspectors

1402. The Act sets out the functions of the Authority[574]. It also sets out the functions of health and safety representatives[575] and health and safety committees[576]. But the Act says nothing about the functions of inspectors. Instead, this very important matter is–

> *"defined by internal strategies and protocols established by the Authority".*[577]

This internal documentation is, for the most part, not in the public domain, and has been described by the Victorian Trades Hall Council as "woolly and convoluted".[578]

1403. In my view, the Act should be amended by the insertion of a provision along the following lines –

> *"The functions of inspectors under this Act are –*
>
> *(a) to monitor and promote compliance with this Act and the regulations;*

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573 Minister's Media release dated 2 December 2003 "Victoria Leads the Way with WorkSafe Inspectors".

574 Section 8 – see the discussion in Chapter 5

575 Section 31(1).

576 Section 37(4).

577 Australian Industry Group submission to the Review. Access via VWA website: http://www.workcover.vic.gov.au/dir090/vwa/home.nsf/pages/OHSAct_review.

578 Victorian Trades Hall Council submission to the Review.

> *(b) to deal with disputes about health and safety issues at workplaces as required by this Act or the regulations;*
>
> *(c) to respond to emergency or dangerous situations arising at any workplace or from the conduct of any undertaking;*
>
> *(d) to investigate contraventions or possible contraventions of this Act or the regulations; and*
>
> *(e) to take appropriate measures to enforce or secure compliance with this Act and the regulations."*

Purposes for which powers may be exercised

1404. The powers conferred on inspectors by OHSA and EPSA may be exercised "for the purpose of the execution of the Act or the regulations". A generalised statement of purpose of this kind does little to define the scope of the powers conferred. Powers under DGA may be exercised "to find out whether this Act is being complied with". This compliance focus takes no account of the need for those powers to be capable of exercise in emergency situations.

1405. In its recent report concerning the powers of authorised persons, the Victorian Parliamentary Law Reform Committee (VPLRC) recommended that all Victorian Acts conferring powers of entry, search, seizure and questioning on authorised persons should –

- clearly state the purpose of every provision which confers powers on authorised persons; and
- contain separate provisions for each identified purpose.[579]

1406. In its official response, the Government agreed in principle -

> *"that the purpose of inspection powers should be readily ascertainable from the Act that creates them. To achieve this objective, it may not be necessary for the purpose of each power-conferring provision to be explicitly stated. It will often be clear from the relevant Act what the purpose is for any particular power. Similarly, where it is clear from the relevant Act which powers are available for a particular purpose, it is not necessary for separate provisions for each purpose to be created."*[580]

1407. In my view, OHSA should be amended to include a clear statement of the purposes of those powers. EPSA and DGA should be similarly amended. Setting out the purposes for which powers may be exercised will not only elucidate the scope of the various powers, but will also clarify the role of the inspector. At the same time, it is not

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579 Victorian Parliament Law Reform Committee, *The Powers of Entry, Search, Seizure and Questioning by Authorised Persons,* Government Printer, Melbourne, May 2002, p.xix. Access via: http://www.parliament.vic.gov.au/lawreform/Search%20&%20Seizure%20Information/discussion%20paper.pdf

580 VPLRC, 2002, p.3.

necessary for the purpose of each power-conferring provision in OHSA to be explicitly stated, provided that the Act contains a clear statement of the purposes of the powers generally.

1408. The Act should state that the powers conferred on inspectors are conferred to enable them to conduct investigations for any one or more of the following purposes:

(a) to ascertain whether the requirements of, or any requirements properly made under, the Act or the regulations are being complied with;

(b) concerning a contravention or possible contravention of the Act or the regulations;

(c) concerning an emergency or dangerous situation which arises in the conduct of the undertaking of an employer or proprietor;[581] and

(d) in order to deal with workplace health and safety disputes.

The need for clarity and consistency

1409. In my view, the whole of Part V of the Act should be redrafted. Most of the substantive powers in Part V should be retained, but they should be recast in a more coherent framework, which clearly defines the extent of the powers, the rights of persons subjected to an exercise of power, and the safeguards on power.

1410. The changes proposed should enhance consistency and fairness in the exercise of the powers, and also consistency across the range of powers exercised by Authority inspectors. In its submission to the VPLRC inquiry, the Legal Policy Unit of the Department of Justice described the problems created by inconsistencies in inspectors' powers as follows:

> *"It is undesirable for there to be an ad hoc array of inspectors' powers. This is primarily because people should be able to know their rights and responsibilities when they are subject to inspection. If each type of inspection is distinct, then the persons subject to inspection will have little capacity for knowing the details of what they may and must do."*[582]

1411. In order to promote consistency of inspectors' powers across the legislation administered by the Authority, I recommend that the revised framework of powers under OHSA should also be applied to EPSA and DGA. I have also endeavoured to ensure, where appropriate, that the recommended changes are consistent with the powers conferred on authorised officers under RTDGA, which applies uniformly throughout Australia.

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581 I recommend in Chapter 13 that the general duties be expanded to cover all persons who conduct undertakings, not only employers and self-employed persons. I recommend further that persons conducting undertakings should be referred to as 'proprietors'.

582 Victorian Parliament Law Reform Committee, 2002, p. 250.

Powers of inspectors

1412. The inspectors have broad powers under the various pieces of health and safety legislation.[583] Under s.39(1) of the Act, for example, inspectors have power to –

- enter, inspect and examine workplaces (by day or by night);
- take possession of any plant or thing for examination, testing or use as evidence;
- make examinations or inquiries;
- take samples, photographs, measurements, sketches and recordings;
- require the production of and take copies of documents; and
- direct that the workplace be left undisturbed.

1413. In my view, the provisions conferring powers on the inspectors should be recast, so as to deal separately with the powers of entry and with evidence-gathering powers upon entry.[584]

1414. The Act should further separate the evidence-gathering powers which are not restricted to entry to premises. These powers should be exercisable only by the Authority.

Powers of entry

1415. Under s.39(1) of the Act, an inspector has power to enter, without a warrant, any workplace –

> *"which the inspector considers it necessary to enter, inspect and examine"*

for the purpose of the execution of the Act or the regulations.[585]

1416. An inspector may also enter any workplace without warrant if requested or required under the Act or the regulations to attend at the workplace. This provision is relevant, for example, if –

(a) workplace parties are unable to resolve health and safety issues at a workplace, and one of them requires an inspector to attend in accordance with s.26(4); or

(b) following the issue of a provisional improvement notice by an HSR, an inspector is required, pursuant to s.35(1), to attend at the workplace.

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583 Section 39, OHSA; s.17(1), DGA; s.13, EPSA.
584 The NSW Act clearly draws this distinction: ss.59,60 and 62.
585 S.39(1)(a).

1417. Unlike the position in NSW,[586] OHSA contains no provision entitling inspectors to use reasonable force for the purpose of gaining entry to premises. The Act does, however, makes it an indictable offence for a person to refuse an inspector access to a workplace.[587] Where such a refusal occurs, both the occupier of and the employer at the premises are guilty of the offence, unless the occupier or employer (as the case may be) did not know, and could not reasonably have known, of the refusal. This reverse onus provision should be repealed, for reasons explained below.

Entry without warrant?

1418. The VPLRC expressed particular concern about legislation - such as the Act and EPSA - which empowers entry to premises without a warrant for the purpose of investigating suspected contraventions. The Committee stated:

> *"Where inspectors exercise their powers based on a suspicion that an offence has been committed the potential consequences (in some cases conviction for an indictable offence) are more serious than cases in which the inspectors exercise their powers to monitor compliance with legislation... In contrast... the potential consequences and incursions on civil liberties are generally not as serious where inspectors use their powers to monitor compliance with the legislation."*[588]

1419. The Committee recommended that, as a matter of general principle, a warrant should be required for the investigation of suspected offending. In its official response, the Government said that it would –

> *"give further consideration to the question of when it is appropriate for warrants to be required for the exercise of inspection powers."*

The response suggested that it might also be appropriate to give particular consideration to the position of residential premises.[589]

1420. A comparison with other States is instructive. Inspectors' powers of entry under the principal occupational health and safety legislation in other States are set out in the following table.

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586 NSW Act, s.54
587 Section 42(1)(a).
588 Victorian Parliament Law Reform Committee, 2002, p.258.
589 Government response 2003, p.18.

	Entry without warrant	Entry with warrant
QLD	Any workplace If occupier consents to entry High risk plant is situated at place No power to enter domestic premises if not a workplace or suspected workplace	If there are reasonable grounds for suspecting there is any thing or activity that may provide evidence of an offence against the Act
NSW	Any premises the inspector has reason to believe is a place of work at a reasonable time in the daytime or at any hour when work is carried on or is usually carried on at the premises. May use reasonable force to enter if authorised by WorkCover in writing. No power to enter any part of premises used only for residential purposes.	If there are reasonable grounds for believing that a provision of the Act or the regulations has been or is being contravened in or about any premises.
SA	Any workplace or other place where any plant to which the Act extends in situated at a reasonable time. No power to enter a workplace where a self-employed person works alone except where there is a reasonable belief that there is a risk to health and safety of another person	No provision
WA	Any workplace at all reasonable times of the day or night. Any workplace at any other time that the performance of his functions under the Act requires such entry.	
TAS	Any place that inspector has reasonable cause to believe that an industry is or is intended to be carried on, or an amusement structure or temporary public stand is located No power to enter a residence without consent or authorisation	An inspector may apply to Court for authorisation to enter a residence.
ACT	Any premises other than residential premises at any reasonable time or with the consent of the occupier.	If there are reasonable grounds for suspecting that within next 72 hours there may be a thing connected with an offence against the Act.
NT	Any workplace	No provision
CTH	Any workplace where is reasonably necessary to do so in connection with the investigation at any reasonable time by day or night.	No provision

1421. The policy foundation for entry without warrant is obvious enough. First, it will usually be impossible for an inspector to find out whether the legislation is being complied with, or to gain sufficient information to assess whether an offence may have been committed, without entering and making observations at a workplace. Secondly, health and safety issues frequently arise in circumstances of emergency or (perceived) immediate risk to health and safety. To require inspectors to obtain warrants in these circumstances could cause critical delay.

Entry to workplaces

1422. In my view, the existing power of inspectors to enter workplaces without warrant should be retained. There are obvious reasons for the existence of this power, as suggested above, and I have received no submissions arguing for its removal. In particular, it has not been suggested that the power to enter without warrant has been abused, or creates any significant unfairness. Workplaces, moreover, are typically commercial premises and entry to such premises does not raise the same civil liberties issues as arise in relation to residential premises.

1423. To require inspectors to obtain a warrant before entering a workplace for the purpose of investigating a possible contravention would be likely to create considerable confusion. A purpose-based test is inevitably difficult to apply. For example, a person subjected to inspection would be in no position to determine whether the inspector was or was not entering for a particular purpose, for only the inspector would be able to state what his/her purpose was.

1424. Moreover, such a requirement would create considerable uncertainty amongst inspectors about whether or not particular decisions to enter were lawful, as this would depend on a characterisation of the sole or primary purpose of any given entry. This would tend to discourage inspectors from taking what will often be the very necessary step of entering the workplace.

1425. Importantly, the right under OHSA for an inspector to enter a workplace without warrant accords with the position in every other State.

Entry to other places

1426. The power of entry is, at present, confined to workplaces. Under s.4 of the Act, a workplace is defined as –

> *"any place, whether in a building or structure, where employees or self-employed persons work."*

1427. This limitation presents no difficulty where routine workplace inspection activities are concerned. But I can see no reason for excluding a right of entry to places other than workplaces for the purpose of investigating possible contraventions.

1428. This additional power of entry should only be exercisable with the authority of a warrant. The justification for its conferral would be to enable suspected offences to be investigated and, moreover, the power would permit an inspector to enter residential premises and unattended workplace premises. For these reasons, an inspector should be required to obtain a warrant before making such entry.

1429. This is the model adopted under the uniform national RTDGA legislation.

Notice of entry

1430. Section 40(1) of the OHSA currently requires an inspector to take all reasonable steps, upon entering any workplace, to notify the employer and any health and safety representative of the entry. An inspector need not give advance notice to any person prior to entering a workplace.

1431. There should, undoubtedly, be an obligation on an inspector to give notice of entry. The present provision is unsatisfactory insofar as it requires notice be given to "the employer". This means that–

(a) if there is no "employer" at the premises, the duty to notify does not arise; and

(b) on the other hand, if – as frequently occurs – there is more than one employer on a worksite, the inspector, strictly speaking, needs to give notice to each such employer.

1432. The clear intent of the provision is to ensure that the person who has ultimate management responsibility for the premises is notified of the inspector's entry. In my view, the provision should be amended to require an inspector to give notice of his or her entry to the person in charge, or apparently in charge, of the premises and to any health and safety representative. A useful model is s.42(2) of the Cth Act, which provides-

> *"Immediately upon entering the workplace, an investigator must take all reasonable steps to notify:*
>
> *(a) the person who is for the time being in charge of operations at the workplace;*
>
> *(b) if there is a health and safety representative for a designated work group in which there is included an employee performing, at the workplace, work to which the investigation may relate – that representative…"*

1433. The Act should also require the inspector to produce his or her identification card. Such a provision would give effect to the principle that, if a person is to be subject to inspection powers, he/she should be able to know that the person exercising those powers does so with authority.

1434. In most circumstances, there will not be a practical impediment to inspectors producing identification upon entry. Indeed, they are currently obliged to do so under s.38 (4), which requires an inspector to produce his or her identification card "if practicable, on each occasion before he or she proceeds to act pursuant to this Act". For reasons set out below, this broad provision should be replaced with specific obligations to produce identification in specific circumstances.

1435. At the same time, the notice of entry provision should also make clear – as s.78(2)(d) of the NSW Act does - that an inspector need not give notice in circumstances where

the giving of notice would defeat the purpose for which the premises were entered, or would unreasonably delay the inspector, or where the occupier and the health and safety representative are already aware of the inspector's entry or were notified in advance of when the inspector would enter the premises.

1436. Currently, the notice of entry provision is part of s.40, which is entitled "Further provisions in relation to inspections". To enhance the clarity and comprehensibility of the legislation, the notice of entry provision should be the subject of a separate provision located immediately after the provisions conferring powers of entry.

Persons assisting inspectors

1437. Section 39(2) of the current Act provides that an inspector may, for the purpose of exercising any of the powers conferred by s.39(1), seek the assistance of any person, and the occupier or employer at a workplace shall permit any such person access to the workplace. It is an offence for a person to refuse access to a workplace not only to an inspector, but also to a person assisting an inspector.[590]

1438. In light of the recommendations made above in relation to powers of entry, this provision should be amended to allow a person assisting an inspector to enter any place – not just a workplace – that is lawfully entered by the inspector. For the sake of clarity, it would also be more sensible to locate together with the assistance provision the right of an inspector when entering premises to bring such equipment, materials and other things as the inspector requires (currently in s.39(1)(c)).

1439. The current s.39(1)(c) allows inspectors to "take" equipment or materials as required. This might be thought to permit seizure of equipment and materials. Read in context, however, the provision merely gives inspectors power to bring with them such equipment and materials as may be necessary during an inspection. This reading is supported by the fact that the appeal provisions which apply to seizures under s.39(1)(g) do not apply to s.39(1)(c). Any ambiguity should be removed, by replacing the word "take" with the word "bring".

Powers of investigation and evidence-gathering

1440. Section 39(1) at present contains a miscellany of powers. Some are quite general, such as the power to "make such examination and enquiry as may be necessary".[591] Some are more specific, such as the power to "examine any plant substance or other thing whatsoever at the workplace".[592]

1441. The list includes powers which are evidently intended to be exercised only while the inspector is in attendance at relevant premises. It also includes powers and others

590 Section 42(1)(a).
591 Section 39(1)(d).
592 Section 39(1)(e).

which could not sensibly be so confined. An example of the former are the powers with respect to "any plant substance or other thing" found at the workplace. The inspector is empowered to –

- examine any plant, substance or other thing;[593]
- take or remove samples for analysis;[594] and/or
- take possession of any thing for further examination or testing, or for use as evidence.[595]

Examples of the latter are the powers, respectively –

- to obtain documents;[596] and
- to take photographs or measurements or make sketches or recordings.[597]

1442. Then there is the power under s.39(1)(j) to direct that –

> *"the workplace or any part of the workplace be left undisturbed for as long as the inspector considers necessary."*

1443. In my view, the Act needs to distinguish clearly between powers which are exercisable on entry to premises and powers which may be exercised generally. Further, the Act should separately identify-

- coercive powers (production of documents and questioning) upon entry to premises;
- powers of seizure;
- investigative, examination and testing powers, including scene -preservation powers;
- powers to require name and address; and
- "emergency" powers.

I will deal with of these categories in turn.

Coercive powers on entry to premises

The production of documents

1444. Section 39(1)(i) enables an inspector, for the purpose of the execution of the Act or the regulations, to "require the production of, examine and take copies of any document

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593 Section 39(1)(e).
594 Section 39(1)(f).
595 Section 39(1)(g).
596 Section 39(1)(i).
597 Section 39(1)(h).

or any part of any document". Failure to produce a document required by an inspector is an indictable offence under s.42(1)(c).

1445. The offence provision does not provide a defence of "reasonable excuse". Moreover, the occupier and the employer at the workplace at which an offence occurs are deemed to be guilty of the same offence, subject to proof of lack of knowledge: s.42(2)[598].

1446. The current provisions do not –

(a) specify the means by which the "requirement" to produce documents must be made;

(b) specify the person or class of persons to whom the requirement may be directed;

(c) unambiguously limit the requirement to documents physically located in or about the premises under inspection;

(d) afford a defence of "reasonable excuse" for refusing or failing to comply with an inspector's requirement to produce and, in particular, do not specify-

(i) whether common law privileges (the privilege against self-incrimination and legal professional privilege) apply; or

(ii) the manner in which privilege/s may be asserted and, if necessary, tested;

(e) make it an offence for a person knowingly to supply a false or misleading document to an inspector, in purported compliance with an inspector's requirement; or

(f) require inspectors to warn the person to whom the requirement is made that it is an offence to refuse or fail to comply with the requirement.

In what follows, I deal with each of these matters.

The means by which the requirement must be made

1447. The power to require the production of documents is exercisable during a lawful entry by an inspector to premises in the course of an investigation. Entry may therefore be for the purpose of investigating a suspected contravention, dealing with a health and safety dispute, monitoring compliance or responding to an emergency or dangerous situation. If the legislation required inspectors to reduce to writing any and every requirement to produce documents, both routine compliance monitoring visits and emergency response activities might be significantly hampered. No other jurisdiction requires such requests for documents to be in writing.

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598 I consider s.42(2) in more detail below.

1448. At the same time, non-compliance with such a requirement is a criminal offence. In my view, the Act should provide that a requirement for documents may be made orally or in writing but that, if made orally, it must be confirmed in writing within 48 hours.

The person or class of persons to whom the requirement may be made.

1449. It is unsatisfactory that s.39(1)(i) does not specify the person or class of persons to whom a requirement to produce documents may be made. An inspector may, for example, address a requirement to produce documents to a person who does not have the authority to produce the documents. The legal owner or custodian of the documents – frequently the dutyholder whose premises are under examination – may not be made aware of the request and will therefore not be in a position to consider whether any claim of privilege might be made.

1450. RTDGA empowers an authorised officer to:

> *"direct a person in charge or apparently in charge of premises or a vehicle or equipment … to produce documents."*

This provision should be replicated in the Act. This would also be consistent with the changes recommended to the notice of entry provision.

1451. The power is currently limited to workplaces entered by an inspector. Consistently with my earlier recommendations in relation to powers of entry, the power should be extended to any premises lawfully entered by an inspector. The power should also be limited to documents which are physically located in or about the premises being inspected. The obtaining of documents from elsewhere should be the subject of a different power (see below).

Offences and "reasonable excuse"

1452. The offence provision should also be subject to a defence of "reasonable excuse". This is discussed in more detail below.

Common law privileges

1453. The principles relating to the applicability to these requirements of common law privileges – in particular, the privilege against self-incrimination and legal professional privilege – are considered in detail below.

Offence: knowingly providing a false or misleading document

1454. It should be an offence for a person to produce knowingly a false or misleading document to an inspector in response to a requirement to produce.

Requirement to warn

1455. The Act should require an inspector to warn a person to whom a requirement to produce documents is made that it is an offence for the person to refuse or fail to comply with the requirement (without a reasonable excuse). There should be an exception if, in all the circumstances, it would be unreasonable or impracticable for the inspector to warn the person. The inspector should also be required to produce his or her identification card when making the requirement, in circumstances where the inspector has not previously produced the identification card to the person to whom the requirement is made.

Questioning

1456. Inspectors are currently entitled under s.39(1)(d) –

> *"to make such examination and inquiry as may be necessary to ascertain whether or not [the] Act or the regulations have been complied with."*

1457. Section 41 imposes a positive duty on all workplace parties, including employees, to provide "such assistance as an inspector may require for any entry inspection examination or inquiry". It is an offence under s.42 for a person to hinder, impede or obstruct an inspector.

1458. The view of many inspectors is that, read with s.39(1)(d), these provisions effectively oblige a workplace party to answer questions asked by inspectors, such that a failure to answer such questions may constitute an offence under s.42 if the refusal obstructs, hinders or impedes the inspector's inquiries. But, even if this were so as a matter of construction, it is most unsatisfactory for such an important obligation to be imposed in such an oblique way.

1459. The NSW Act deals quite directly with the power to ask questions. Section 59 provides that an inspector may –

> *"require any person in or about... premises to answer questions or otherwise furnish information".*[599]

It is an offence for a person to refuse or fail to answer a question asked by inspector unless the person has a reasonable excuse.

1460. Likewise, s.19(11) of the RTDGA provides that an authorised officer – which includes, within Victoria, an appropriately-appointed WorkSafe inspector – may direct a person to answer questions that may help the authorised officer.

1461. In my view, inspectors must be afforded the power to require persons who are present at premises (which have been lawfully entered by an inspector) to answer questions that may assist the inspector. This is particularly so in relation to the preventive

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599 Section 59(e) NSW Act.

(sometimes referred to as remedial) role of inspectors in issuing improvement and prohibition notices and in giving directions.

1462. An inspector should also have the power to require any person at the premises under inspection to state his/her name and address, and to verify the name and address if the inspector suspects that the name and address supplied is false. (See further below).

1463. A person should not be liable to a criminal penalty for refusing or failing to answer an inspector's question if the person has a reasonable excuse for not doing so.

1464. As with requirements for the production of documents, the Act should require an inspector to warn a person that it is an offence for the person to refuse or fail to answer an inspector's question unless the person has a reasonable excuse. There should be an exception in circumstances where it is impracticable or unreasonable in all the circumstances for the inspector to warn the person.

1465. The inspector should also be required to produce his or her identification card when making the requirement, in circumstances where the inspector has not previously produced the identification card to the person to whom the requirement is made. Furthermore, as with the production of documents, a person who knowingly provides a false or misleading answer to a question asked by an inspector should be guilty of an offence.

Seizure powers

1466. Section 39(1)(g) permits an inspector to take possession of any plant or thing for further examination or testing or for use as evidence. Section 40(4) gives occupiers and employers a right of appeal to the Industrial Division of the Magistrates' Court against such seizures.[600] The current power therefore permits the seizure of plant, substances and other things for two distinct purposes – (a) further examination and testing and (b) use as evidence.

1467. It is difficult to see any justification for inspectors having a power to seize things for the sole purpose of further examination and testing, in the absence of reasonable grounds for believing that the "thing" would constitute evidence of an offence. Inspectors have the power under s.39(1) to inspect and examine any workplace, and any plant, substance or other thing at the workplace, and may also take and remove samples for analysis. Inspectors are also entitled to direct that the workplace, or part of it, be left undisturbed for as long as the inspector considers necessary,[601] and may be assisted in their examination and inquiry by any person - for example, a chemist or occupational hygienist - under s. 39(2).

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600 The right of appeal against decisions, including seizures, is dealt with in Part 9.

601 Section 39(1)(j).

1468. In my view, these powers sufficiently equip inspectors to determine whether the "thing" would constitute evidence of an offence against the Act or the regulations. Only such a belief, held on reasonable grounds, should justify the seizure of a thing by an inspector. The Act should be amended accordingly.

1469. In this regard, the Act should include a seizure provision consistent with the terms of s.27 of RTDGA which provides, as follows:

> *"If, in the course of searching under this Act, an authorised officer finds things (other than things specified in a warrant under this Act) that the authorised officer believes on reasonable grounds:*
>
> *(a) would constitute evidence of an offence; and*
>
> *(b) would be concealed, lost or destroyed, or used in committing an offence, if the officer did not seize them;*
>
> *the authorised officer may:*
>
> *(c) seize the things; or*
>
> *(d) do whatever is necessary to preserve the evidence, including placing a seal, lock or guard."*

1470. Currently, s.39(1)(g) allows an inspector to take possession of "any such plant or thing for further examination or testing or for use as evidence". Section 39(1)(g) would seem to empower an inspector to seize an original document, but it has been suggested that the powers of the inspector may be limited to taking a copy of the document pursuant to s.39(1)(i). The Act should therefore make it abundantly clear that the expression "things" in the proposed provision includes any document found by an inspector, whether as a result of a search of the premises by the inspector or as a result of the production of the document.

Return or disposal of property

1471. The Act should also provide for the return of, or alternatively the forfeiture or disposal of, property seized by an inspector. The current Act does not deal with these important matters.

Forfeiture and disposal upon conviction

1472. The *Confiscation Act* 1997 (Vic) provides for –

(a) the forfeiture of "tainted property" (which primarily means property used in connection with or in the commission of an offence); and

(b) the disposal of certain limited classes of property, most of which are not relevant to OHS.

1473. Under ss.32 and 77 of the *Confiscation Act*, if a defendant is convicted of a "forfeiture offence", the DPP or an "appropriate officer" may apply to the Supreme Court (or the

trial court) for a forfeiture order in respect of "tainted property" and a disposal order in relation to certain classes of property, as outlined above. All indictable offences – which includes all offences under OHSA (other than for breach of regulations) – are "forfeiture offences".

1474. Only the DPP or, in the case of applications in the Magistrates' Court, the Chief Commissioner of Police (or her delegate) may make a forfeiture or disposal order application. The Authority has no standing to make such an application.

1475. In my view, the power to make applications for forfeiture or disposal in relation to offences under health and safety legislation should be extended to the Authority. The *Confiscation Regulations* 1998 permit applications to be made by –

(a) the Director-General of Gaming and Betting appointed under the *Gaming and Betting Act* 1994;

(b) the Victorian Casino and Gaming Authority established under the *Gaming and Betting Act* 1994; and

(c) the Director-General within the meaning of the *Conservation, Forests and Lands Act* 1987.

1476. The Act should also provide for forfeiture of seized property, in terms similar to s.73 of the NSW Act, both where no prosecution is brought and, where a prosecution is brought, in relation to property that has not been the subject of a forfeiture or disposal order. In such cases, property should be forfeited to the Authority if the Authority:

(a) cannot find the owner of the property after making reasonable inquiries, or

(b) cannot return it to its owner, after making reasonable efforts, or

(c) reasonably considers it is necessary to retain the thing to prevent it being used to commit an offence against this Act or the regulations.

1477. The Act should require the Authority to inform the owner in writing of its decision to forfeit the thing, except where the Authority cannot find the owner after making reasonable inquiries or where it would otherwise be impracticable or unreasonable to give written notice. In determining whether and, if so, what inquiries and efforts are reasonable, or whether it would be unreasonable to give notice about a thing, the Act should stipulate that regard must be had to the nature, condition and value of the thing.

1478. The owner should have a right to seek internal review within 28 days of the Authority's decision, and an external merits review by VCAT if the owner is not satisfied with the result of the internal review[602].

Inspection, examination and testing powers on entry

1479. Under the present s.39(1), an inspector may -

> *"(e) examine any plant or substance or other thing whatsoever at the workplace;*
>
> *(f) take or remove without payment such samples of such substance or thing as may be required for analysis; or*
>
> *(h) take photographs or measurements or make sketches or recordings."*

1480. These provisions should be retained. I have received no submissions suggesting otherwise.

Provisions relating to samples

1481. Section 40(3) of the current Act provides:

> *"Where an inspector proposes to take and remove a sample from any workplace for the purposes of analysis the inspector shall so notify the employer and any health and safety representative or, if there is no such representative, the health and safety committee and after having taken the sample the inspector shall –*
>
> *(a) divide the sample taken into as many parts as are necessary and mark and seal or mark and fasten up each part in such manner as its nature will permit;*
>
> *(b) if required by the employer, representative or committee, deliver one part each to the employer, representative or committee;*
>
> *(c) retain one part for future comparison –*
>
> *and if it is determined that an analysis of the sample is to be made the inspector shall submit another part to an analyst for analysis."*

1482. The first limb of s.40(3) – notification of the employer and the HSR - is quite appropriate, although the inspector's obligation to give notice of his or her intention to take a sample should not be limited to the employer. The inspector should be required to notify the person in charge, or apparently in charge, of the premises, in addition to any HSR at the premises.

1483. It has also been suggested that the obligation to divide and distribute samples may, in relation to hazardous substances, pose risks to the health and safety of inspectors, employers and HSRs. Section 40(3) contemplates a limitation on the division of a

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602 See Chapter 39 on external review.

sample as far "as its nature will permit". The provision should specifically excuse non-compliance in circumstances where the division or distribution of the sample cannot be conducted in a manner that is safe and without risks to health.

Obligations of inspectors when entering premises

1484. Section 40(2) requires an inspector, upon concluding an inspection, to give to the employer and any HSR (or, if there is no such representative, the health and safety committee) information with respect to the inspector's observations and any action the inspector proposes to take in relation to the workplace. Inspectors currently fulfil this obligation by issuing "field reports", usually prepared on a laptop computer, at the conclusion of each visit.

1485. Section 40(6) obliges inspectors to provide employers and HSRs access to photographs, sketches and recordings taken during an inspection.

1486. These provisions should be retained, with the minor modification that an inspector must provide the relevant information, and access to the photographs, sketches or recordings, to the person in charge or apparently in charge of the premises rather than to the "employer at the workplace", as well as to any HSR.

Power to require name and address where offence suspected

1487. Inspectors cannot arrest a person suspected of having committed an offence against the Act. All prosecutions for offences under health and safety legislation are commenced by the Authority (or an inspector) by way of summons. In the case of suspected offences by natural persons, the ability of the Authority to bring proceedings for the offence depends on the Authority knowing the name of the suspect (for the summons) and the address of the suspect so that the summons may be served.

1488. Under s.17(1)(e) of DGA, a requirement to state name and address may be made of a person who is found committing an offence against that Act, or who the inspector believes on reasonable grounds has committed an offence against that Act. Furthermore, if the inspector suspects on reasonable grounds that the name and address provided by the person is false, the inspector may require the person to produce evidence of its correctness. Section 19 of the RTDGA confers a similar power on authorised officers where the authorised officer believes on reasonable grounds that a person has been involved in the transport of dangerous goods by road.

1489. The Act should be amended to include a comparable provision.

Section 39(1)(k)

1490. The current s.39(1)(k) provides that an inspector may –

> *"exercise such other powers as may be necessary or as are conferred upon the inspector by this Act or the regulations."*

1491. The operation of the second limb of this provision is quite clear. It permits an inspector to exercise other powers conferred by the Act or the regulations - for example, the power to issue an improvement notice under s.43 or a prohibition notice under s.44.

1492. The operation of the first limb – the power to "exercise such other powers as may be necessary" – is far from clear. Some inspectors have suggested that the provision empowers inspectors, where "necessary", to exercise substantive powers such as a power to give verbal directions to ensure safety. For example, in circumstances of immediate risk an inspector would wish to be able to direct a person to cease working at height without adequate fall protection. (The need for such a power is considered below).

1493. Whatever may be said of the breadth of its language, it seems quite clear that s.39(1)(k) was intended to confer only an incidental power, that is, a power to do such things as might be necessary or appropriate for the execution of the inspector's express powers under the Act or the regulations.

1494. In the proposed redraft of Part V, the incidental power should be conferred in the following terms:

> *"An inspector may do all such acts or things as may be necessary to enable the inspector effectively to exercise or execute any of the inspector's powers under this Act or the regulations."*

An express incidental power is, strictly speaking, unnecessary because the power is implied at common law, but it is as well to make express provision.

Power to give directions to ensure safety

1495. Section 17(2) of DGA enables an inspector to give to any person appearing to be the occupier or the person in charge of any premises -

> *"any written direction not inconsistent with this Act which the inspector believes on reasonable grounds is necessary to ensure the safety of persons or property".*

A person who fails to comply with such a direction is guilty of an offence against s.20(1A).

1496. It is not difficult to conceive of circumstances which would make it highly desirable for inspectors performing their functions under OHSA to have such a power. Of course, inspectors already have considerable powers under ss.43 and 44 to deal with contraventions and immediate risks. Those powers do, however, have the following limitations:

(a) they must be exercised with a level of formality that is not suited to emergency or dangerous situations; and

(b) they are directed respectively at the person in charge of an activity (in the case of a prohibition notice) and at the dutyholder (in the case of an improvement notice). That is, it is usually not possible to issue a notice to each worker involved in a hazardous activity

1497. For example, if an inspector sees workers performing work at height without adequate fall protection, an inspector should be empowered to direct those workers to cease that work immediately. That direction should be able to be given verbally.

1498. The purpose of the power is to enable inspectors to give very practical and specific directions to ensure safety where the inspector considers that any person's health and safety is endangered. The direction might also require a person in charge of the premises or activity, or a dutyholder, to take particular steps to remove the danger. A person who fails to comply with such a direction should be guilty of an offence.

1499. Electricity and gas safety legislation confers powers to issue emergency directions which are similar in character to the directions I am proposing in this section. For example, s.141A of the *Electricity Safety Act* 1998 empowers the Chief Electrical Inspector to:

> *"do anything or give any direction that the chief electrical inspector considers necessary to make an electricity emergency situation safe."*

The Chief Electrical Inspector may delegate this power, with the consent of the Minister, to an officer or employee of the OCEI. A person who fails to comply with the Chief Electrical Inspector's (or delegate's) direction is liable to severe penalty.

1500. I have in mind a power, exercisable upon lawful entry to premises, along the following lines:

> *"Directions to ensure safety -*
>
> *(1) An inspector may, for the purpose of dealing with an emergency situation or a situation in which the safety or health of any person is endangered, do anything or give any direction to any person that the inspector considers is necessary to make the situation safe.*
>
> *(2) If a verbal direction is given under subsection (1), the inspector must confirm the direction in writing and serve it on the person to whom it was given as soon as possible after giving the verbal direction.*
>
> *(3) Subsection (2) does not apply if in all the circumstances it is not reasonably practicable for the inspector to confirm the direction in writing and serve the written direction on the person.*

> *(4) A person must comply with a direction given to that person under this section.*
>
> *Penalty:*
>
> *(5) An offence under subsection (3) is a summary offence."*

The phrase "emergency situation" should be defined in terms similar to those used to define "electricity emergency situations" in the *Electricity Safety Act* 1998.

1501. As indicated above, after giving any directions necessary to remove danger, an inspector may then undertake an investigation and issue whatever notices may be appropriate.

The preservation of incident scenes and investigation notices

1502. The OHSA contains no provision requiring employers, occupiers and workers not to disturb things in the immediate vicinity of an incident at the workplace until an inspector arrives. But regulation 10 of the *Occupational Health and Safety (Incident Notification) Regulations 1997* deals with the preservation of a site where a person is killed, as follows:

> *"(1) If an incident at a workplace results in the death of any person, the employer must ensure that the site of the incident is not disturbed until –*
>
> *(a) an inspector arrives at the site of the incident; or*
>
> *(b) an inspector directs otherwise at the time of the notification.*
>
> *(2) Sub-regulation (1) does not apply if the disturbance to the site is for the purpose of:*
>
> *(a) protecting the health and safety of any person; or*
>
> *(b) aiding an injured person involved in an incident; or*
>
> *(c) taking essential action to make the scene safe or to prevent a further occurrence of an incident."*

The regulations impose severe penalties for non-compliance with this regulation.

1503. Regulation 10 is not, however, as extensive as the NSW Act[603] and regulations,[604] which require that where a person has been killed or seriously injured, or there is an immediate threat to life, the occupier of the workplace must not disturb the place (or any plant involved) for a period of 36 hours.

1504. The requirement that a person not disturb the scene of a serious workplace incident is particularly important. In my view, it is too important to be tucked away in a

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603 Section 87.

604 *Occupational Health and Safety Regulation 2001* (NSW), regulation 344.

regulation which, on its face, has nothing to do with scene preservation. I recommend that a provision be inserted in OHSA along the lines of s.87 of the NSW Act.

1505. The preservation of incident scenes should also extend to incidents where persons are seriously injured, not only where there is a death. The current criteria which govern notification of serious incidents (in Regulation 7 of the *Occupational Health and Safety (Incident Notification Regulations)* 1997) should also be used to identify the scenes which occupiers and employers must not disturb.

Inspector's direction to leave workplace undisturbed: section 39(1)(j)

1506. Under s.39(1)(j), an inspector has power to direct that a workplace or any part of a workplace be left undisturbed for as long as the inspector considers necessary. The EPSA confers a similar power.[605] The power is limited to places entered by an inspector pursuant to powers of entry under the legislation.

1507. Surprisingly, failure to comply with a non-disturbance direction appears not to be an offence under the Act, though any interference or disturbance might constitute an attempt to pervert the course of justice under the general criminal law.

1508. The provision enables an inspector to give a "blanket" non-disturbance direction. It does not specify the class of persons to whom a direction may be issued. Furthermore, there is no requirement that the direction be written, or be exhibited in order to warn those who may happen upon the scene of workplace incident.

1509. The NSW Act allows an inspector to issue an "investigation notice"[606] for a period of up to 7 days.[607] While an investigation notice is in force the occupier of the workplace must –

- stop the use or movement of, or interference with, any plant, substance or thing that is specified in the notice; and
- take measures to prevent the disturbance of any plant, substance or thing that is specified in the notice, or any specified area in which it is located.

1510. The notice may be exhibited at the workplace by the inspector. A penalty applies if the occupier fails to comply with the notice, or if a person removes damages or destroys a notice which has been exhibited by an inspector. The decision to issue the notice is reviewable in the same manner as a decision to issue an improvement or prohibition notice.

1511. In my view, s.39(1)(j) should be repealed, and replaced by a provision enabling inspectors to issue investigation notices, with the decision to issue such a notice being

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605 Section 13(1)(i).

606 Sections 89 and 90.

607 The notice can be renewed more than once by an inspector by issuing a further investigation notice.

open to review. This is clearly preferable to having this important matter dealt with by way of a verbal direction which is not subject to review.

1512. The provision should be cast in the following terms:

> *"Investigation notices*
>
> *(1) An inspector who has lawfully entered premises may serve an investigation notice on a person in charge, or apparently in charge, of the premises if the inspector believes on reasonable grounds that it is necessary to issue a notice in order to facilitate the exercise of the inspector's powers under this Act or the regulations in relation to the premises.*
>
> *(2) An investigation notice requires the person upon whom it is served –*
>
> *(a) to stop the use or movement of, or interference with, any plant, substance or thing that is specified in the notice; and*
>
> *(b) to prevent the disturbance of any plant, substance or thing that is specified in the notice, or any specified area of the premises in which it is located.*
>
> *(3) An investigation notice must-*
>
> *(a) specify the plant, substance or thing or area of the premises to which the notice applies; and*
>
> *(b) specify the period for which the notice remains in force (being a period of not more than 7 days).*
>
> *(4) Nothing in subsection (3)(b) prevents an inspector from issuing further investigation notices after the expiration of earlier notices issued in relation to the same matters.*
>
> *(5) An investigation notice must also-*
>
> *(a) state that the notice requires the person upon whom it is served –*
>
> *(i) to stop the use or movement of, or interference with, any plant, substance or thing that is specified in the notice; and*
>
> *(ii) to prevent the disturbance of any plant, substance or thing that is specified in the notice, or any specified area of the premises in which it is located,*
>
> *and that a failure to do so is an offence; and*
>
> *(b) specify the person's right to seek review of the decision to issue the notice,*
>
> *or be accompanied by a form, approved by the Authority, which contains that information."*

The power to take affidavits

1513. Under s.39(3) OHSA, an inspector has the power to –

> *"take affidavits for any purpose relating to or incidental to the exercise of the inspector's powers or the performance of the inspector's duties".*

This provision was inserted in OHSA in 1996 by the *Accident Compensation (Occupational Health and Safety) Act,* which gave effect to the transfer to the Authority of responsibility for the administration of OHS legislation.

1514. According to the Minister's Second Reading Speech, s.39(3) was inserted to –

> *"restore the power of inspectors under the…Occupational Health and Safety Act to take affidavits, which they do in the course of carrying out their duties."*

1515. This power was said to have been –

> *"inadvertently omitted [as] the unintended consequence of the [earlier] transfer of various powers."*

1516. Prior to the transfer of responsibilities to the Authority, inspectors were able to take both statutory declarations (by virtue of s.107A(1)(y) of the *Evidence Act* 1958) and affidavits (by virtue of s.123C of that Act). They were able to do so because of their status as public sector employees within a salary classification set out in regulation 5 of the *Evidence (Affidavits and Statutory Declarations) Regulations* 1990. When inspectors became employees of the Authority, they no longer fell within regulation 5 and, as a result, no longer had these powers.

1517. To remedy this situation, s.39(3) OHSA, s.13(3) EPSA and s.17(7) DGA were introduced. There are two important aspects of these amendments, as follows:

- The amendments reinstated only the power to take affidavits. They did not reinstate the power to take statutory declarations.
- Parliament dealt with the matter by enacting specific provisions in the OHSA, EPSA and DGA, rather than by amending ss.107A and 123C of the *Evidence Act* or by amending regulation 5 of the *Evidence (Affidavits and Statutory Declarations) Regulations.*

1518. The explanation for the approach taken by Parliament on both counts may lie in s.123(1)(h) of the *Evidence Act,* which provides that affidavits may be sworn and taken within Victoria before, *inter alia* –

> *"any officer or person empowered authorized or permitted by or under any Act of Parliament to take affidavits in relation to the matter in question or in the particular part of Victoria in which the affidavit is sworn or taken."*

1519. Section 107 of the *Evidence Act* stipulates that a statutory declaration must be signed by a person who is authorised under s.107A(1) to witness the signing of a declaration. Section 107A(1) does not contain a provision similar to s.123(1)(h), which permits other legislation to confer the right to take statutory declarations.

1520. In my view, inspectors should be able to take both affidavits and statutory declarations. At the same time, it seems clearly preferable for matters relating to the taking of affidavits and statutory declarations to be regulated by the *Evidence Act* (and the regulations made thereunder) rather than by OHS legislation. Consequently, the new Part V which I am proposing would not include the power to take affidavits. Rather, amendments should be made to the *Evidence (Affidavits and Statutory Declarations) Regulations 1998* or to ss.107A(1) and 123C(1) of the *Evidence Act* 1958, enabling inspectors appointed under OHSA, EPSA and DGA to take affidavits and statutory declarations. Clause 8 of Schedule 5 of the *Magistrates' Court Act* 1989 should also be amended to permit statutory declarations taken by inspectors to be included in hand-up briefs.

Reasonable excuse

1521. As indicated earlier, I consider that where the Act creates any offence of refusing or failing to comply with a requirement by an inspector – whether to produce documents or to answer questions – a defence of "reasonable excuse" should be available.

1522. Merely to use that phrase, however, would create uncertainty, particularly concerning the applicability of the privilege against self-incrimination and of legal professional privilege. As the Parliamentary Law Reform Committee observed –

> *"the term…by no means clearly incorporates the privilege against self-incrimination."*[608]

1523. In the light of the decision of the majority of the High Court in *Corporate Affairs Commission (NSW) v. Yuill*,[609] legal professional privilege will not necessarily constitute a "reasonable excuse".

1524. The Act must deal specifically with each of these important matters.

Protection from incrimination

1525. Victorian health and safety legislation (including OHSA) provides that no person shall be required to answer any question or give any evidence tending to self-incrimination[610].

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608 p.140

609 (1991) 172 CLR 319.

610 Section 40(8) OHSA; s.20(3) DGA, s.20 EPSA.

1526. In other Australian jurisdictions, however, OHS legislation expressly abrogates the privilege against self-incrimination, subject to restrictions on the use of the material against the person in later proceedings (commonly referred to as "use immunity").[611] For example, s.65 of the NSW Act provides:

> *"(1)* ***Self-incrimination not an excuse***
>
> *A person is not excused from a requirement under this Division to make a statement, to give or furnish information, to answer a question or to produce a document on the ground that the statement, information, answer or document might incriminate the person or make the person liable to a penalty.*
>
> *(2)* ***Statement, information or answer not admissible if objection made****.*
>
> *However, any statement made or any information or answer given or furnished by a natural person in compliance with a requirement under this Division is not admissible in evidence against the person in criminal proceedings (except proceedings for an offence against this Division) if:*
>
> *(a) the person objected at the time to doing so on the ground that it might incriminate the person, or*
>
> *(b) the person was not warned on that occasion that the person may object to making the statement or giving or furnishing the information or answer on the ground that it might incriminate the person."*

1527. The Parliamentary Law Reform Committee recommended – and I agree - that as a matter of general principle all legislation should specifically preserve the privilege against self-incrimination in relation to questioning. The Government's response to the report indicated support for that general principle "unless it is shown that abrogation is justified". In determining whether abrogation is justified, the Government said, consideration should be given –

> *"to the seriousness of the harm being combated, the type of offence involved, the difficulties involved in prosecuting cases, the nature of the applicable penalties, the effectiveness of the proposed powers in adequately enforcing the law, and the rights of the individuals affected by those powers, so that an appropriate balance is struck between the minimisation of the harm and people's rights."*[612]

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611 See s.37(3) and (4) Tas Act, s.47(2) WA Act and s.65 NSW Act.

612 Government response to the Victorian Parliament Law Reform Committee final report (*The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*, 2002) , p.11. Retrieved from Department of Justice website December 2003: http://www.justice.vic.gov.au/

1528. The privilege against self-incrimination is a fundamental "human right designed to protect personal freedoms, privacy and human dignity"[613]. The presumption in favour of maintaining the privilege is rightly a strong one. In the OHS context, the following matters tend against any abrogation of the privilege:

- The Act creates indictable offences which carry heavy monetary penalties and specific offences which carry terms of imprisonment. (Offences against inspectors under s.42 and offences relating to prohibition notices each carry a five year maximum.) Furthermore, it is open to a court to impose an additional five year term (in the case of indictable offences) and an additional two year term (in the case of a summary offence) under s.53.[614]
- The Act confers substantial powers of entry and investigation. If my recommendations are accepted, these powers will extend to requiring persons to answer questions, furnish information and produce documents, in addition to existing extensive powers of search and seizure.

1529. One of the submissions to the Review argued that the privilege "plays a vital role in ensuring that the powers of inspectors are exercised fairly". This is said to be particularly so when –

> *"inspectors make inquiries in the immediate aftermath of a notified incident [and] employees and witnesses..[are] traumatised, distressed or disoriented at the time of questioning"*[615].

In my view, the point being made here is a valid one, though not directly relevant to the retention of the privilege, as the privilege does not excuse a refusal or failure to comply with a requirement because of emotional trauma or distress. Rather, it is relevant to the proposed defence of "reasonable excuse".

1530. The following matters weigh against the retention of the privilege:

- The power to require persons to answer questions and provide information is critical to inspectors fulfilling their functions under the Act. Those functions extend beyond investigating (possible) contraventions and include responding to emergencies and dangerous situations. It is essential that inspectors be adequately informed about the circumstances in the workplace, to enable them to make appropriate decisions about whether to issue notices and/or to give directions. Notices and directions under OHSA not only have an obvious enforcement function, but also have – equally important –

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613 *The Laws of Australia*, Lawbook Company, Sydney, vol.11, 11.2 [40].

614 Even though I propose in Chapter 35 that these provisions be repealed, their repeal will require a reassessment of the adequacy of the current maximum penalties for the various offences under the Act and the regulations.

615 Allens Arthur Robinson, submission to the Review.

remedial and preventive functions. Self-evidently, the exercise of those powers should be informed by the best available information.

- The duties (and therefore the offences) under the Act are necessarily cast in general terms. This means that every person at a workplace – employer, sub-contractor, worker – is potentially the subject of an inspector's investigation. Reluctance to give any information to an inspector is therefore quite understandable. Claims of privilege are easy to make but very difficult for an inspector to test.

1531. In the end, however, I am not persuaded that a case is made out for abrogating the privilege, at least in relation to individuals. In particular, it has not been suggested, either by the Authority or by unions, that the existence of the privilege is a serious obstacle to effective enforcement of the legislation. I recommend that the privilege be expressly retained for individuals.

1532. A further question arises as to whether the privilege should be available to corporations. Given the broad definition of "person" in s.38 of the *Interpretation of Legislation Act* 1984, the protection in the current s.40(3) would seem to extend to bodies corporate.

1533. In *Environment Protection Authority v. Caltex Refinery Co Pty Ltd*,[616] a majority of the High Court held that the privilege is not available to corporations. Brennan J expressed the rationale for this conclusion as follows:

> *"The rationale of the privilege against self-incrimination has no application to corporations. In practice, if investigative powers were qualified by a privilege against self-incrimination enuring for the protection of corporations, the liability of corporations to criminal sanctions would be frequently unenforceable."*

1534. The modern rationale for the privilege is premised on the notion that it is a human right -

> *"designed to protect personal freedoms, privacy and human dignity".*[617]

As Brennan J pointed out, those concepts have no application to corporate entities, which have legal personality but no other.

1535. In my view, the privilege against self-incrimination should not apply to corporations.

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616 (1993) 178 CLR 477.

617 *The Laws of Australia*, volume 11, 11.2 [40].

The production of documents

1536. It is not clear under the current Act whether the privilege against self-incrimination applies to the production of documents. As a matter of ordinary language, the words "give any evidence" in s.40(8) would not apply to the production of documents.

1537. The VPLRC recognised this distinction between questioning and the production of documents. The Committee recommended that –

> *"as a general principle, a person who has been asked by an inspector to produce a document or other item should not be able to rely on the privilege against self-incrimination unless the production of the document would "require the person to identify, locate, reveal the whereabouts of, or explain the contents of, the document or item."*[618]

1538. The Government responded to this recommendation as follows:

> *"The Government also supports as a general principle that where a person is under a legal obligation to produce a document or item to an inspector, the privilege against self-incrimination will not apply. This will normally mean (particularly where the document or item is required to be kept pursuant to legislation) that a requirement to produce will include a requirement to identify or reveal the whereabouts of the document or item."*[619]

1539. The power to require the production of documents is a particularly important investigative tool for inspectors and the Authority. The power complements an inspector's ability to search for things, including documents, during a lawful entry of premises.

1540. Some commentators have characterised the power to require the production of documents as, effectively, a power to co-opt recipients of notices as investigators for the regulator.[620] I do not agree with this characterisation. To require the production of documents is no more nor less than a power to gain access to material which may contain evidence. Compliance with such a requirement is no different in substance from compliance with a search warrant. It is for the investigator to specify the documents which must be produced.

1541. OHS offences are primarily committed by "organisations" of varying sizes and complexity and the evidence of OHS offences is primarily located at business premises. In particular, documents relevant to an inspector's investigation will frequently be scattered throughout the organisation or business premises, and may be particularly difficult to locate through search.

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618 Victorian Parliament Law Reform Committee, 2002, p.144.

619 Government response to the Victorian Parliament Law Reform Committee final report (*The Powers of Entry, Search, Seizure and Questioning by Authorised Persons*, 2002), pp.11-12.

620 Clough, J and Mulhern, C., *The Prosecution of Corporations*, Oxford University Press, South Melbourne, 2002, p.25.

1542. For this reason, a person should not be permitted to resist production of documents that could otherwise be seized during a search of premises, unless the production of the document or things requires some "testimonial disclosure" by the person.[621] Particularly in the case of inquiries relating to circumstances of immediate risk, emergency or danger, to require an inspector to search for relevant documents may cause critical delay.

1543. In my view, to allow a person in charge of premises to resist production of documents on the basis of the privilege against self-incrimination would likely defeat the primary purpose of the power. It would also necessitate much greater exercise of entry, search and seizure powers which would arguably constitute a greater incursion upon individual liberties.

1544. Accordingly, the privilege against self-incrimination should not apply to the requirement to produce documents.

Name and address

1545. Consistent with recommendation 34 in the VPLRC report, and the Government's response to that recommendation, a person should not be able to rely on the privilege against self-incrimination to avoid giving his/her name and address and such information as is required to verify the name and address supplied. To provide otherwise would significantly undermine the purpose of the power.

1546. Accordingly, the privilege against self-incrimination should not apply to the requirement of a person to give an inspector his or her name and residential address or to verify such details.

Legal professional privilege

1547. The current OHSA makes no mention of legal professional privilege. It is an offence to fail to produce documents[622] and – unlike the ACA – OHSA has no "reasonable excuse" qualification.

1548. As the High Court again declared in its decision in *Daniels Corporation International Pty Ltd v. ACCC*,[623] the privilege will not be taken to have been abolished except by express language or clear and unmistakable implication.

1549. In my view, the Act should deal with the matter directly, and should explicitly preserve legal professional privilege as a form of "reasonable excuse". I have in mind a provision along the following lines:

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621 Legal Policy, Department of Justice, submission to the VPLRC inquiry in relation to powers of entry, search , seizure and questioning by authorised persons, p.28.

622 Section 42(1) OHSA.

623 (2002) 192 ALR 561.

> *"A person is excused from a requirement under this Act to answer a question or to produce a document on the ground that to do so would disclose a communication to which legal professional privilege applies".*

1550. The Authority does not currently have a formal protocol for the handling of documents over which a claim for legal professional privilege is made. The Australian Taxation Office has such a protocol. The Law Reform Committee considered that it was important that agencies have a system in place. The Government agreed with the Committee's finding, as do I.

1551. In my view, the Authority should develop an appropriate policy for dealing with the seizure of documents over which legal professional privilege is claimed.

Audit privilege

1552. The general duties under OHSA impose obligations on dutyholders to improve health and safety continuously. An employer, for example, must provide and maintain a safe working environment for workers.

1553. It is essential, if an "incident" occurs, that a dutyholder conduct a comprehensive inquiry into the matter, to determine whether the current risk control measures are adequate and, if not, to develop more stringent control measures. For this process to be effective, all those who work within the organisation must be able to be candid about all aspects of the incident, in particular in identifying any failings in the work processes or safety systems which may have contributed.

1554. Legal practitioners who regularly represent dutyholders have pointed out that, under the current scheme, an inspector may require a dutyholder to produce documents which contain the results of the dutyholder's own investigation of an incident, in circumstances where that incident is being investigated by the Authority or is relevant to the investigation of a different incident. It is argued that the existence of the power to obtain such documents is both unfair (because the dutyholder is penalised for trying to do the right thing) and counterproductive (because the risk of subsequent disclosure will discourage candour internally and will inhibit the creation of the necessary written records).

1555. It was submitted by Allens Arthur Robinson (AAR) that the same considerations applied to any document recording the results of an "internal audit" of risk control:

> *"For companies to take the lead in management of OHS risks, it is important that they be confident that if they undertake comprehensive and critical audits, the efficacy of this exercise is not undermined by fear that their internal audit documents will be used against them in prosecution. The results of such audits often enable companies to identify and remedy operational problems and OHS risks at an early stage.*

> *However, the audits may also reveal previous or existing breaches of OHS laws and thereby give rise to civil or criminal liability. The existence of an internal OHS audit may be used at a later stage as evidence that the company had knowledge of the circumstances surrounding the later breach. This may adversely impact on the degree of candour employed in the exercise. The Act does not currently offer protection for a company from disclosure of its internal audit documents. Instead, a company must rely on the common law doctrine of client legal privilege to assert confidentiality over internal OHS documents."*[624]

1556. I am not, however, persuaded that the Act should establish what, as far as I am aware, would be a new species of privilege, in respect of "internal audit" documents. In my view, such a privilege would be wrong in principle, and is unnecessary in practice, for the following reasons.

1557. Continuous self-assessment and review of compliance is part of what every business does, and needs to do, in relation to statutory requirements of all kinds. Take financial reporting for example. Vigorous, frank internal audit processes are essential if a company is to comply with the requirements of Chapter 2M of the *Corporations Act*. It has never, as far as I am aware, been suggested that internal audit reports of that kind should be privileged from production to the Australian Securities and Investments Commission if it were investigating a possible contravention of that Act.

1558. Likewise if a company suffered a substantial financial reverse. The statutory and fiduciary duties of directors would oblige them to act honestly and diligently in investigating the causes of the problem, including by causing all necessary investigations to be made and all necessary evaluative reports to be created. The fact that such reports might be required to be produced to ASIC could not as a matter of law, and would not in practice, affect in any way the discharge by the directors of that obligation.

1559. Likewise in the OHS context, employers are obliged to take a proactive approach to managing health and safety. They must comprehensively and systematically identify, assess and control risks. Under the regulations, specific forms of hazard identification and risk assessment must be undertaken, some of which must be documented.[625] These "audits" must indeed be "comprehensive and critical", as AAR have argued, but the documentary results must necessarily be available to the Authority if it is to be able to discharge its statutory function of evaluating the company's compliance with the Act.

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624 Allens Arthur Robinson, submission to the Review, p.13.

625 For example, regulation 310 of the *Occupational Health and Safety (Hazardous Substances) Regulations* 1999 requires that an employer must "*record the results of any risk assessment made in relation to a hazardous substance and must retain the record of the results while the assessment is relevant to the use of hazardous substances at the employer's workplace".*

1560. As AAR rightly point out –

> *"The existence of an internal OHS audit may be used at a later stage as evidence that the company had knowledge of the circumstances surrounding the later breach."*[626]

Far from justifying a privilege against production, however, this merely demonstrates why such documents should be available to the Authority. After all, one of the factors relevant to the crucial "practicability" question is the "state of knowledge", which includes the actual knowledge of the dutyholder.[627] If documents exist showing that the dutyholder had specific prior knowledge of "the circumstances surrounding the later breach", this would be clearly relevant to what it was "reasonably practicable" for the dutyholder to do. It would also be relevant in assessing the level of culpability for that breach.

1561. It is, in my view, essential that, as with regulatory investigations of many other kinds, the Authority have the power to examine the entire paper trail when monitoring compliance or investigating possible contraventions – with the obvious exception of documents covered by legal professional privilege. If it can be said of an internal review report that it was prepared for the dominant purpose of the dutyholder obtaining legal advice, or preparing for actual or anticipated legal proceedings, it will be privileged from production to the Authority.[628]

Repeal s.42(2)

1562. As pointed out earlier, where a person commits an offence under s.42(1) in relation to an inspector's exercise of powers at a workplace, s.42(2) renders the occupier of, and the employer at, the workplace automatically guilty of the same offence, unless the occupier or employer (as the case may be) proves that –

> *"the act or omission constituting the offence took place without [its] knowledge … and that [it] did not know and could not reasonably have known thereof."*

As the Supreme Court held in 1990, this section creates a species of joint liability.[629]

1563. As I have said in Chapter 33, I am not convinced that there is any justification for reversing the onus of proof. In my view, s.42(2) should be repealed. If any other person is an accessory to the principal offence under s.42(1), in the sense of being knowingly involved, that accessory can be prosecuted in the normal way.

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626 Allens Arthur Robinson, submission to the Review, p.13.

627 See Chapter 10.

628 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

629 *Messimeri-Kianidis v Pacific Dunlop Tyres Pty Ltd and ors,* Unreported, Supreme Court of Victoria, Nathan J, 30 November 1990.

Chapter 29: Improvement and prohibition notices

1564. The Robens Committee recommended that inspectors should have the power to issue improvement notices to employers –

> *"requiring employers to remedy particular faults or to institute a specified program of work within a stated time limit".*[630]

The Committee contemplated that improvement notices would contain specific directions for employers to follow in order to comply with the notice.

1565. Furthermore, the Committee recommended that inspectors should, in addition, have an "alternative and stronger" power to deal with cases involving serious risks. The procedure for prohibition notices -

> *"would be the same as for Improvement Notices, with the important variation that the Notice itself would contain a direction that, in the event of non-compliance with the stated time limit, the use of specified plant, machinery, processes or premises must be discontinued, or continued only under specified conditions."*

And further:

> *"We would expect that when issuing a Prohibition Notice it would normally be appropriate and practicable for the inspector to allow – as in the case of improvement notices – a reasonable period of time for remedial action, the prohibition becoming effective only if the remedial action is not taken during the time allowed. It would, however, also be necessary to provide for those relatively rare cases where there might be justification for an immediate prohibition … [w]here in the judgment of the inspector, there is a situation of imminent danger calling for very urgent action."*

Improvement notices

1566. Under s.43(1), the power to issue an improvement notice is triggered when an inspector is of the opinion that a person is contravening a provision of the Act or regulations, or has previously contravened and is likely to do so again. In short, the inspector must have formed the view that, as at the time of the inspection, the dutyholder has not done, or is not doing, all that is reasonably practicable to remove or mitigate the hazard or risk.

1567. An improvement notice requires the person –

> *"to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention".*

Moreover, the notice must specify the date before which the contravention must be remedied, being a period of not less than 7 days.

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630 Robens, A., 1972, p.85.

1568. The plain intention of s.43 is to enable an inspector, and therefore the Authority, to require a dutyholder to take steps which will have the effect of moving the dutyholder from a position of non-compliance to a position of compliance.

1569. The critical issue, which neither s.43 nor s.45 adequately addresses, is what occurs during the period of the notice. That is the period during which – so the Act assumes – the dutyholder will be taking measures for the purpose of moving to a position of compliance. By definition, the risk which prompted the issue of the notice will continue – albeit to a diminishing degree – throughout that period.

Continuation of the risk

1570. Unlike a prohibition notice, an improvement notice by itself does nothing to prevent the dutyholder from continuing the activity to which the relevant contravention or likely contravention relates. Indeed, the requirement that the notice fix a period of at least seven days before the dutyholder is required to have remedied the contravention necessarily means that the risk will continue for at least that period.

1571. The longer the period for compliance in the notice, the longer the continuation of the risk. I understand that, typically, notices specify periods in excess of seven days and, in some instances, specify periods measured in months.

1572. Under s.45(1), an inspector may include in an improvement notice directions as to –

> *"the measures to be taken to remedy any contravention, likely contravention, risk, matters or activities to which the notice relates."*

1573. I understand that this power of direction is exercised rather infrequently. If this is so, it must be a function of the Authority's operational policies, for there is nothing in the Act to suggest that the power should be exercised sparingly.

1574. The Field Operations Manual, which governs the activities of inspectors, refers to the power in s.45(1)[631] and comments as follows –

> *"WorkSafe expects inspectors to refer dutyholders to any relevant approved Code of Practice or published guidance material, and to indicate there are options or a choice of ways in which to remedy the contravention or likely contravention."*

1575. Even where a code of practice is referred to, the Manual instructs the inspector to note in the "direction" that –

> *"alternative compliance measures can be implemented by the dutyholder."*[632]

631 and the corresponding power in s.24 of EPSA.

632 VWA Field Operations Manual

1576. In my view, the language of s.45(1) evinces a clear legislative intention that the power to give directions can, and should, be used expansively. So much is evident from the fact that a direction can relate to –

> *"any risk, matters or activities to which the notice relates".*

1577. The reference to "risk" makes it unambiguously clear, in my view, that this power could be exercised to give directions as to interim measures to be remove or reduce risk as from the time of issue of the notice. As I understand the position, however, the power is never exercised for this purpose. Indeed, the Manual contains no instructions for inspectors to deal with risk control during the period of an improvement notice.

1578. Separately from the power under s.45(1), an inspector also has power, at the same time as issuing an improvement notice, to issue a prohibition notice in respect of the activity, if it involves or will involve an immediate risk to health and safety. But, in the majority of cases, the observed risk which prompts the issue of the improvement notice will not justify or require an immediate cessation of the relevant activities.

1579. In short, if an improvement notice is issued, and no direction is given under s.45(1) with respect to interim measures, the effect is that the Authority, through the inspector, is tacitly acquiescing in the continuation of the risk – and the non-compliance with the Act – for at least seven days and often for much longer. This is not a criticism of the Authority: the continuation of the risk is, as I have pointed out, a necessary consequence of the Act's (and the Robens Committee's) requirement that there be a period for compliance. But the issue nevertheless needs to be addressed.

1580. Improvement notices are a very important part of the Authority's enforcement armoury. In 2001-2002, a total of 11,913 improvement notices were issued. In 2002-2003 the number jumped to almost 15,000. The sheer number of notices issued underlines their utility but, at the same time, emphasises how often the Authority, through its inspectors, tacitly permits the continuation of a risk and of the duty holders non-compliance with the Act – while a notice is on foot.

1581. In my view, the Act should deal specifically with the issue of risk control in the period between the issue of an improvement notice and the date specified for compliance. The new provision would have at least the following elements:

(a) the inspector should be required, when issuing an improvement notice and determining the period for compliance, to consider the question of risk to any person in the period between the period of the issue of the notice and the date for compliance;

(b) the inspector should be empowered to give such directions to the dutyholder, including prohibitory directions, as may be necessary to minimise the risk in that period;

(c) the inspector should be empowered to include in an improvement notice conditions governing the conduct of any activity to which the notice relates within the period specified for compliance; and

(d) it should be expressly provided that non-compliance with a condition – or a direction – would itself be a non-compliance with the notice.

Conditional prohibition

1582. As noted above, the Robens Committee envisaged that in the usual case a prohibition notice would allow –

> *"a reasonable period of time for remedial action, the prohibition becoming effective only if the remedial action is not taken during the time allowed."*

1583. The Act at present does not provide for this. A prohibition notice can only be issued where there is an "immediate risk", in which case the activity must cease immediately. With an improvement notice, on the other hand, the only consequence of a failure to complete remedial action in the time specified is that the dutyholder is liable to be prosecuted for non-compliance with the notice under s.43(3).

1584. In my view, the Act should be amended to empower inspectors to include in an improvement notice a direction that an activity to which the notice relates shall cease if the required remedial action has not been taken within the time specified.

Suspension of notice pending appeal

1585. At present, by virtue of s.46(3)(a) of the Act, the operation of an improvement notice is automatically suspended if a person to whom an improvement notice is issued exercises the right conferred by s.46(1) to appeal to the Magistrates' Court. The notice remains inoperative throughout the appeal period, up to and including the date of the court decision. (In the case of a prohibition notice, by contrast, an appeal does not suspend the operation of the notice.)[633]

1586. In Chapter 38, I am recommending the establishment of a system of speedy, accessible, internal review of inspectors' decisions to issue notices. Internal review will have one of two results. If the inspector's decision is set aside by the Authority on review, no question of further appeal arises. If, however, the Authority on review affirms the decision to issue the notice, then the dutyholder will have a right to seek external review at VCAT.

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633 Section 46(3)(b).

1587. In those circumstances, I see no justification for retaining the statutory suspension of operation of an improvement notice pending either internal review or external review. As I have noted in Chapter 38, VCAT has power to grant an interim stay of a decision which is the subject of a review application. If a dutyholder can establish grounds justifying the grant of an interim stay, then the Tribunal would have the discretion to stay the decision. Otherwise, the public interest in safety in workplaces demands, in my view, that the notice continue in force.

The time for compliance

1588. In my view, the requirement that an improvement notice must allow the dutyholder at least seven days to remedy the contravention is unduly rigid and should be removed.

1589. The Robens Committee did not contemplate such an inflexible rule. Rather it concluded that inspectors should afford dutyholders "a reasonable time" for the taking of remedial action. All other jurisdictions, with the exception of NSW, allow inspectors to require remedial action within a reasonable period. The NSW Act imposes the minimum seven day period, with the proviso that:

> *"an inspector may specify a period that is less than 7 days after the issue of the improvement notice if satisfied that it is reasonably practicable for the person to comply with the requirements imposed by the notice by the end of that period."*[634].

1590. Freehills, in its submission, opposed the removal of the seven day minimum, partly on the basis that it –

> *"would be inappropriate to require compliance before the time within which an appeal can be brought … The period for an appeal is too short already and should not be further shortened or able to be circumvented by allowing the imposition of a shorter compliance period."*

1591. I agree that the current appeal period is too short. But the length of the appeal period is a quite separate issue. Inspectors must be able to issue notices which are appropriate to the circumstances they face. The compliance period must be set having regard to what it is reasonable to expect the dutyholder to do, with particular regard being paid to the severity of the continuing risk and the nature of the activity being conducted. In relation to the latter point, it is clear that in some cases, particularly on temporary or dynamic work sites (eg. construction sites), the activity or matter giving rise to the risk may have ceased entirely before the seven day period has expired.

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634 Section 91(3).

1592. In my view, the only requirement which the Act should impose on the time specified for compliance is that it be reasonable. This must be complemented by speedy internal and external review of notice decisions.

Prohibition notices

1593. A prohibition notice is a quite different creature from an improvement notice, in three important respects. First, the notice prohibits the activity, whereas an improvement notice permits it to continue. Secondly, the issue of a prohibition notice is not dependent on the inspector forming the view that a person has contravened the Act or the regulations (though in practice the inspector will often have formed that view). Thirdly, the person to whom the notice may be issued need not be a dutyholder under the Act (though in practice the person will often be a dutyholder).

1594. Self-evidently, the power to issue a prohibition notice is intended to enable an inspector to intervene "on the spot" in circumstances of imminent risk, and to ban - with effect immediately – any activity which poses a serious risk to health and safety. That the activity may also constitute an offence under the Act is irrelevant to that purpose. If a prohibition notice is issued, the recipient must cease the relevant activity or cause it to stop, until an inspector certifies in writing that the matters giving rise to the risk are remedied (s.44(1)).

Prohibiting an activity by reference to manner or method

1595. In many cases, the risk created by a given activity arises not from the nature of the activity itself but from the manner in which it is being conducted. Assume, for example, that an inspector observes workers working at height without adequate fall protection. The activity – working on the roof – only involves an immediate risk to health and safety because, in the particular instance, the appropriate protective equipment is not being used.

1596. Assume that the inspector issues a notice prohibiting the workers from continuing to work at height. Before the inspector's return visit, they resume working but this time using the appropriate safety equipment. The difficult question then arises of whether the notice has or has not been complied with. On the face of it, the resumption of the prohibited activity would constitute a breach of the prohibition notice. Yet the object of the exercise of power – the immediate removal of the risk – was achieved, by the change in the manner of working.

1597. In my view, the Act should be amended, along the lines of s.46(3)(b) of the Cth Act, to allow inspectors to prohibit the carrying on of an activity in a particular way. Under the Commonwealth provision an inspector must either:

> *"(i) direct the employer to ensure that the activity is not engaged in [ie. a blanket prohibition on the activity]; or*

(ii) direct the employer to ensure that the activity is not engaged in in a specified manner, being a manner that may relate to any one or more of the following:

(A) any workplace, or part of a workplace, at which the activity is not to be engaged in;

(B) any plant or substance that is not to be used in connection with the activity;

(C) any procedure that is not to be followed in connection with the activity."

Immediate risk

1598. The use of the phrase "immediate risk" in s.44(1) appears to have created uncertainty – in particular for some inspectors – as to when an activity may be said to "involve an immediate risk".

1599. In my view, the use of the word "immediate" is apt to mislead. It tends to suggest that, unless the relevant risk is present before the inspector's eyes, the power is not exercisable.[635] This is clearly not what was intended, as s.44(1) expressly contemplates the issue of a prohibition notice in respect of an activity which "may occur" in the future, being an activity which "will involve" an immediate risk. It is not the immediacy of the risk – in the sense of its being present and urgent - which calls for the exercise of the power, but rather the severity of the risk, whether it exists or may exist (the language is that of possibility rather than that of probability) in the future.

1600. The provision should, in my view, be clarified so that inspectors no longer feel (incorrectly) that they are powerless to act if "there is no activity occurring at the time".

1601. In my view, the existing s.44(1) should be replaced with a provision along the following lines:

"44(1) Where an inspector is of the opinion that at any workplace –

(a) an activity is occurring which involves; or

(b) an activity may occur, which if it does occur will involve,

a risk to the health and safety of any person, and the severity of that risk warrants, or would warrant, the immediate prohibition of the activity, the inspector may exercise any of the powers under sub-section (2).

(2) Where subsection (1) applies, the inspector may serve on the person who has, or may be reasonably presumed to have, control over the activity a notice stating that –

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635 The Shorter Oxford English Dictionary defines "immediate" as: "Present or nearest in time; most urgent; occurring or taking effect without delay; done at once, instant."

> *(a) in the case of an activity which is occurring, the activity must cease immediately, or must cease to be carried on in a specified manner;*
>
> *(b) in the case of an activity which may occur, that the activity may not be commenced, or may not be commenced to be carried on in a specified manner,*
>
> *until an inspector certifies in writing that the matters which give or will give rise to the risk are remedied."*

Directions

1602. As noted in paragraph 1572, s.45(1) gives an inspector power to include in an improvement notice or a prohibition notice directions as to –

> *"the measures to be taken to remedy any contravention, likely contravention, risk, matters or activities to which the notice relates"*

1603. I have already noted that, under current Authority policy, inspectors are encouraged to give guidance to dutyholders, rather than to give specific directions.

1604. For my part, I do not see the power to give directions as being in any way inconsistent with the performance–based nature of the duties imposed by the Act. As noted in paragraph 1576, the language of s.45(1) clearly indicates that Parliament envisaged this power being treated as an expansive rather than a narrow one. Whether and when the giving of a direction is appropriate is, of course, a matter for the inspector's judgment, but inspectors should act in the confident knowledge that this is a power which is available for exercise and should be exercised whenever the circumstances warrant it.

1605. Under s.45(2)(a) a direction given by an inspector may refer to a code of practice. In *Shire of Mildura v Inspector Flood,*[636] the Industrial Relations Commission[637] reviewed the decision of an inspector to issue a prohibition notice prohibiting trenching work, accompanied by a direction that the trenching works be carried out in accordance with the code of practice. The Commission set aside the direction as inappropriate, on the ground that it altered the status of the code from "guidance" to that of a mandatory requirement.

1606. With respect, this decision appears to misunderstand s.45(2)(a). The giving of a direction by reference to a code of practice has precisely the effect which the Commission regarded as inappropriate. That is, it makes compliance with the relevant code mandatory. There is, moreover, much to be said for incorporating references to codes when such directions are given. Rather than the inspector having

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636 Unreported, Industrial Relations Commission of Victoria, 6 March 1991, cited in Sherriff, B., 1998, p.6-10.

637 The predecessor, for this purpose, of the industrial division of the Magistrates Court.

to identify particular measures, the reference to the code immediately identifies the measures which the recipient of the notice must take. Nothing in s.55(8) of the Act is inconsistent with what I have said.

1607. Equally, the direction can be expressed in general terms, which will give the notice recipient a degree of flexibility in relation to compliance. Or, as s.45(2)(b) contemplates, the direction may offer the person to whom the notice is issued "a choice of ways" in which to remedy the relevant risk. The degree of specificity of the direction will, naturally, depend on what the circumstances require.

Direction to carry out an investigation

1608. A question has been raised in the consultations as to whether the power to give directions presently does – or, if it does not, whether it should – enable an inspector to require the notice recipient to investigate the cause of a particular incident. In my view, it does not, and should not.

1609. The word "measure" is a wide one.[638] It is relevantly defined in the Shorter Oxford English Dictionary as:

> *"A plan or course of action intended to attain some object."*

1610. In my view, consistently with that definition, a direction included in a notice pursuant to s.45(1) must prescribe a step or course of action to be taken by the notice recipient,[639] and that step or course of action must be intended or calculated to attain the relevant object viz the remedying of the relevant matter.

1611. The proper subject matter of a direction is "the measures to be taken to remedy …", that is, to rectify or make good the relevant matter. The measures specified must be directed at rectification. A direction to investigate the cause of an incident – without more - is not concerned with rectification.

1612. The position might be different if a direction were given for an investigation to be undertaken as part of a series of measures expressed to be directed at remedying the risk or contravention, that is, as a necessary part of the remedial process. Thus, an inspector could direct that an engineer be engaged to identify the causes of a particular problem and to recommend remedial measures, which measures the recipient of the notice was required by the direction to implement.

1613. I see no justification for departing from the remedial purpose – risk elimination or control – of the power to give directions. The Authority has ample powers to carry out its own investigation into the causes of particular incidents, and the related questions of compliance with the Act. I referred earlier to the concern that the

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638 *Environment Protection Authority v Simsmetal Ltd* [1990] 1 VR 623 at 632

639 Compare *Jacob Utah Construction and Engineering Pty Ltd* (1996) 116 CLR 200 at 206.

Authority not be in a position to "co-opt" dutyholders to conduct the Authority's investigations for it. I share that concern.

Prosecuting the threshold contravention

1614. It should not be overlooked that the threshold condition for the issue of an improvement notice is the formation of the opinion that there is or has been a contravention of the Act. By definition, the formation of that opinion would entitle the Authority to prosecute the dutyholder for that contravention.

1615. There is nothing in the Act to suggest that the issue of an improvement notice forecloses the possibility of the Authority also prosecuting the dutyholder in respect of the threshold contravention. The decision to issue a notice does not constitute an irrevocable election between two alternative courses of action, the other being prosecution[640] – nor does the Act suggest that compliance with the notice, by the remedying of the contravention, gives the person immunity from prosecution for the contravention.

1616. It was apparent during the consultations that this point is not well understood by employers. One employer complained:

> *"We feel we cannot trust the Authority. We complied with the improvement notice and then they turned around and prosecuted us".*

It seems to be thought that an improvement notice is equivalent to a non-conviction bond with conditions attached. In short, it is assumed that if the conditions are complied with, the slate is clean.

1617. The legal position is, of course, quite different. The identification of the initial contravention raises two quite separate questions, as follows:

(a) what should be done to remedy the contravention?

(b) should the dutyholder be prosecuted in respect of its past failure to comply, as evidenced by the identified contravention?

1618. In my view, the position can and should be clarified, so that dutyholders are left in no doubt that these are quite separate issues. The Act should be amended, along the lines of s.103 of the NSW Act, to provide that –

> *"The issue, variation, revocation or withdrawal of a notice under this Part does not affect -*
>
> *a) any liability which a person may have under this Act or the regulations; or*
>
> *b) any proceedings for an offence against this Act or the regulations,*

640 cf. *Sargent v ASL Developments Ltd* (1974) 131 CLR 634.

in respect of which the notice was issued."

1619. The Act should also require that any notice issued contain a statement to that effect.

Limitation period for prosecuting the threshold contravention

1620. While the Authority must retain the right to prosecute for the threshold contravention, there should in fairness be a limitation period beyond which no such prosecution can be instituted. The regulator should be obliged to make a decision on such a prosecution within a fixed time. Otherwise, there is simply a continuing state of uncertainty for the dutyholder, with the "sword of Damocles" hanging over its head.

1621. At present, the Authority applies a "zero tolerance" policy in relation to certain categories of risk, for example risks associated with forklifts and work at height. The policy applies to a dutyholder who has in the past been the recipient of a notice in respect of a risk of that kind. When a further such contravention is identified, the Authority regards itself as entitled to prosecute the dutyholder for both that contravention and for each previous contravention.

1622. It is, in my view, unfair for the Authority to reserve to itself an unlimited right to revive previous unprosecuted contraventions. The Act should impose a time limit of two years on the Authority's right to prosecute for a contravention in respect of which a notice has previously been issued.

Service of notices

1623. The Act does not currently stipulate the manner in which notices must be served. Instead, there is power to make regulations on the matter, under s.59 and Schedule 1, clause 44. No such regulations have been made. In the absence of such regulations, it is likely that notices must be served personally, or must at least come to the knowledge of the person to whom they are issued, in order to be effective.

1624. In my view, the proper service of notices is fundamental to the integrity of the administrative sanctions. It should be dealt with in the principal Act.

1625. ACA s.246 deals with service of notices in the following terms -

> *"(1) Any…notice…to be served or given by the Authority or a self-insurer shall be deemed to have been duly served or given –*
>
> *(a) if delivered personally to, or if left at the last known place of abode or business in or out of the State of the person, whether or not the person is an employer, on or to whom the notice or document is to be served or given or, in the case of an employer, at the address for service shown on the last return furnished by the employer with some person apparently in the employment of the employer; or*

> *(b) if sent by prepaid letter post, addressed to the person, whether or not the person is an employer, on or to whom the notice or document is to be served or given at the last known place of business or abode in or out of the State or, in the case of an employer, at the address for service shown on the last return furnished by the employer.*
>
> *(2) In any case to which subsection (1)(b) applies, unless the contrary is proved, service shall be deemed to have been effected two days from the date of posting.*
>
> *(3) The provisions of this section are in addition to and not in derogation of any other provisions of this Act relating to the service of documents or the provisions of ...the [Corporations Legislation]".*

1626. Section 101 of the NSW Act provides:

> *"(1) A notice under this Part (including a notice confirming, revoking or withdrawing such a notice) may be issued or given to a person:*
>
> *(a) by delivering it personally to the person; or*
>
> *(b) by leaving it with some other person at, or sending it by post or facsimile transmission to, the person's place of residence or business or the place of work to which the notice relates.*
>
> *(2) This section does not affect the operation of any provision of a law or rules of a court authorising a notice or other document to be served in a manner not authorised by this section."*

1627. Section 47(2) of the Cth Act imposes more stringent conditions on service, in relation to improvement notices, as follows:

> *"Where the responsible person is an employer but it is not reasonably practicable to issue the notice to the employer by giving it to the employer, the improvement notice may be issued to the employer by giving it to the person who is, or who may reasonably be presumed to be, for the time being in charge of the activity, undertaken by the employer, in connection with which, in the investigator's opinion, the employer is contravening, or is likely to contravene, this Act or the regulations and, where the notice is so issued, a copy of the notice must be given to the employer as soon as practicable thereafter."*

1628. When providing for service of notices under the Act, a balance must be struck between the need for efficient enforcement and the need to ensure that the notice comes to the attention of the person who is responsible for compliance (ie. the person to whom the notice is addressed). A failure to comply with a notice is an indictable

offence.[641] In the case of a failure to comply with a prohibition notice, the maximum penalty under the current Act is five years imprisonment.

1629. Such an offence constitutes a "serious indictable offence" within the meaning of s.325 of the *Crimes Act* 1958. Furthermore, the period for lodging an appeal against a notice runs from the time of issue/service. (It is presently 7 days, but I am recommending that the period be increased to 14 days. There is no mechanism - and I am not recommending one - for extending the time for lodging an appeal).

1630. I recommend that the Act should provide for service of a notice by the following means –

(a) personal service;

(b) sending it by post or facsimile to the person's usual or last known residential or business address or the premises to which the notice relates;

(c) leaving it at the person's usual or last known residential address with a person apparently over the age of 16 years; or

(d) leaving it at the person's usual or last known business address, or the premises to which the notice relates, with a person apparently over the age of 16 years who is, or who appears to be, in charge of the premises.

1631. Furthermore, the Act should require that, where a notice is left with a person in charge, or apparently in charge, of premises, that person must, as soon as possible after receiving it, give the notice, or a copy of the notice, to the person to whom the notice is directed. Section 41(1) of the SA Act includes a provision of this sort.

Display and notification of notices

1632. It is essential that when an inspector issues a notice, whatever its nature, the contents of the notice be brought to the attention of any person whose work may be affected by the notice. This is particularly important where the notice prohibits, or restricts the continuation of, an activity or requires that persons not disturb an area of the premises.

1633. The Act does not currently empower an inspector to exhibit notices, nor does it require the person to whom the notice is issued to display, or inform others about, the notice. Most other jurisdictions provide for the display or notification of notices in one way or another. For example, the NSW Act permits an inspector to exhibit a copy of, or an extract from, a notice at the relevant place of work in a manner approved by WorkCover: s.102(1). It is an offence to destroy, damage or remove a notice that has been exhibited by an inspector.

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641 Though I consider below whether a failure to comply with notices or directions should be dealt with summarily.

1634. Section 41 of the SA Act requires that the person to whom the notice is addressed must, on receipt of the notice (or a copy of the notice) –

- supply a copy of the notice to any health and safety representative who represents any employees whose work is affected by the notice;
- bring the notice to the attention of any person whose work is affected by the notice; and
- display the notice or a copy of the notice in a prominent place at or near any workplace or plant that is affected by the notice.

1635. In my view, the SA approach is likely to be more effective than the NSW approach in ensuring that the right persons are informed about a notice. The person to whom the notice is issued will usually be best placed to determine where the notice should be displayed and which persons should be notified. This is also consistent with the proposed requirement (discussed below) that employers and proprietors should take all reasonable steps to ensure that workers comply with a notice.

Revocation and variation of notices

1636. Under the current Act, there is no express power for an inspector (or the Authority) to revoke or vary a notice after issue. If a notice can be regarded as a "subordinate instrument" within the meaning of s.41A of the *Interpretation of Legislation Act* 1984, the power to issue the notice would include an implied power to amend, alter or vary the notice.

1637. This important matter should be dealt with expressly, not by implication. The Act should expressly empower any inspector (not just the issuing inspector) to revoke or vary a notice after issue. This power should be exercisable at any time, unless the notice is under review by the Authority (whether of its own motion or at the request of the person to whom the notice was issued). In such cases, the Authority must have the sole power to revoke or vary the notice.

1638. The decision to revoke or vary should itself be reviewable.

Offences relating to notices

1639. Improvement notices are, by far, the most frequently used compliance and enforcement tool available to inspectors. In the last financial year alone, inspectors secured compliance through the issue of an improvement notice on 13,826 occasions.

1640. According to WorkSafe, in the last financial year there were 257 improvement notices which were not complied with within the time required by the notice. But only 12 prosecutions (10 of which were successful) were brought against notice recipients for non-compliance. This is a prosecution rate of 5%, which seems extraordinarily low. In the 2001/2002 financial year, WorkSafe prosecuted only 4 out of 261 instances of non-compliance with improvement notices.

1641. Obviously, the effectiveness of the notice as an enforcement tool depends upon the recipient recognising that non-compliance will have consequences. It is vitally important, therefore, that the Authority take, and be seen to take, prompt enforcement action in the event of non-compliance.

1642. This means, in turn, that inspectors must be instructed to follow up notices immediately the time for compliance has expired, and to refer any instance of non-compliance for investigation with a view to prosecution. While the proposed express power to vary a notice would be exercisable to extend the time for compliance, the health and safety of workers (and the public) means that the power to extend time should only be exercised where good cause is shown.

1643. Time has not permitted any investigation of the reasons for the low rate of prosecution of non-complied notices. Suffice it to say that the Authority has rightly acknowledged that it needs to improve the enforcement of notices as a matter of urgency.

Summary offences

1644. A failure to comply with an improvement or prohibition notice is currently an indictable offence that is triable summarily. A failure to comply with a prohibition notice carries a particularly heavy penalty, as it should. (Section 44(3) imposes a statutory minimum penalty. I am recommending in Chapter 35 that mandatory minimum penalties be removed).

1645. The seriousness of a failure to comply with a notice, particularly a prohibition notice, cannot be overstated. Indeed, in some cases, a failure to comply with a notice may involve a higher level of culpability than that associated with a breach of the general duties, since the notice recipient has, by definition, failed to take measures which have been specifically drawn to its attention. For this reason, in my view, notice breach offences should as a matter of principle remain indictable offences, subject to appropriate maximum penalties.

1646. At the same time, there are good reasons for the Authority to prefer the course of having these matters prosecuted summarily, namely:

- the relative simplicity of the proofs involved in notice breaches, particularly those involving breach of prohibition notices, directions or express conditions in notices; and
- the need to impose sanctions for breaches of administrative notices in a timely fashion, so as to promote general deterrence.

Defects in notices – the challenge of technical compliance

1647. As I said in Chapter 27, an issue of particular concern to inspectors is the difficulty of drafting a notice under the Act which complies with all the technical requirements. It

is obviously undesirable for the already-difficult job of an inspector to be complicated in any way by a concern that "the form has not been filled in correctly".

1648. In my view, the Act should be amended to safeguard notices against challenge on grounds of technical (as opposed to substantive) non-compliance. The *Bankruptcy Act* 1996 provides (s.306(1)) that –

> *"Proceedings under this Act are not invalidated by a formal defect or an irregularity, unless the Court before which the objection on that ground is made is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by an order of that court."*

An equivalent provision – applicable to notices as well as to proceedings – should be included in the Act.

1649. The position at common law is that a defect in a statutory notice will not invalidate the notice unless the defect has the effect that the notice –

(a) does not fulfil its statutory purpose; or

(b) fails to meet a requirement made essential by the legislation; or

(c) could reasonably mislead the recipient as to what is necessary to comply with it.[642]

1650. There is, in my view, a case for simplifying the statutory requirements as to the contents of notices, particularly prohibition notices which typically have to be issued in circumstances of some urgency. The content requirements which are "made essential" by the Act should be those – and only those – which are necessary to inform the notice recipient of –

- what he/she must do or refrain from doing, and by when;
- the consequences of non-compliance; and
- the availability of internal and external review.

Identification and other formal defects

1651. The following specific problems are being encountered, reportedly with increasing frequency, in relation to notices:

- An inspector issues an improvement notice to an employer, using the name by which the employer is usually known (for example, a trading or business name) rather than its proper legal name. The notice is served on a person who appears to be in charge of the employer's undertaking at the relevant workplace.

642 See, for example, *Deputy Commissioner of Taxation v. Woodhams* (2000) 199 CLR 370 at 384-5.

- An inspector issues an improvement notice to a person in the mistaken belief that the person is the relevant employer, when in fact he/she is not. The person to whom the notice is issued does not raise the defect with the inspector, nor does he/she challenge the notice.

1652. The Act deals with the identification of employers, but only in relation to "legal proceedings for an offence", in which case –

> *"it shall be sufficient to state the name of the ostensible occupier of or employer at any workplace or the name or title by which the occupier or employer is usually known."*[643]

1653. In my view, an equivalent provision should be added to preserve the validity of notices. A failure to state the correct legal name of the person to whom a notice is issued is purely a matter of form and should not invalidate the notice, provided that the description used in the notice sufficiently identifies the correct legal person.

1654. A notice should not be liable to challenge on the basis of the imperfect description, and the Act should expressly exclude such an objection in any proceedings for breach of the notice, perhaps in the following terms:

> *"A person upon whom a notice is served in accordance with this Act must comply with the notice even if the notice does not describe the person by the person's proper name, provided that the notice describes the person by a name or title by which the person is usually known."*

Information (forms) to be given with notices

1655. There is at present no requirement in the Act that an inspector inform the notice recipient of any of the following:

(a) what the notice recipient is required to do, or refrain from doing;

(b) what may happen if the notice is not complied with; or

(c) the right to seek review (currently the right of appeal).

1656. Although the standard form of notice issued by the Authority does include this information, provision of this essential information should not be a matter of administrative discretion. It is of particular importance that the notice set out the obligations of the notice recipient to take all reasonable steps to ensure that workers comply with the requirements in the notice.

1657. In relation to an improvement notice, the Act should include a provision along the following lines:

> *"An improvement notice must also-*

643 Section 51(b)

(a) state that the notice requires the person upon whom it is served, before the day specified in the notice –

(i) to remedy the contravention or likely contravention or the matters or activities occasioning the contravention or likely contravention specified in the notice; and

(ii) to comply (and, in the case of an employer or proprietor, take all reasonable steps to ensure that workers comply) with any direction included in the notice; and

(ii) to comply (and, in the case of an employer or proprietor, take all reasonable steps to ensure that workers comply) with any condition included in the notice relating to the future conduct of any activity,

and that a failure to do so is an offence; and

(b) specify the person's right to seek review of the decision to issue the notice,

or be accompanied by a form, approved by the Authority, which contains that information."

1658. A similar provision should be included in relation to prohibition notices, as follows:

"A prohibition notice must also-

(a) state that the notice requires that the person upon whom it is served must –

(i) not carry on the activity prohibited by the notice (and, in the case of an employer or proprietor, take all reasonable steps to ensure that workers do not carry on the activity prohibited by the notice) until an inspector certifies in writing that the matters which give or will give rise to the risk are remedied; and

(ii) to comply (and, in the case of an employer or proprietor, take all reasonable steps to ensure that workers comply) with any direction included in the notice,

and that a failure to do so is an offence; and

(b) specify the person's right to seek review of the decision to issue the notice,

or be accompanied by a form, approved by the Authority, which contains that information."

Injunctive relief

1659. At present, if an inspector observes an activity which poses a health and safety risk at a workplace, the inspector may issue a prohibition or improvement notice, depending on the nature of the risk. If a person fails to comply with a notice, the Authority may prosecute the person for an offence but it has no further power to stop the dangerous activity.

1660. The Qld Act enables the regulator to apply for an order from a Supreme Court judge in chambers to require compliance with either a prohibition or improvement notice.[644] The Tas Act contains a similar provision.[645] The *Environment Protection Act* 1970 (Vic) allows the Environment Protection Authority to apply to the Supreme Court for an injunction restraining any person from contravening the Act or failing to comply with certain notices, works approvals or permits.[646]

1661. The SA Act is more interventionist. Under s.45(1), if a person fails to comply with a notice, the inspector who issued the notice may have the necessary remedial measures carried out and, for that purpose, the inspector may (subject to reasonable notice being given) enter and take possession of any workplace, and do such things as "full and proper compliance with the notice" may require.

1662. Failure to comply with an improvement notice, and a fortiori a prohibition notice, may have serious implications for the safety of workers and members of the public. Failure to comply with an investigation notice (see Chapter 28) may seriously affect investigations in relation to a possible contravention or the vital inquiries of an inspector preceding the issue of an appropriate enforcement/remedial notice or directions.

1663. In my view, the Authority must be able to seek an injunction to restrain non-compliance in appropriate cases. The Act should be amended to include a provision, similar to s.64A of the *Environment Protection Act*, to enable the Authority to apply for an injunction –

(a) to restrain any person from contravening the Act or the regulations, or any notice issued under the Act or any condition or direction included in such a notice; or

(b) compelling any person to comply with the Act or the regulations, or with any notice issued under the Act or any condition or direction included in such a notice.

644 Section 119, Qld Act.
645 Section 42(1), Tas Act.
646 Section 64A, EPA Act.

Chapter 30: Infringement notices

1664. Victorian health and safety legislation enables the Minister to make regulations in relation to infringement notices[647]. The regulations may provide for a person to be served with an infringement notice for a prescribed offence as an alternative to prosecution.

1665. No such regulations have ever been made. Oddly enough, the Authority's Compliance and Enforcement Policy refers to infringement notices as part of the existing enforcement framework, even though the necessary regulations have not been made to enable their use.

1666. New South Wales, the Northern Territory and Queensland all use infringement notices as part of their health and safety enforcement strategies. The EPA uses infringement notices to enforce environment protection laws[648]. The view of the EPA is that such notices are an effective enforcement tool, and "a good use of resources". The infringement notice has the statutory advantage of "bringing it home to the person promptly".

1667. In 1998 the National Occupational Health and Safety Commission commissioned a report to evaluate the impact of on-the-spot fines on prevention outcomes in Australian workplaces. The report found that on-the spot fines were generally considered an effective preventive measure by inspectors and by most industry respondents.[649]

1668. Furthermore, the Industry Commission's 1995 report relating to workplace health and safety recommended that all jurisdictions adopt a system of on-the-spot fines for breaches of OHS legislation. One obvious advantage is that infringement notices are capable of having an effect as soon as a breach of the legislation is detected. The penalty is directly and immediately associated with the breach.

Introducing infringement notices

1669. In my view, a regime for the issue of infringement notices should be introduced without delay. The power to make regulations providing for such notices has been in the Act for 13 years. I am unaware of any explanation for the power having lain dormant for so long.

1670. I understand that the Authority has had the issue under consideration for a considerable time. Again, I do not know why this process has never been brought to a

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647 Section 47A, OHSA; s.45B, DGA; and s.27, EPSA.

648 *Environment Protection Act 1970,* s.63B.

649 Gunningham, N., Sinclair, D. & Burritt, P. *On-the-Spot fines and the prevention of injury and disease: the experience of Australian workplaces*, a report prepared for NOHSC, Sydney, May 1998. Retrieved November 2003 from the NOHSC website: http://www.nohsc.gov.au/OHSInformation/NOHSCPublications/misc/spotfines/title.htm

conclusion. Certainly the inspectors to whom I have spoken have argued strongly for the existence of such a power. For the reasons set out earlier, the case for having this power available as part of the enforcement armoury seems to me to be very strong.

1671. At the same time, it is not a power which should be available in relation to the principal categories of offences under the Act. They are serious, indictable offences. In cases of lower culpability, these offences can be prosecuted in the Magistrates' Court or dealt with administratively by the issue of an improvement notice, with or without a prohibition notice.

1672. As the ALRC said in its 2002 Report, "Principled Regulation", infringement notices are –

> *"typically used for low-level offences and where a high volume of uncontested contraventions is likely."*[650]

1673. In my view, it is the Act, rather than the regulations, which must specify the offences for which an infringement notice may be used as an alternative to prosecution. The appropriate categories of offence, in my view, are those arising from non-compliance with specific, positive obligations under the regulations – for example, the obligation under the Noise Regulations to put up signage drawing attention to the need for workers to wear hearing protection. The ALRC phrase "low-level" offence seems appropriate. Obviously, any offence which raised a question of what was "reasonably practicable" would not be suitable for this purpose.

1674. The NSW legislation provides a useful parallel. The types of offences which may be the subject of infringement notices include:

- failure to take non-disturbance measures;[651]
- failure to co-operate to enable compliance;[652]
- failure to consult with employees.[653]

Penalties

1675. Under s.47A(1), the maximum penalty level for infringement notices is 10 penalty units or $1000. In New South Wales, the maximum penalty for an infringement notice is the maximum amount which could be imposed by a court for the offence, though the relevant regulations provide for penalties between $200 and $1500.

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650 Australian Law Reform Commission, *Principled Regulation: Federal, Civil and Administrative Penalties in* Australia, October 2002(a). Retrieved via the Australasian Legal Information Institute website, November 2003: http://www.austlii.edu.au/au/other/alrc/publications/reports/95/

651 Section 87(2).

652 Section 20(2).

653 Section 13.

1676. In Queensland, infringement notice penalties range from $150 to $1500. The Australian Law Reform Commission recommended that the level of penalty should not exceed 20 per cent of the maximum penalty that could be imposed by a court for the offence.[654]

1677. In my view, the fixing of penalties for infringement notices under OHSA (and under the other safety legislation) should conform with the ALRC's recommendation.

1678. As with the other enforcement options available to the Authority, the effectiveness of any infringement notice scheme would depend on the Authority making use of infringement notices as part of an integrated enforcement policy. As noted by Bluff and Johnstone:

> *"There is a need for further empirical studies of infringement notices in Australian OHS law enforcement to determine the characteristics of infringement notice schemes that are most effective in prevention. Ultimately, the success of infringement notices depends on their ability to change the behaviour of recipients so that future injury, disease and death are prevented."*[655]

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654 Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper 65, 2002(b) p.418. Retrieved via the Australasian Legal Information Institute website November 2003: http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/alrc/publications

655 Bluff, E. & Johnstone, R. "Infringement notices: stimulus for prevention or trivialising offences?", *Journal of Occupational Health and Safety – Australia and New Zealand* , 2003, vol. 19, no.4, 337-346, p.344.

Chapter 31: Enforceable undertakings

1679. Recent amendments to the Tasmanian and Queensland health and safety legislation enable the relevant regulator to accept "enforceable undertakings" from alleged offenders as an alternative to prosecution.[656] Failure to comply with the terms of an enforceable undertaking may constitute an offence in itself, punishable by a considerable maximum penalty.[657] In addition, or alternatively, the regulator may apply for a court order directing compliance. In the last resort, proceedings for contempt would lie in the event of non-compliance.[658]

1680. In his second reading speech, the Queensland Minister for Industrial Relations described the anticipated use of enforceable undertakings as follows:

> *"An enforceable undertaking is an additional tool to prosecution. It allows the chief executive of the Department to enter into a written undertaking with someone who has breached the Act that sets out what actions a person or company will take, over and above rectification of their breach of the Act. For example, a company may agree to provide publicity or education programs to deter potential offenders, or implement programs to prevent future contraventions. This can be used as an incentive to improve health and safety, rather than as a punishment for having failed to comply with the legislation."*[659]

1681. Enforceable undertakings provide the regulator and the alleged offender with an opportunity to avoid the delays and cost inherent in prosecution. It has also been said that undertakings "may be used to achieve more focused, tangible outcomes",[660] such as the implementation by an offender of an appropriate health and safety management system. In order for the undertaking to be effective, the regulator must monitor compliance with its terms.

1682. The Australian Securities and Investment Commission (ASIC) and the Australian Competition and Consumer Commission (ACCC) use enforceable undertakings with increasing regularity[661]. In 1999 ASIC published a detailed practice note (No.69) for the use of undertakings. Consumer Affairs Victoria (CAV) also uses undertakings in the enforcement of the *Fair Trading Act* 1999 (Vic) and other consumer legislation.

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656 Queensland (Part 5) and Tasmania (s.55A).

657 This is the case in Queensland. A maximum penalty of $100,000 applies.

658 This is the case in both Tasmania and Queensland. Section 55A provides that the Secretary may apply to the Magistrates' Court for an order directing the person to comply with the undertaking; an order directing the person to pay to the Board an amount not exceeding any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the contravention; an order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the contravention; or any other order that the Court considers appropriate.

659 Legislative Assembly (Queensland), 3 December 2002 p.5232.

660 Clough, J and Mulhern, C., 2002, p.167.

661 ASIC (sections 93A and 93AA ASIC Act), ACCC (section 87B *Trade Practices Act*).

ASIC, ACCC and CAV each maintain a public register of undertakings on their respective websites,[662] which includes full copies of undertakings.

1683. Enforceable undertakings are a new and largely-unexamined enforcement measure. Their advantage as a means of avoiding protracted litigation was noted by Burchett and Kiefel JJ, in the context of an ACCC undertaking –

> *"When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters, and investigating officers … to turn to other areas … that require their attention."*[663]

Issues arising from the negotiation process

1684. An enforceable undertaking necessarily involves the regulator negotiating with a dutyholder as to its terms. A number of issues may arise from the negotiation process.

1685. There may be an "inherent institutional imbalance" between the bargaining positions of the regulator and the regulated party.[664] The regulator will probably have the stronger bargaining position as it may simply reject the terms of the undertaking offered and proceed with a prosecution. The imbalance may be more pronounced in relation to small and medium-sized enterprises.

1686. Third parties, in particular injured workers and relatives of persons killed at work, may be adversely affected by the use of enforceable undertakings. If a prosecution is not brought in relation to the circumstances of a worker's injury or death, the worker or the relatives of the worker will be precluded from making an application for compensation under s.85B of the *Sentencing Act* 1991 (Vic).[665]

1687. As the Australian Law Reform Commission has commented:

> *"The private nature of enforceable undertaking negotiations reduces the transparency of the enforcement process, and may raise questions concerning the extent to which the regulator is accountable for the exercise of its enforcement powers."*[666]

The terms of enforceable undertakings

1688. The Queensland provision, like other statutes which permit enforceable undertakings, is particularly broad. It permits the chief executive to accept a workplace undertaking

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662 These websites are: http://www.consumer.vic.gov.au, www.accc.gov.au and http://www.asic.gov.au.

663 *NW Frozen Foods v Australian Competition and Consumer Commission* (1996) 71 FCR 285, 290-291.

664 Australian Law Reform Commission, 2002(a), para 16.7.

665 It should be noted that the right to make an application for compensation in respect of pain and suffering under section 85B was removed by the *Accident Compensation (Common Law and Benefits) Act* 2000. This Act effectively restored access to common law damages for seriously injured workers.

666 Australian Law Reform Commission, 2002(a), para 16.62.

which includes "an assurance from the identified person about the person's future behaviour".

1689. The explanatory notes indicate that the undertaking could include assurances:

- to cease certain behaviour;
- to take specific action to redress parties adversely affected by the contravention;
- to implement specified actions or programs to prevent future breaches; and
- to implement other publicity or educative programs to help deter other obligation holders.[667]

1690. A broad power to accept undertakings allows maximum flexibility for the regulator and the regulated party to resolve health and safety issues. The ALRC concluded, however, that in the interests of certainty, consistency and fairness -

> *"there should be clearly articulated legislative parameters guiding the scope of undertakings that are appropriate for the regulated community to offer, and for regulators to accept."*[668]

1691. Furthermore, with such a broad power "there may be a risk that undertakings are accepted for purposes that are not authorised by the legislative grant."[669]. In particular, terms in an enforceable undertaking which require a dutyholder to do something over and above that which is necessary to remedy the contravention are really punitive in nature and may well be beyond the power of the regulator to accept. This may affect the legitimacy of terms, for example, which require the payment of a monetary penalty, the making of donations, publicity or participation in education programs.

The Authority should have the power

1692. In my view, the Authority should be empowered to accept enforceable undertakings as an alternative to prosecution. The power to accept undertakings should be expressed broadly and should not be unnecessarily fettered by legislation.

1693. The conferral of such a broad power means that it will be imperative that the Authority develop, and disseminate publicly, appropriate guidelines for the use of undertakings, similar to the guidelines published by ASIC in its Practice Note 69.

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667 Explanatory Memoranda to the *Workplace Health and Safety & Another Act Amendment Bill 2002*, pp.11-12. Retrieved November 2003 from: http://www.whs.qld.gov.au/whsact/whsactamdb02exp.pdf

668 Australian Law Reform Commission, 2002(a), para 16.79.

669 Yeung, K. "Negotiated Compliance Strategies: The Quest for Effectiveness and the Importance of Constitutional Principles", Paper presented at *Penalties : Policy, Principles and Practice in Government Regulation*, ALRC conference, Sydney, 8 June 2001.

1694. There has been widespread support for this proposal in the consultations. What is recognised, it seems, is the forward-looking aspect of enforceable undertakings, as contrasted with the backward-looking focus of prosecutions, and the capacity of an enforceable undertaking to deal in some detail with risk prevention by the dutyholder into the future.

1695. The Authority's enforcement policy will need to address squarely the relationship between the power to issue improvement notices (exercisable by inspectors) and the power to accept an enforceable undertaking (which would be exercisable only by the Authority). For example, an observed contravention may warrant the taking of measures promptly to control the relevant risk, thus necessitating the issue of an improvement notice, but the question of prosecution and of an enforceable undertaking as an alternative would remain to be considered. It is quite conceivable that a dutyholder could be given an improvement notice, to deal with a particular risk, and at the same time could offer to the Authority an undertaking dealing with OHS issues more broadly.

Proposed provision – enforcement of undertakings

1696. I have in mind a provision along the following lines:

> *(1) The Authority may accept a written undertaking given by a person in connection with a matter in relation to which the Authority has a function or power under this Act.*
>
> *(2) The person may withdraw or vary the undertaking at any time, but only with the Authority's consent.*
>
> *(3) A person who gives a written undertaking which has been accepted by the Authority must comply with the terms of the undertaking.*
>
> *(4) If the Authority considers that the person who gave the undertaking has breached any of its terms, the Authority may apply to the court for an order under sub-section (5)*
>
> *(5) If the court is satisfied that the person has breached a term of the undertaking, the court may make any or all of the following orders:*
>
> > *(a) an order directing the person to comply with that term of the undertaking;*
> >
> > *(b) any other order that the court considers appropriate to secure compliance with that term, including an order requiring the person to do, or refrain from doing, any particular act or thing.*

PART 8: ENFORCEMENT - CRIMINAL

Chapter 32: Civil concepts, criminal liability

1697. As envisaged by Robens, the general duty provisions[670] "enunciate the basic and overriding responsibilities of employers and employees." The concepts which those provisions embody – such as safe systems of work – were essentially imported from the common law of negligence.

1698. The law of negligence is concerned with civil remedies for loss and damage. It is compensatory in nature.

1699. OHSA is a quite different creature. Breach of an OHSA duty is a criminal offence. It gives rise to no civil remedy.[671]

1700. A prosecution for a breach of an OHSA duty is also quite unlike a typical criminal prosecution. First, the offence is committed whether or not harm was caused. Though prosecution typically follows workplace accidents, the dutyholder is not charged with "conduct causing death or serious injury". Nor is the seriousness of the breach of duty measured by the seriousness of the consequences (if any) of the breach.

1701. Secondly, proof of a breach of an OHSA duty does not depend upon proof of a relevant state of knowledge or intent ("*mens rea*"). And there are no statutory defences under OHSA.

1702. In short, the Act imposes what lawyers describe as an *absolute* obligation to comply with the duties, subject always to considerations of "practicability".[672]

Reasonable practicability and the concept of fault

1703. An employer will be in breach of s.21(1) if it fails to provide and maintain so far as is practicable –

> *"a working environment that is safe and without risks to health".*

To prove the breach, the Authority as prosecutor will have to show that the employer had not taken one or more of the steps which it was practicable (in the defined sense) for the employer to take to provide a safe, risk-free environment.

1704. The prosecution therefore has first to identify the measures, or kinds of measures, the employer could have taken. The role of the "practicability" factors set out in s.4 is

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670 Sections 21-25.

671 Section 28.

672 See Chapter 10.

then to determine what, in the circumstances, the employer could reasonably be expected to have done, that is, ought to have done.

1705. In substance and in practice, therefore, OHSA employs a test of "reasonable practicability". (In Chapter 10, I have recommended that the Act be amended to reflect this). The prosecution must show both what was feasible, having regard to "the availability and suitability of preventive or mitigating measures", and what the employer ought reasonably to have done, having regard to the other practicability factors, namely –

(a) the severity of the hazard or risk;

(b) the state of knowledge; and

(c) the cost of removing or mitigating the hazard or risk.[673]

1706. By creating an implicit test of what "ought reasonably to have been done", the concept of practicability brings the concept of fault into OHSA. Although proof of breach of duty involves no mental element, the prosecution's assertion that the employer did less than it ought reasonably to have done is, in substance, a contention that the failure was blameworthy.

1707. The source of this implicit judgment is obvious enough. It is to be found in the objects of the Act in s.6. As discussed in Chapter 2, the provisions of s.6 encapsulate the community consensus that persons at work should be protected against all risks to their health or safety.

1708. The avoidance of injury or death in the workplace is treated by the Act, as by the community, as a self-evident good. An employer who fails to discharge the duty to (take reasonable steps to) ensure a risk-free workplace is, so the legislation assumes, deserving of censure. Hence the imposition of criminal liability.

Not industrial manslaughter

1709. It follows from the nature of OHSA offences that no question of manslaughter can arise under OHSA. Manslaughter is a concept known only to the criminal law, as are the offences of negligently or recklessly causing serious injury.

1710. As pointed out earlier, there can be a punishable breach of an OHS duty whether or not that breach had any direct consequence in the form of injury or death. No question of causation arises. Instead, the fact that somebody is injured or dies is relevant only –

(a) as evidence of the existence of the risk to health and safety which the dutyholder (*ex hypothesi*) failed to take adequate measures to prevent; and

673 In Chapter 11, I recommend that "control" be added to this list of factors.

(b) in providing some indication (perhaps) of the "severity of the hazard or risk" and, therefore, as a pointer to what the dutyholder ought reasonably to have done.

1711. The Victorian Government announced early in 2003 that it had decided not to introduce an offence of industrial manslaughter. For the reasons I have given, that issue simply does not arise in the context of the present review.

1712. The question of penalties for OHSA offences is dealt with in Chapter 35.

Chapter 33: Onus of proof

1713. At present, the Authority as prosecutor bears the onus of proving all of the elements of an offence under the general duty provisions, including practicability.[674] That is, the prosecution must show that the dutyholder failed to do that which it could, as a matter of reasonable practicability, have done.

1714. In New South Wales, by contrast, it is the defendant who has the burden of making out, as a statutory defence, that it did everything that was reasonably practicable in the circumstances. The Qld Act has the same practical effect.

1715. In my view, the current Victorian position should be maintained. It is a fundamental principle of criminal law that the prosecution should bear the onus of proving all of the elements of an offence. This principle should only be departed from in the most exceptional circumstances.

1716. I have heard nothing to suggest that any such circumstances exist in relation to the OHSA. To the contrary, the fact that – as explained in the previous chapter – the concept of reasonable practicability imports notions of fault into OHS breaches makes it all the more important that it be for the prosecution to establish that this standard was not met.

1717. Nor has there been any suggestion from the Authority that it is difficult to prove offences under the general duties because of the burden of having to prove the practicability element. The Authority is successful in the vast majority of prosecutions it conducts. This is no doubt, at least in part, because in many prosecutions the practical evidentiary burden falls on the dutyholder[675].

1718. The "practical" shift in the evidentiary burden was described by Dawson, Toohey and Gaudron JJ in *Chugg v. Pacific Dunlop* as follows:

> *"In some cases the mere identification of the cause of a perceptible risk may, as a matter of common sense, also constitute identification of a means of removing the risk, thereby giving rise to a strong inference that an employer failed to provide "so far as is practicable" a safe workplace. In other cases, the same inference will arise from the identification of some method which would remove or mitigate a perceptible risk or hazard. And, in such case, that inference might well be further strengthened by the failure of an employer to call evidence as to matters, such as cost and suitability, peculiarly within his knowledge…*
>
> *Questions of cost and suitability are but aspects of the overall question of practicability. And they are aspects upon which, in a good many cases, the practical evidentiary burden will, in any event, fall on a defendant for, as earlier indicated, evidence as to the nature of the risk, the cause of*

674 *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249

675 *Chugg v Pacific Dunlop Ltd*, at 261

> *the risk or means by which the risk may be avoided will often be all that is necessary to ground an inference that practicable means of avoiding the risk were not taken."*[676]

1719. The Authority is well positioned to bear the onus of proof and, in particular, the burden of proving that there were available measures which it was reasonably practicable to implement and which would have removed or controlled the relevant risk or hazard. As Deane J concluded in *Chugg* -

> *"[A]n informant would have the resources of government available to him and would not be expected to be in a position of disadvantage, vis-à-vis the employer, as regards what was and was not practicable in terms of maintaining a safe working environment. Indeed, the responsible Minister or an inspector may well have more general information and more ready access to expert advice than an accused employer."*[677]

1720. Finally, there is simply no evidence which I have seen to suggest that deterrence – and thereby health and safety outcomes - would be improved by having dutyholders bear the onus of proving that all reasonably practicable measures were taken.

No need for defence of due diligence

1721. Once it is clear that it is for the prosecution to prove that the defendant did not do what was reasonably practicable, it is unnecessary to provide for statutory defences based on "due diligence" or "reasonable precautions". Those concepts are interchangeable with what practicability requires, that is, what the dutyholder could reasonably be expected to have done in the circumstances.

1722. In short, what the prosecutor will need to prove is that the defendant did not "exercise due diligence" and did not "take reasonable precautions". That is what is entailed in proving that the defendant fell below the standard of "reasonable practicability". If the defendant exercised due diligence, then the prosecution case – by definition – must fail. There is no need for a separate defence.

1723. Moreover, once the factor of "degree of control, including ability to exercise control" is added to the practicability matrix – as I have recommended in Chapter 11 that it should be – there is no need for a defence of "breach caused by factors beyond the defendant's control".

Section 56 should be repealed

1724. Section 56 attempts to bring Codes of Practice into play in determining whether a contravention has occurred. But the provision is difficult to understand, and of quite uncertain effect.

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676 *Chugg v Pacific Dunlop Ltd.*

677 *Chugg v Pacific Dunlop Ltd* at 254.

1725. According to the Authority, s.56 is a little-used provision. No doubt this is in large measure because the reference to Codes of Practice in s.56 does not in practice remove the need for the prosecution to show what was reasonably practicable, since most Codes of Practice are themselves expressed to be subject to practicability.

1726. In my view, s.56 should be repealed. It serves no useful purpose. The question which then arises is whether proven compliance with a Code of Practice should be an answer to a charge of breach of duty.

Compliance with a Code of Practice

1727. OHSA already provides (s.27) that compliance with regulations made under OHSA is deemed to constitute compliance with the applicable general duties. The opportunity to achieve compliance by adhering to the regulations arises whenever –

> *"the regulations make provision for or in relation to any duty, obligation, act, matter or thing"*

to which Part III of the Act applies.

1728. In my view, a similar provision should be inserted regarding compliance with the Codes of Practice. Given that each Code must be approved by the Minister[678], the Codes are given significant status under the Act. Moreover, their stated purpose according to s.55(1) is to provide –

> *"practical guidance to employers, self-employed people, employees, occupiers, designers, manufacturers, importers, suppliers or any other person who may be placed under an obligation by or under this Act."*

1729. The policy which underlies s.27 – that compliance with the regulations should be encouraged – applies with equal force to the Codes of Practice. Compliance with a relevant Code of Practice should, therefore, be deemed to constitute compliance with the relevant duty or obligation. This change would give legal effect to what the Authority already states in each Code of Practice.

1730. A similar provision is to be found in the *Queensland Workplace Health and Safety Act* 1995. Under s.26(3) of that Act –

> *"(3) If an advisory standard or industry code of practice states a way of managing exposure to a risk, a person discharges the person's workplace health and safety obligation only by –*
>
> *(a) adopting and following a stated way that manages exposure to the risk; or*
>
> *(b) adopting and following another way that gives the same level of protection against the risk."*

678 Section 55(1).

Chapter 34: Right to prosecute

The right to prosecute

1731. Section 48 of the Act gives the Authority[679] the exclusive right to bring proceedings for offences against the Act. In the Discussion Paper (paras 477-488), I raised the question of whether the right to bring proceedings should be extended to others, including unions (as is the case in NSW) or workers (SA).

1732. In my view, the Authority should retain the exclusive right to prosecute for breaches of OHSA. (The reference in s.48 to an inspector bringing proceedings is redundant, and should be removed. An inspector is, of course, an officer of the Authority and, as s.48(2) makes clear, it is for the Authority to decide, in every case, whether a prosecution should be brought.)

1733. The prosecution of persons for criminal offences is a matter of the utmost seriousness. It is, in my view, properly the exclusive function of the State, and should be performed by a State agency – whether a Crown Prosecutor (subject to the DPP) or a prosecuting authority such as EPA or VWA.

1734. I can see no justification for conferring on any other party – whether a union, a worker or anyone else – a statutory right to bring a prosecution. Those who advocate the conferral of such a right argue that it would potentially mean an increase in the number of prosecutions which, in turn, would improve OHS outcomes. But this argument is based on the assumption – unstated and unsubstantiated – that VWA is not prosecuting "as often as it should be".

1735. If it were true as a matter of fact the VWA was "under-prosecuting" – and I have seen no evidence to substantiate the suggestion – there might be a variety of reasons for non-prosecution in a given case, such as that –

(a) WorkSafe was unaware of the relevant breach; or

(b) WorkSafe was aware of the relevant breach but –

(i) was unable because of a lack of resources to prosecute; or

(ii) had exercised its discretion inappropriately in deciding not to prosecute.

1736. In my view, none of these possible explanations for any shortfall in prosecutions by VWA would justify giving third parties the right to prosecute. The first explanation relates to investigative resources, and the sufficiency of lines of reporting to VWA. If a union is aware of a contravention which it believes should be investigated by WorkSafe, it should notify WorkSafe without delay. The question whether or not to prosecute will then be dealt with in the usual way.

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679 Or an inspector, provided the inspector is authorised in writing either generally or in a particular case.

1737. The second possible explanation assumes a lack of prosecuting resources. If there is a problem of this kind, it should be addressed by giving additional resources to VWA to prosecute, not by creating a new class of prosecutor. There has in fact been a substantial increase in recent years in the resourcing of the prosecutions unit – measured in numbers of lawyers and investigators – and this has been reflected in a commensurate increase in the number of prosecutions instituted. The current annual rate of prosecutions is two and a half times what it was 10 years ago.

1738. The third possible explanation concerns the Authority's exercise of its prosecutorial discretion. If that discretion were being inappropriately – or, worse still, improperly – exercised, there should be transparent accountability and review mechanisms which would enable such decision-making to be rectified. I recommend in Chapter 39 that significant improvements be made to the mechanism for review by the Director of Public Prosecutions of a decision not to prosecute.

1739. There are, on the other hand, powerful considerations in favour of keeping the prosecution function where it is. First, the role of prosecutor is a specialist one, and the duties of a prosecutor – to the court and to the defendant – are onerous. It is desirable that the relevant expertise be concentrated in one place.

1740. Secondly, it is important to the integrity and consistency of the enforcement side of the scheme that VWA have exclusive control over prosecutions. As prosecution is not the only enforcement tool available to the Authority, there would be considerable potential for conflict if third parties had a right to prosecute – for example, where the Authority had already issued a notice or (assuming power to do so) had accepted an enforceable undertaking in lieu of prosecution.

1741. The Authority must be able to select the most appropriate enforcement response to any given issue, and dutyholders must be confident that they will not be exposed to different treatment instigated by a third party.

1742. Thirdly, it seems to me to be inappropriate for unions to be cast in the role of prosecutor of employers. As I have said elsewhere, unions have a key role to play in working with employers to produce the best possible OHS outcomes. For unions to be able to prosecute employers would, in my view, prejudice the development of trust and the dialogue between unions and employers which are essential if workplace health and safety is to be improved.

Limitation period for prosecutions

1743. In Chapter 29, I have recommended that there be a limitation period in respect of the Authority's right to prosecute a person for the contravention which founded the issue of an improvement notice. I have recommended that the relevant period be two years.

1744. In my view, it is appropriate that there be a general limitation period on the institution of prosecutions. First, it seems wrong in principle for a potential defendant to be left indefinitely in a state of uncertainty as to whether it will have to face charges. Secondly, where the investigation arises out of a workplace incident causing injury or death, there are very significant implications for the worker, for his or her dependants and for the employer if the investigation continues for a long period.

1745. I have received submissions from parties who have been affected by long-running investigations in circumstances such as these. The submissions have drawn attention to the high degree of distress which results, both from the continuing uncertainty and, ultimately, from the awareness of all parties that they will be required to revisit the unfortunate circumstances when the matter eventually comes on for hearing.

1746. There is another, quite different, consideration. It is of the first importance, for reasons of general deterrence, that the Authority's prosecution activities should be, and be seen to be, responsive to breaches of the Act. If several years are allowed to pass between a serious workplace incident and the bringing of defendants to trial, the educative impact of the prosecution – in underlining the importance of OHS compliance – is inevitably diminished.

1747. Accordingly, I recommend that there be a general time limit of two years on all prosecutions. This is consistent with the position in New South Wales.[680] The NSW exception in relation to coronial inquiries should also be included.

1748. This time limit would need to be qualified to allow for the circumstance where evidence of a contravention did not come to the attention of the Authority until some time after the occurrence. In this regard, s.63A of the *Environment Protection Act* 1970 allows, in addition to a general limitation period of three years –

> *"a further period being within one year after the day on which the Authority ... first obtained evidence of the commission of the alleged offence ..."*[681].

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680 NSW Act s.107(1).

681 Section 63A has the additional words "considered sufficient by the Authority to warrant commencing proceedings", but they are not appropriate here, in my view.

Chapter 35: Penalties

1749. The OHSA has a somewhat outmoded offence and penalty structure. It contains a general offence and penalty provision – s.47 – which creates a single offence for the many and varied breaches of the Act and the regulations. Sub-section 47(1) provides:

> *"Any person who contravenes or fails to comply with any provision of this Act or the regulations shall be guilty of an offence against this Act."*

1750. There are a two notable exceptions to the general penalty provision, namely, offences under s.42 (offences relating to inspectors) and under s.44 (breach of a prohibition notice). Those offences carry the same maximum monetary penalty as provided for in the general penalty provision, but also impose a minimum monetary penalty and provide for a maximum term of five years imprisonment.

1751. The creation of a single offence of contravening the Act means that no distinction is drawn – on penalty – between the various breaches which may be committed against different provisions of the Act. An extreme example will demonstrate the point. The offence of failing to prepare and keep an up-to-date written list of the designated work groups at a workplace (as required by s.29(10)) would carry the same maximum penalty as the – much more serious – offence of failing to ensure a safe working environment for employees, as required by s.21(1).

1752. In this respect, OHS is out of step with other jurisdictions, and with most other modern Victorian statutes, which specify particular penalties for particular offences.

1753. In my view, s.47 should be repealed and replaced with appropriate offence-specific penalties. This will also necessitate a complete review of the regulations under the Act, and the imposition of appropriate penalties for contraventions of the regulations. Any review of the regulations will need to have regard to the Guidelines issued under the *Subordinate Legislation Act* (1 January 1995), concerning the inappropriateness of imposing significant criminal penalties under subordinate legislation.

Indictable offences under regulations

1754. Under s.59 OHSA and Schedule 1 (item 46), the Governor-in-Council may make regulations –

> *"providing for contravention of or failure to comply with a provision of a regulation to be an indictable offence or a summary offence."*

1755. The *Major Hazard Facilities Regulations 2000* create a number of indictable offences, for what must be regarded as very serious breaches – failing to control risks so far as practicable; failing to review an emergency plan; and operating a major hazard facility without a licence.

1756. Two issues immediately arise. First, it is plainly inappropriate for such serious offences to be created by regulation. As reflected in the Guidelines referred to above, it is Government policy that if indictable offences are to be created this should only be done in legislation.

1757. The second issue concerns duplication of offences between the Act and the regulations. For example, r.304 of the Major Hazard Facilities Regulations requires the operator of a major hazard facility to "adopt measures which eliminate or, if it is not practicable to eliminate, which reduce so far as is practicable, risk to health and safety." This regulation replicates the general duty under s.21(1) of the Act, which applies to the operator of a major hazard facility as to any other employer.

Duplication of offences

1758. There is at present a substantial degree of overlap between the general duties under the Act and many of the offences prescribed by regulations. Most of the regulations impose specific obligations on employers to identify, assess and control risks to health and safety in relation to particular hazards or risks. For example, under regulation 15 of the *Occupational Health and Safety (Manual Handling) Regulations 1999*, an employer must –

> "*ensure that any risk of a musculoskeletal disorder affecting an employee occurring-*
>
> *(a) is eliminated; or*
>
> *(b) if it is not practicable to eliminate the risk, is reduced so far as is practicable."*

1759. It will be immediately obvious that this obligation duplicates the employer's general duty under s.21(1). The consequence is that, if the employer fails to meet its obligation, it could theoretically be prosecuted for two separate offences, namely –

(a) the summary offence of breaching the regulation, which carries a maximum penalty of $50,000; and

(b) the indictable offence of breaching the Act, which carries a maximum penalty of $250,000.

1760. It is hardly surprising that specific regulations duplicate - for specific hazards or risks - the obligations imposed by the Act. Indeed, the Act implicitly assumes that this will be so, as s.27 provides that compliance with the regulations is compliance with the general duties. Nor it is unusual for an act, omission or course of conduct to constitute more than one offence.

1761. The Authority has no formal policy for determining whether a prosecution should be brought, in any given case, under the regulations or under the Act. I understand that WorkSafe's general prosecution practice is that, in cases involving a failure to control

risk, charges will ordinarily be laid under the Act unless the matter involves a low level of culpability.

1762. In such cases, prosecutors will charge under the relevant regulations. This practice is confirmed by WorkSafe's prosecution statistics. In the last financial year, the Authority brought 167 completed prosecutions, only 19 of which related to contraventions of the regulations.

1763. In my view, duplication of this kind involves a conceptual confusion. As I have said, the function of the regulations is to specify, in greater detail, what steps are required for compliance with the general duties in relation to particular hazards. The regulations should not create a parallel class of offences, except insofar as they impose obligations which are properly to be regarded as additional to the general duties imposed by the Act.

1764. Take regulation 13 of the *Occupational Health and Safety (Noise) Regulations 1992* for example. It requires an employer to ensure-

> *"that employees' exposure to noise is controlled so as to minimise risk to health and safety and ... that the exposure to noise of any employee does not exceed the exposure standard by-*
>
> *(i) the implementation of engineering controls to the extent which is practicable; and*
>
> *(ii) if engineering controls do not reduce the exposure of employees to the exposure standard, by implementation of administrative controls to the extent which is practicable; and*
>
> *(iii) if engineering and administrative controls do not reduce employees' exposure to noise to the exposure standard, by providing and maintaining hearing protection devices to employees which will ensure the employees' exposure to noise, taking into account the effect of the device, does not exceed the exposure standard; and*
>
> *(c) any engineering and administrative controls implemented in accordance with this regulation are retained despite these controls failing to reduce noise levels to the exposure standard."*

1765. The utility of a regulation of this sort does not lie in giving the Authority the option of bring enforcement action for a breach. Conduct which amounts to a breach of the regulation would, undoubtedly, amount to a breach of the employer's general duty under s.21(1), and could be dealt with accordingly.

1766. Instead, this regulation is designed to give employers a practical means of complying with the general duty. The regulation, in effect, identifies the considerations which should be brought to bear on an employer's choice of control measures. These are

vital regulations, and they would lose none of their importance if they were not separately enforceable, with any question of prosecution being left to be dealt with under the general duties.

1767. A further example is regulation 12 of the same regulations, which requires that an employer must, before taking any action under the regulations, consult with-

> *"(a) the employees who are exposed to the noise; and*
>
> *(b) any health and safety representative for the designated work group of which those employees are members."*

At present this regulation would probably be regarded as imposing obligations additional to the obligations imposed by the Act - and therefore separately enforceable. If (as I recommend in Chapter 20) the Act is amended to include a general duty to consult, regulation 12 would remain vitally important, as providing a specific means of compliance with the general duty in connection with noise hazards.

1768. Of course, these "practical guidance" or "compliance" regulations can be supplemented by regulations which prescribe, in relation to the particular hazard or risk in question, additional hazard-specific obligations. An example is regulation 14 of the *Noise Regulations,* which provides that the employer must –

> *"clearly identify by signs, labelling of machines, or other appropriate means when and where hearing protection devices should be worn."*

A penalty must apply for breach of such a provision but, in most cases, because of the nature of the obligation, the regulation should not impose significant criminal penalties.

Minimum penalties

1769. The Act imposes a minimum mandatory fine for offences against inspectors under s.42, and for the offence of failing to comply with a prohibition notice (s.44(3)). Having regard to the substance of these offences, it is difficult to understand why it was thought necessary to fetter the sentencing discretion of the court in this way. For example, s.42 imposes a mandatory minimum penalty for –

- refusing access to a workplace to an inspector;
- obstructing an inspector;
- failing to produce a document required by an inspector; or
- preventing or attempting to prevent a person from assisting an inspector.

1770. These offences may be loosely described as obstruction offences or hindering offences. A brief survey of other Victorian statutes reveals that the current maximum penalty in

OHSA for offences of this type ($50,000) is comparatively high. For example, the maximum penalty for obstructing an enforcement officer acting under the *Electricity Safety Act* is $30,000, and for failing to produce a document to an enforcement officer is $20,000.

1771. A comparison with s.111(2) of the *Fisheries Act* 1995 and s.343 of the *Crimes* Act 1958 reveals an even more striking disparity. The *Fisheries Act* imposes a maximum penalty of $5,000 (or 3 months imprisonment or both) for assaulting or obstructing an authorised officer, and the *Crimes Act* imposes a maximum fine of $6,000 for obstructing a police officer. I am not aware of any Victorian statute (other than OHSA) which imposes a mandatory minimum for obstruction-type offences.

1772. Offences involving assault or intimidation of an inspector, or breach of a prohibition notice, obviously fall into a much more serious category, although I am not aware of any Victorian statute which imposes a mandatory minimum penalty for equivalent offences.

1773. In my view, there is no justification for having mandatory minimum penalties for any offence under the Act. Neither the Authority, nor anyone else I have spoken to, has suggested otherwise.

1774. In fact, in two recent prosecutions, the Authority conceded that ss.42(4) and 44(3)(c) and (d) did not require the court to impose the minimum fine, if an alternate non-monetary disposition was appropriate.

1775. In my view, the sentencing discretion of courts should not be fettered in relation to offences under OHS legislation. It is well-recognised that mandatory sentencing can result in the same punishment being imposed for offences with quite different levels of culpability, where the "actual behaviour which constitutes the offence may be a far cry from the perceived paradigm of that offence".[682]

1776. Consistent with this view, I also recommend (below) the repeal of s.53, which imposes additional penalties for further offences.

Maximum penalties for general duty offences

1777. I am asked by Term of Reference 4 to make –

> *"recommendations on the level and types of penalties to achieve deterrence objectives and influence and promote health and safety outcomes".*

1778. For the reasons set out below, I have reached the conclusion that the penalties for the general duty offences should be substantially increased. I do not propose, however, to recommend a particular level of penalty for any particular offence under OHSA. It is

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682 Submission of Associate Professor John Willis to the Senate Legal and Constitutional Reference Committee Inquiry into the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999.*

beyond the scope of this review – and my own expertise – to undertake the sophisticated analysis which would be necessary in order to specify a precise maximum fine or period of imprisonment in respect of each offence or group of offences.

Comparative penalties

1779. The current maximum penalty under OHSA for a breach of the general duty to ensure a safe working environment is $250,000 for corporations and $50,000 for individuals.

1780. The following table shows the equivalent penalties in other jurisdictions:

	NSW	Vic	Qld	SA	WA	Tas	NT	ACT
Individual offence	$55,000	$50,000	$75,000	$100,000	$200,000	$50,000	$25,000	$25,000
Corporate offence	$550,000	$250,000	$375,000	$100,000	$200,000	$150,000	$125,000	$125,000

1781. As this table demonstrates, the maximum penalties applicable to corporations in Victoria are considerably lower than those in New South Wales and Queensland. Both Western Australia and the Commonwealth are proposing to increase the maximum penalties under their respective OHS statutes to levels well above those provided in OHSA.

1782. In 1995, the Industry Commission recommended that all jurisdictions increase the maximum penalties in OHS legislation to $100,000 for individuals and $500,000 for corporations, and noted that even penalties of this magnitude may not be appropriate in the longer run. The Commission's view was that the "appropriate level is likely to be much higher".[683]

1783. The key questions are as follows:

(a) do the existing maxima for offences against OHSA accurately reflect the seriousness of the offences in question?

(b) do the existing maxima adequately deter would-be OHS offenders?

The relative seriousness of the general duty offences

1784. It is clear to me that the community in general – and employers and unions in particular – regard a culpable failure to provide a safe working environment as a matter of the utmost seriousness. This is a reflection of the view that "one workplace death is one too many" (see Chapter 2). As I said at the beginning of this Report,

683 Industry Commission, 1995, vol. 1, p. 117.

there is universal condemnation of the notion that exposure to the risk of injury or death in the workplace is simply "the price you pay for having a job".

1785. As an aid to considering this issue, I set out in the Discussion Paper a table of comparable offences and their respective penalties. For ease of reference, that table is reproduced at the end of this chapter.

1786. This comparison reveals a stark disparity between the current maximum penalties for OHSA offences and the maxima applicable to comparable offences under other legislation. For example, the offence of knowingly handling food in an unsafe manner – which may at worst cause injury or death – is punishable under the *Food Act* by a fine of up to $500,000. Under the *Environment Protection Act*, the offence of dumping industrial waste likewise attracts a maximum penalty of $500,000.

1787. These are, of course, serious offences. But no-one would suggest that these are - or would be regarded by the community as being - more serious offences than breaches of the OHSA duty to maintain a safe working environment. Rather the contrary. Given that the maximum penalty for disobeying an emergency direction of the Chief Electrical Inspector is $1 million, it would seem clear that the community – and the Parliament – view safety-related offences as being at the very serious end of the scale.

1788. In short, the disparity between the maximum penalties under OHSA and the maxima for comparable regulatory offences is wholly unjustified and must be rectified.

Deterrent effect of penalties

1789. A number of submissions have argued that there should be no consideration of increased penalties because-

> *"there is no evidence that increased penalties will improve health and safety outcomes."*

1790. I do not regard the lack of a statistical correlation as negating the case for increased penalties. First, the rate of incidence of workplace injuries is, at best, only one indicator of OHS "performance" by employers. Secondly, and more importantly, the consultations have left me in no doubt that the threat of prosecution, and the size of the potential penalties, are significant motivating factors in the minds of employers in relation to compliance with OHSA.

1791. In 1995 the Industry Commission made a startling finding. The Commission produced figures which quantified as a financial risk the probability of an OHS offender being inspected, the likelihood of a breach being detected, prosecuted and convicted and the severity of likely penalty. It concluded that, at best, OHS offenders faced an "expected penalty" of just $33. In Victoria, the expected penalty was estimated to be $29. Whilst I have not attempted to replicate the statistical analysis

conducted by the Industry Commission, the expected penalty – as at the beginning of 2004 – would not be substantially greater, for the following reasons.

1792. There has been a substantial increase in the number of inspectors in the last 10 years. In 1993/4 the Authority is reported as having had 170 inspectors. It now has around 300. The number of inspections, however, has dropped dramatically, from 70,579 in 1993/4 to 48,425 in 2002/03. Furthermore, due to increasing numbers of workplaces, the overall ratio of inspectors to workplaces has only marginally increased[684] and the ratio of inspections to workplaces is considerably lower than it was in 1993/4.

1793. In large part, it would seem, the fall in the number of inspections is to be explained by the huge increase in the intensity of enforcement activity per workplace visit, as follows -

- The number of improvement notices has increased from 1,804 in 1993/4 to nearly 15,000 in 2002/03.
- The number of prohibition notices has increased from 875 in 1993/4 to 2904 in 2002/3.

1794. Moreover, the number of prosecutions has increased from 64 in 1993/4 to 149 in 2002/03. The average penalty for OHS offences has also increased from $12,682 in 1993/4 to $22,213 over the last three financial years.

1795. It has been repeatedly said in consultations - by employers and by the lawyers who advise them – that the threat of prosecution is a matter of very great significance. This is a corollary of the growing importance to employers of establishing a reputation as a safe employer. There is also the increasing public opprobrium and adverse publicity associated with charge, prosecution and sentence in OHS matters.

1796. Furthermore, in research recently undertaken on the Authority's behalf by Sweeney Research Pty Ltd, one hundred employers were surveyed. 26% agreed that the threat of being prosecuted, or the fact of another employer being prosecuted, encouraged them to make changes to their organisation's health and safety procedures. Of those, 46% made changes because "the fear of prosecution is always on [their] minds". The remaining 74%, who said that the threat of prosecution did not encourage them to make changes to their organisations, were employers who believed that they were already meeting the required standards.

1797. This study confirms that the threat of prosecution, and penalties, has a real impact on driving compliance by employers, particularly those who might otherwise lag behind.

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684 In 1993/4 the ratio was estimated to be one inspector per 1165 workplaces. Today it is approximately one inspector to 1000 workplaces.

However, given the very low "expected penalty", there is considerable scope to improve general deterrence by increasing penalties.

Other factors

1798. It has also been submitted that the relatively low level of the fines meted out by the Courts in health and safety prosecutions suggests that there is no need to increase the maximum penalties. It is submitted that, before recommending any increase in the statutory maximum, I should seek to discover why the courts have not "flexed their statutory muscle".

1799. In the Discussion Paper I noted that the average fine for a breach of the general duty provisions in 2002/2003 prosecuted in the summary stream represented 7.18% of the statutory maximum and 17.94% of the Magistrates' Court sentencing cap.

1800. In my view, these statistics are of no real assistance in determining whether the existing maxima are appropriate. As the statutory maximum is the first point of reference in the determination of an appropriate penalty in a given case, the low level of fines may simply reflect that the starting point is too low.

1801. VECCI submitted that any proposal to increase penalties under the legislation should only be considered –

> *"in the context of the open-ended nature of the obligations that are now imposed by the existing framework of legislation… Proponents of significant increases in fines or penalties must also justify why such changes should not also be accompanied by the introduction of more prescriptive direction for employers in terms of the obligations required to be complied with."*

1802. There is considerable force in this point. In my view, the clarification of the requirements of the "practicability" test, and the inclusion of a provision about Code of Practice compliance, will significantly enhance the ability of dutyholders to take positive measures to avoid criminal liability under the Act.

Further penalties for subsequent offences

1803. It is also necessary to consider the impact of s.53 on the question of appropriate maxima. Section 53 of the OHSA gives the court a discretion to impose a further penalty, in addition to the penalty it imposes for an offence, where the offender has previous convictions under the Act. Similar provisions are contained in EPSA (s.32) and DGA (s.45A).

1804. In the original Act, s. 53 allowed the sentencing court to impose an additional penalty where an offender had been previously convicted of "the same offence" and had on the present occasion "wilfully repeated the act or omission constituting the offence".

1805. The current provision was inserted in 1990. The Minister's second reading speech indicated that the exercise of the judicial discretion to impose an additional penalty

should not be restricted to cases involving repetition of the same offence. The Minister, Mr Pope, said:

> "*The Bill provides for further penalties for subsequent offences. This broadens the scope of the existing provision, in recognition that the notion of "wilful repetition" of the "same" offence is unduly restrictive. Accordingly, the Bill provides for judicial discretion in imposition of any further penalty.*
>
> *The targets of the Bill are those employers who blatantly disregard the occupational health and safety legislation, those who put profits ahead of their employees' lives and livelihoods, and those who do not change their ways even after they are convicted of offences against the Act or Regulations."*

1806. Section 53 applies only to repeat offending against the OHSA. It has no application in a case where an offender is convicted of an offence under DGA or EPSA and is subsequently convicted of an offence under OHSA.

1807. Section 53 provides no guidance as to the relevant factors which should determine whether a court should exercise the discretion to impose an additional penalty. As a result, the courts have developed their own criteria for the application of the provision.

1808. In *DPP v. Pacific Dunlop Ltd* (28/6/1994 County Court), Judge Mullaly set out a "two step" process for sentencing in cases where s.53 applies, as follows:

> "*The use of the words "addition" and "further" indicate to me that the sentencing process involves first, the imposition of an appropriate proportionate penalty for the instant offence, and then, if the judicial discretion is so exercised, a further penalty".*

1809. Furthermore, his Honour held that, in determining whether to exercise the discretion under s.53, regard should had to –

- the circumstances of the instant offences;
- the nature of the previous offences as compared with the instant offences;
- the number of previous convictions as compared with the extent of the defendant's total operations; and
- the steps taken by the defendant to ensure a safe working environment.

1810. In the subsequent case of *Nylex Corporation Limited* (24/10/1997 County Court), Judge Hassett set out further factors relevant to the discretion under s.53, as follows –

- the objects of the Act as stated in s.6;
- the temporal proximity of the previous convictions to the instant offence; and
- the corporate structure of the offender.

1811. Section 53 was recently applied by Cummins J in the prosecution of Esso Australia Pty Ltd arising from the tragic explosion at the Longford gas processing plant. His Honour rejected the Mullaly approach as "too restrictive", explaining the proper construction of s.53 as follows:

> "*That section operates to provide a discretion to impose an additional penalty on a person convicted of an offence under the Act if a person has previously been convicted of an offence under the Act. Its operation is not limited to a prior conviction for the same offence or even the same category of offence. The power given is discretionary, that is, the court may, not must, impose an additional penalty.*
>
> *Section 53 does not increase the maximum penalty for any particular offence the subject of the present conviction; rather it empowers the imposition of an additional penalty. The section thus operates globally, is discretionary and is additional. The section does not state the criteria for its exercise. Accordingly it falls to be interpreted in accordance with its terms, content and purpose and in accordance with fundamental sentencing principles.*
>
> *The first such fundamental principle is that the offender is not to be punished twice for the one offence. The further penalty is not a second penalty for the prior conviction. Rather, it is a further penalty for the present conviction by reason of the existence of the prior conviction. The further penalty marks the seriousness of the present offences in the context of an offender who has previously offended.*
>
> *At common law, sentencing is ultimately an holistic, not a segmented process…It is not correct to sentence by a sequential, stepped process. However, given the terms of s.53…it is necessary to identify the further penalty. The parties are entitled to know it. As a consequence, in the otherwise holistic synthesis, if s.53 is invoked the element of prior conviction – a narrower concept than character – must necessarily be omitted to ensure there is no double counting. In all respects the ultimate sentence remains holistic.*
>
> *Circumstances justifying the operation of s.53 are the nature and number of prior convictions, their proximity or remoteness in time to the present offence, their relevance, the character otherwise of the offender, and whether the combination of prior convictions and present conviction demonstrates systemic failure by the offender or a longitudinal, general or flagrant failure to fulfil the lawful obligation of safety in employment." (emphasis added)*

1812. The further penalty provision is unique to health and safety legislation and is rarely invoked. Given the analysis of Cummins J, in particular the need to avoid "double counting" in sentencing and the need to sentence holistically according to fundamental principle, it is difficult to see how s.53 improves the sentencing process.

1813. Section 5(2) of the *Sentencing Act* 1991 obliges the court, in every case when imposing sentence, to consider the offender's previous character, including prior convictions. Section 53, when invoked, necessarily fragments the sentencing process by requiring that the court consider the prior history of the offender as a discrete issue, rather than as part of the overall circumstances.

1814. Furthermore, as Cummins J clearly stated, courts ultimately have regard to fundamental principles, including the principle that a court ought not to impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which sentence is imposed: see s.5(3) of the *Sentencing Act* 1991.

1815. I recommend that s.53 be repealed. The increased maximum penalties which should now be set for specific offences will need to be high enough to accommodate the most egregious cases and, in particular, to enable the Court to deal appropriately with repeat offenders.

Custodial sentences

1816. At present, certain offences under the Act carry custodial penalties, but there seems to be no coherent policy explanation for the selection of the particular offences to which they apply.

1817. At present, a Court may impose a term of imprisonment of up to five years for any breach of s.42(1) or (3). That is, the defendant is – potentially – liable to imprisonment both for the serious offence of assaulting or intimidating an inspector (s.42(3)) and for the relatively minor offence of failing to produce a document required by an inspector (s.42(1)(c)). Even more surprisingly, the reverse onus provisions of s.42(2) mean that, where any such offence is committed, the occupier and/or employer will also be liable to imprisonment for the offence, unless lack of knowledge can be proved.

1818. More appropriately, the offence of non-compliance with a prohibition notice carries a penalty of imprisonment of up to five years. The policy rationale here is obvious. The basis for the issue of a prohibition notice is the existence of a present or future "immediate risk to the health and safety of any person". Non-compliance with the notice means that the person to whom it has been issued has permitted the relevant activity to continue, notwithstanding the immediate risk. Of course, the degree of culpability will vary, according to the degree of wilfulness of the non-compliance.

1819. Finally, under s.53, the Act permits the court to impose on a person, in respect of a second or subsequent offence against the Act, a term of imprisonment of up to five years, in addition to the penalty imposed for the offence under charge.

1820. Two things are immediately clear. First, it is the clear policy of the legislation that imprisonment is an appropriate sentencing option for serious breaches of the legislation. That is the policy which underpins s.53 and s.44(3). Secondly, it is wholly inappropriate for a custodial sentence to be available in relation to most of the offences under s.42(1). The offence of assaulting or intimidating an inspector is, of course, comparable to the offence of assault or intimidation under the general criminal law, and should be dealt with accordingly. (I am aware that offences against

authorised persons discharging functions in the public interest are generally treated as being more serious than common assault.)

1821. It seems inexplicable that the offence of non-compliance with a prohibition notice carries a custodial sentence, yet the Act does not allow a court to impose a custodial sentence in respect of serious breaches of the general duties under Part III. There is no reason why the policy which informs s.44(3) should not apply, with equal force, to breaches of the general duties which create serious or immediate risks to health and safety.

1822. As I have mentioned in Chapter 29, although it is not a precondition of the issue of a prohibition notice that the inspector should first have identified a contravention, very often this will in fact be the case. Assume that the Authority decided to prosecute the notice recipient for a contravention arising from the activity giving rise to the immediate risk. There seems to be no reason in logic or policy why the court should not be able to impose a custodial sentence for that contravention, just as it would have been able to do had the recipient not complied with the notice.

1823. But there is an even more compelling reason for the Act to make a term of imprisonment a sentencing option for breach of the general duties. For reasons set out above, I have recommended that s.53 be repealed. I pointed out that one of the consequences of this repeal would be that the maximum penalties set for offences under the Act would need to be set at a high enough level to enable the court to deal appropriately with offences of the highest degree of culpability, which will include offences committed by repeat offenders. This must necessarily mean, in view of the custodial sentence currently available for repeat offending under s.53, that the maxima for breach of the general duties must include custodial penalties.

The position in other States

1824. The imposition of custodial sentences for general duty crimes is not novel. In fact, most other jurisdictions provide for imprisonment for breaches of the general duties.

1825. Under the NSW Act, the maximum penalty for a general duty offence by a natural person who has previously been convicted of an offence against the Act is $82,500 or imprisonment for 2 years or both.[685] In Queensland, the maximum is $50,000 or 6 months imprisonment. This is not dependent on the offender having a previous conviction and the maximum term of imprisonment increases depending on the nature of the harm caused by the breach. For instance, in the case of a general duty breach which results in multiple deaths the maximum penalty is $2 million or 3 years imprisonment or both.[686]

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685 NSW Act, s.12(c).

686 Qld Act, s.24.

1826. The SA Act imposes a maximum penalty of 5 years imprisonment (in addition or as an alternative to a fine) if a person contravenes the general duty provisions knowing that the contravention was likely to seriously endanger the health and safety of another or was recklessly indifferent as to whether the health or safety of another was so endangered.[687]

Recommendation

1827. I recommend that the Act be amended to provide –

(a) for a substantial increase in the monetary penalties attaching to breaches of the Act, the amount of such increase to be determined taking into account all of the factors I have identified (including the issue of multiple charges, referred to below); and

(b) that for a general duty breach which involves high level culpability, the court should be able to impose a custodial sentence.

1828. Again, as I mentioned at the start of this chapter, it is beyond the scope of this review – and my own expertise – to determine an appropriate maximum fine or term of imprisonment for each specific offence or group of offences.

Other forms of penalty

1829. Under the current scheme the courts have limited sentencing options for dealing with health and safety offences. Fines, with or without conviction, are the most common sentencing order and are a particularly 'blunt' tool.

1830. In 1994, the Australian Law Reform Commission reported on the effectiveness of monetary penalties in relation to securing compliance with the *Trade Practices Act 1974* (Cth). The Commission made certain observations about the limited effectives of monetary penalties for corporate offenders. Those observations, which are equally applicable to health and safety matters, were as follows:

- Monetary penalties do not necessarily result in offenders taking internal disciplinary action against responsible officers. As a consequence, internal controls are often not revised to prevent further contraventions.
- The burden of large monetary penalties may be borne by shareholders, workers or consumers, rather than by responsible officers of the offending corporation.
- Monetary penalties may convey the impression that offences are purchasable commodities or are a cost of doing business.

687 SA Act, s.59(1).

- A large monetary penalty may force a corporation into liquidation. The Court could be faced with a choice between putting the company into liquidation or imposing a penalty that does not reflect the gravity of the offence; and
- Monetary penalties are prone to evasion through the use of incorporated subsidiaries and other avoidance techniques such as asset stripping.[688]

1831. The courts have available a variety of other sentencing dispositions under the *Sentencing Act* 1991, but many of these alternatives are inapplicable in health and safety prosecutions, particularly those conducted against corporations.

1832. In the following section, I propose new sentencing options for the OHSA – health and safety undertakings, community service orders and adverse publicity orders – to be used in addition to or as an alternative to the imposition of a fine. There is broad support, from those whom I have consulted and those from whom I have received submissions, for the introduction of alternative sentencing options.

Health and safety undertakings

1833. Under s.72 and s.75 of the *Sentencing Act* 1991, a court can release an offender (with or without conviction) for a certain period, subject to the offender giving an undertaking with conditions attached. The undertaking must include a condition that the offender be of "good behaviour" during the period of the undertaking, and the Court may impose "special conditions".

1834. In a recent OHSA prosecution for a failure to comply with a prohibition notice, the Magistrates' Court released the defendant (a training and education institute) without conviction, on an undertaking with a special condition that required the institute to engage a WorkSafe approved OHS consultant to assist to –

- review and assess the employer's existing OHS management systems and recommend improvements;
- develop a program for implementation, as a component of the system, including an internal continuous audit and risk assessment process based on the SafetyMAP model;
- develop a strategy and program for implementing the recommended changes based on available funds and ongoing budgetary considerations;
- provide OHS training for managers and for members of the OHS Committee;
- establish OHS as a component of performance management for managers and staff; and

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688 Australian Law Reform Commission, *Compliance with the Trade Practices Act 1974,* Final Report, 1994, para 10.3. Retrieved from the Australasian Legal Information Institute website, January 2004: http://www.austlii.edu.au/au/other/alrc/publications/reports/68/ALRC68.html

- provide to WorkSafe within 30 days a proposal for an OHS session as an activity in the week of orientation for new students in 2003.

The defendant was also required to include in its annual report a statement concerning the matter.

1835. This example highlights the potential utility of such undertakings in promoting greater OHS compliance in the future. At present, however, the use of undertakings is limited to "lower order" breaches.

1836. In the previous financial year, undertakings were imposed in only 18 out of 149 completed prosecutions.

1837. The current court practice is consistent with the general principle that undertakings are appropriate for low level offending, or exceptional cases where mercy is warranted – see s.70 of the *Sentencing Act* 1991, which sets out the purposes of certain orders, including undertakings.

1838. In my view, the availability of undertakings as a sentencing option in OHS prosecutions should not be confined to "lower order" breaches. The conditions imposed in undertakings have the potential to significantly improve standards by requiring dutyholders to adopt a systematic approach to health and safety. For more serious offending, courts should be able to impose fines and adverse publicity orders (see below) in addition to a health and safety undertaking. The main advantage of health and safety undertakings is that the terms of the undertaking can be tailored to suit the particular circumstances and can bring about internal change in the offender's business to secure or at least encourage future compliance with the Act.

1839. I have in mind a provision along the following lines, modelled on the *Sentencing Act*:

Health and safety undertakings

(1) A court, on being satisfied that a person is guilty of an offence against this Act, may with or without recording a conviction, and in addition to or as an alternative to any other penalty or order that may be made by the Court in connection with the offence, adjourn the proceeding for a period of up to 5 years and release the offender on the offender giving a health and safety undertaking with conditions attached.

(2) An undertaking under subsection (1) must have as conditions –

(a) that the offender appear before the court if called on to do so during the period of the adjournment and, if the court so specifies, at the time to which the further hearing is adjourned; and

(b) that the offender does not commit a further offence under this Act or the Equipment (Public Safety) Act 1986 or the Dangerous Goods Act 1985 during the period of the adjournment; and

(c) that the offender observes any special conditions imposed by the Court, including but not limited to conditions requiring the offender to:

(i) engage an appropriately qualified and/or accredited consultant to assist the offender with occupational health and safety matters;

(ii) develop and implement a systematic approach to managing health and safety risks that arise in the course of the offender's trade, business or undertaking; and

(iii) carry out a specified health and safety audit of the activities carried on by the offender.

Adverse publicity orders

1840. As I have said in discussing incentives for compliance (see Chapter 24), I have formed the clear impression during the consultations that employers - particularly medium-sized and large employers - are placing increasing importance on establishing a reputation as "a safe employer".

1841. There are, of course, two sides to the reputational impact of OHS. There is the positive side, where public recognition can be accorded to employers for high level OHS compliance. And there is the negative side, constituted by the adverse publicity which is almost always associated with serious injury or death in the workplace.

1842. Research by Gunningham showed that, for larger organisations, corporate image and credibility ranked second as a motivator behind regulation-related motivators[689]. As Wright notes:

> *"The strongest motivator identified by research is the fear that the adverse publicity, loss of confidence and regulatory attention subsequent to a serious incident will cause curtailment of operations, imposition of additional costs, loss of corporate credibility and loss of business/interruption of operations."*[690]

1843. KPMG surveyed over 400 managers and concluded that -

> *"although concerns relating to corporate image (particularly negative publicity) were reported by many CEOs, these concerns were reported to have less impact compared with those relating to other issues such as moral responsibility, regulatory or organisational requirements, and commercial factors."* [691]

Nevertheless, 86% agreed that their safety record affected their personal reputation.

1844. Corporate image is particularly important to firms operating in high-risk industries, especially where the impact of an OHS incident would extend directly to members of the public. It is also important to firms who rely on community or government confidence to sustain or expand their business.[692]

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689 Gunningham, N., 1999.

690 Wright 1998, p.12.

691 KPMG Consulting, 2001, p.117.

692 KPMG Consulting, 2001, pp.114-115.

1845. Furthermore, if penalties imposed by courts for health and safety offences are to achieve the desired degree of general deterrence, it is essential that they be publicised widely. Media reporting of prosecution outcomes is one means by which this information is disseminated. But there is, in my view, a strong case for giving the courts the power to order the offender itself to publicise the offence and the punishment, as part of the penalty for the offence.

1846. The power to make adverse publicity orders already exists in Victoria under the *Environment Protection Act* (s.67AC). At a national level, both the *Trade Practices Act* 1974 (Cth) and the *Australian Securities and Investments Commission Act* 2001 (Cth) have conferred a similar power in relation to competition and corporations law offences.

1847. I recommend enacting a provision along the following lines, based on the NSW Act:

Adverse publicity orders

(1) A court may, in addition or as an alternative to any other penalty or order that may be made by the Court in connection with the offence, order the offender to take specified action within a fixed period:

(a) to publicise the offence, its consequences, the penalty imposed and any other related matter;

(b) to notify specified persons or classes of person of the offence, its consequences, the penalty imposed and any other related matter including but not limited to the publication in an annual report or any other notice to shareholders of a company or the notification of persons aggrieved or affected by the offender's conduct.

(2) If the offender fails to comply with an order under subsection (1), the prosecutor or a person authorised by the prosecutor may take action to carry out the order as far as may be possible, including action to publicise or notify:

(a) the original contravention, its consequences, the penalty imposed and any other related matter, and

(b) the failure to comply with the order made under subsection (1).

(3) The offender is liable to pay the costs of any action taken by the prosecutor or a person authorised by the prosecutor pursuant to subsection (2).

Community service orders

1848. A community service order is an order which requires a person to perform a service that is for the benefit of the community or a particular section of the community.[693] Community service orders primarily give effect to restorative notions of justice, rather than deterrence and retribution, in that they require the offender to –

> *"correct the harm that they have inflicted on the community as a result of their contravention."*[694]

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693 Drawn from the definition of "community service order" in s.86C of the *Trade Practices Act* 1974 (Cth).

694 Explanatory Memorandum to *Trade Practices Amendment Bill (no 1) 2000 (Cth),* p.5.

1849. Section 116 of the NSW Act provides-

> "*(1) The court may order the offender to carry out a specified project for the general improvement of occupational health, safety and welfare.*
>
> *(2) The court may, in an order under this section, fix a period for compliance and impose any other requirements the court considers necessary or expedient for the enforcement of the order.*
>
> *(3) A Local Court may not make an order under this section unless it is satisfied that the costs of complying with the order does not exceed the maximum amount for which the General Division of the Local Court has jurisdiction…"*

1850. The EPA Act contains a similar provision.[695] In my view, the Act should include a provision similar to s.116 of the NSW Act. The provision should, as sub-section s.116(3) of the NSW Act does, take account of the limited jurisdiction of the Magistrates' Court in OHS matters.

The problem of duplicity and s.21(2)

1851. It is clear enough from the language of s.21(2) that Parliament intended to provide a non-exhaustive list of generic instances of failures, each of which would constitute a contravention of the general duty under s.21(1). Suppose there was an incident at a workplace where an employee injured his hand in a machine, and that the Authority, upon investigation, concluded that the employer had failed –

(a) to provide and maintain safe plant (see s.21(2)(a)); and

(b) to provide the training and supervision necessary to enable that worker to perform his work without risk to his health (see s.21(2)(e)).

1852. The employer could be charged with a breach of s.21(1). That is, it would be the Authority's case that, in those two respects, the employer had breached s.21(1). It is not, however, possible for these matters to be dealt with in a single information. The Victorian Supreme Court has held that a single information which particularised both of the relevant sub-paragraphs of s.21(2) would be bad for duplicity, as alleging more than one offence against s.21(1) and 47(1).[696] As a result, each separate allegation of a failure to which s.21(2) refers must be the subject of a separate information.

1853. There is, in my view, considerable force in what Fisher P said in his dissenting judgment in *Boral Gas (NSW) Pty Ltd v Magill*[697]. His Honour said –

> *"Most accidents have multiple causation. This case, as the particulars show, is typical. Some matters are breaches of safe working practice, safe working codes and regulations under other*

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695 EPA Act 1970, s.67AC(2)(c).

696 *Chugg v Pacific Dunlop* [1988]; *R v Australian Char Pty Ltd* (1995) 5 VIR 600 at 601-8 – see generally, Johnstone *1997 pp.191 ff.*

697 (1995) 58 IR 363.

> *statutes. The device of bringing the central allegations together under one count, under s.21(1), is inherent in the structure of the Act itself and the long tradition of industrial litigation …".*[698]

1854. In my view, the Act should be amended to remove any legal obstacle to the laying of a single information under s.21(1), the particulars of which refer to more than one of the sub-paragraphs of s.21(2). There will, of course, be many cases in which it will be necessary for separate informations to be laid. In the example referred to earlier, the allegation of a failure to provide safe plant would typically be the subject of a separate information, because quite different issues of "reasonable practicability" would apply from those which would be applicable to a failure to provide appropriate training and supervision.

1855. The real benefit of the change I am recommending would be to avoid the need for a multiplicity of informations where what is to be alleged is a variety of instances of non-compliance with a particular sub-paragraph of s.21(2). It is easy to contemplate in relation to s.21(2)(a), for example, that the failure to provide a safe system of work might be particularised by reference to a series of specific acts or omissions. The provision of s.31 of the NSW Act provides a useful model for amendment.

1856. In the present context, this issue is relevant to the question of what the appropriate penalties should be. Clearly, the number of informations – whether high or low – should not influence the penalty decision. Instead, the court should be able to assess the culpability of the offender's conduct in relation to the particular incident viewed as a whole, and to fix an appropriate penalty having regard to the maximum set by the legislation. This means, in turn, that the maximum penalties should be set at appropriate levels to enable this overall assessment to be reflected in the sentence.

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698 At 387.

Chapter 36: Sentencing guidelines and summary prosecutions

1857. In the consultations, many have expressed concerns about apparent inconsistencies in sentences for offences under the OHSA. Some also argued that the penalties meted out by the courts – particularly those imposed by the Magistrates' Court, where most OHSA prosecutions are conducted – were inadequate, though no particular instances of inconsistency or inadequate penalties were identified.

1858. Statistics provided by WorkSafe show that, on average, a breach of the general duty provisions attracts around 17% of the sentencing cap in the Magistrates' Court and around 7% of the statutory maximum penalty. It is impossible, however, to draw any conclusions from these statistics concerning either the adequacy of penalties generally or the consistency of sentencing Magistrates. All that can be said is that the sentences imposed by the Magistrates' Court are generally at the lower end of the penalty range.

1859. I have considered three possible options for improving consistency in sentencing –

- guidelines to structure the sentencing discretion in OHS matters
- a specialised OHS court or division; and
- increasing the number of prosecutions in superior courts.

Sentencing guidelines

1860. Richard Johnstone recently published a study of recent Magistrates' Court OHS prosecutions[699]. In Johnstone's view, arguments advanced in mitigation of penalty (at plea hearings) direct the court's attention away from an analysis of the failure of the defendant employer's OHS systems, by focusing attention on the minute details of the events leading up to an injury.

1861. Johnstone has argued that this approach –

> *"enables defendants to shift blame onto workers and other; and facilitates [the making of] uncontested claims to be good corporate citizens; coupled often with the allegation that the accident was a 'freak' or 'one-off'."*

He has further argued that the event is "isolated in the past" by submissions which focus on the remedial action subsequently taken by the defendant – such as the introduction of a new management team or OHS management system.

1862. Johnstone argues that his recent empirical work confirms the efficacy of these techniques in achieving reduced penalties for OHS offences. That in turn, he says, reveals a lack of judicial understanding and appreciation of the culpability involved in such offences. Johnstone argues that there is, therefore, a need for sentencing

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699 Johnstone, R., *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety Offences in Victoria*, Federation Press, Sydney, 2003(a)

guidelines in legislation and/or for guideline sentencing judgments to better structure and inform the exercise of the sentencing discretion. According to Johnstone -

> "*Transparent and well structured sentencing guidelines can be particularly useful in ensuring that irrelevant or inappropriate sentencing factors are not considered by the court, and that convicted offenders have the exemplary or unsatisfactory aspects of their OHS performance considered by the courts. For example, sentencing guidelines might outline the appropriate range of sanctions for OHS offences, guide the courts in their choice of sanction, indicate factors to be ignored, to be considered in mitigation (for example a proven compliance program, and/or OHS management system, a regular process of self-reporting of contraventions and so on) and in aggravation (a poor OHS record, proven top management involvement in the offence; lack of co-operation in investigation and so on). Transparent and well publicised sentencing guidelines will signal to duty holders that their investment in compliance programs and OHS management systems will be rewarded if they are prosecuted for a contravention which occurs despite these measures.*"

1863. The only Australian jurisdiction which provides for specific OHS guideline judgments is NSW. Under the NSW Act the Full Court of the Industrial Relations Commission may issue guideline judgements on the application of the Attorney-General. I am not, however, aware of any guideline judgments having been given by that Court.

1864. It is unnecessary for me to make any recommendations in this regard, as recent reforms to the *Sentencing Act* 1990 will empower the Victorian Court of Appeal to give guideline judgements. The reforms will come into operation on 1 July 2004, unless proclaimed earlier.

1865. I do not consider that there is a need for specific sentencing guidelines in OHS legislation. While the factors which determine the culpability of the defendant under OHSA are different from those applied in traditional crimes, it is vital that OHS offences be seen – correctly – as mainstream criminal offences, and subject to the rules which apply to criminal conduct generally.

1866. As Johnstone himself argues, the deterrent effect of prosecutions would be seriously undermined if the courts and the community were to perceive OHS offences as being somehow less serious, as only "quasi-criminal" in nature. Laying down particular rules in legislation to structure the sentencing of OHS offenders would seem to have the potential to do just that. Furthermore, although there is only limited Victorian case law in relation to sentencing OHS offenders, the courts have developed a working body of sentencing principles for health and safety offences.

A specialised court

1867. It has been suggested that the establishment of a specialised OHS Court, or a specialist Division of the Magistrates' Court, would improve consistency in sentencing for OHS offences. This is said to be made necessary by the unique nature of OHS

offences, and the need for familiarity with the concepts used in the legislation and with the whole gamut of issues associated with workplace safety.

1868. On current prosecution levels, it is unlikely there would be a sufficient number of prosecutions to warrant one or more magistrates being allocated full-time to hearing OHS prosecutions. There would, however, be scope for establishing a panel of magistrates one of whom would be available to sit whenever an OHS prosecution was heard.

1869. The obvious advantage of establishing such a panel would be that the panel members would, by dint of frequent exposure to OHS law and practice, develop a level of understanding and sophistication in dealing with OHS matters, which in turn would reduce the need for lengthy expositions by counsel on matters of law. It is highly desirable that the members of such a panel – or, if there is not to be a panel, all magistrates – receive some training in OHS law and practice. This could readily be done through the Judicial College. The resource implications would be small and the benefits enormous.

1870. One obstacle to consistency in sentencing is that magistrates seldom give written reasons for their decisions. The publication of written reasons would enhance consistency, as well as enabling the Authority to maximise the educative benefit of the Court's decisions.

1871. These are, of course, matters for the Chief Magistrate and the Attorney- General. No legislative amendment is required.

An underlying issue

1872. Stakeholder perceptions about the general trends in sentencing for OHS offences may reflect an underlying, more general, dissatisfaction with the nature of summary hearings.

1873. The sheer volume of cases decided every day by summary courts means that cases must be dealt with expeditiously. Sentencing often takes place "on the spot", and detailed reasons for sentence are rarely given. This is not in any way a criticism of the Magistrates' Court. It is simply an acknowledgement of the practical realities of summary justice. Neither the introduction of sentencing guidelines nor the establishment of a specialised division of the Magistrates' Court would greatly improve the conduct of summary OHS prosecutions in this regard.

1874. The underlying issue is whether it is appropriate for OHS offences to be determined by summary courts at all. The answer to this question must involve comparing OHS offences with those offences which are triable only in the County or Supreme Courts, for example, crimes such as manslaughter, rape and armed robbery.

1875. In my view, OHS offences should continue to be triable summarily. At the same time, there is a need to address the disproportionate number of matters which are dealt with in this way.

1876. Presently, the Authority seeks summary jurisdiction in the vast majority of its prosecutions. In 2002/03 only 11 of 149 OHS prosecutions were conducted in the County Court, and only five in the previous year.

1877. There are various possible explanations for this imbalance, as follows:

- The considerable scope afforded by the maximum penalties which may be imposed by the Magistrates' Court. At present, the sentencing cap for a general duty offence committed by a corporation is $100,000.
- A preference by the Authority to conduct its prosecutions 'in-house', in order to achieve the "consistency, transparency and predictability" of prosecutions required by the General Guidelines for Prosecution gazetted on 1 July 1998.
- The readiness of the Magistrates' Court to accede to applications for summary hearing, and the readiness of defendants to plead guilty to charges in the Magistrates' Court. In the last financial year, guilty pleas were entered in 75% of prosecutions conducted in the Magistrates' Court, but in only (roughly) 35% of the (few) prosecutions conducted in the County Court.
- The interest of all parties in the speedy disposition afforded by summary hearings.

1878. In New South Wales the position seems more balanced, with a good proportion of prosecutions conducted in the Industrial Relations Commission (in court session), which is the superior court in the NSW OHS scheme. The Commission's judgments, including sentencing remarks, are delivered in writing and are publicly available. This must result in greater clarity and certainty in the system.

1879. There is no need for legislative amendment to deal with this issue. There are, however, several obvious practical measures which might increase the number of superior court prosecutions. The most important of these is the need for the Authority to foster closer links with the Office of Public Prosecutions. For example, arrangements could be made for Authority lawyers to be seconded to the OPP to handle County Court and Supreme Court prosecutions. Alternatively, a protocol might be developed under which Authority lawyers are permitted to conduct and instruct in Crown OHS prosecutions. I understand that there was such an arrangement for the recent prosecution of Esso Australia Ltd in the Supreme Court.

Chapter 37: Crown liability

1880. The OHS legislation binds the Crown, not only in right of Victoria but also, so far as the legislative powers of the Victorian Parliament permit, the Crown in all its other capacities.[700] The Authority itself is bound by the legislation.

1881. Although the OHS legislation binds the Crown, it is silent as to whether the Crown is criminally liable for a contravention of that legislation.[701] But:

> *"if a statute binds the Crown by express words [as the OHS legislation does], then it is safe to conclude that the Crown is also subject to any penal sanctions (in the form of fines) in the statute."*[702]

1882. The issue does not arise under either the NSW Act or the Cth Act, but for different reasons. In addition to s.118 of the NSW Act (which corresponds with s.5 of OHSA), s.119 specifically provides that the Crown in any capacity may be prosecuted for an offence against the NSW Act or the regulations. Sections 118 and 119 fall within Division 3 of Part 7 of the NSW Act, which is headed 'Proceedings against the Crown and government agencies'. The other provisions in that Division are s.120 (which identifies the responsible agency for the purposes of proceedings against the Crown), s.121 (penalties in respect of proceedings against the Crown), s.122 (investigation, improvement and prohibition notices in connection with the Crown), and s.123 (proceedings against successors of government corporations).

1883. Section 11(1) of the Cth Act provides that the Act binds the Crown in right of the Commonwealth. Unlike s.119 of the NSW Act, however, s.11(2) of the Cth Act provides that nothing in the Act renders the Commonwealth, a Commonwealth authority (other than a Government business enterprise), or persons employed by the Commonwealth or a Commonwealth authority (again, other than a Government business enterprise) liable to be prosecuted for an offence under the Act.

1884. In the early 1990s, the Authority brought a proceeding against the Roads Corporation for three breaches of s.21(1) of the OHSA, arising out of the electrocution of an employee of the Road Traffic Authority, the predecessor of the Corporation. The issue of Crown liability was considered by the Supreme Court of Victoria, on appeal from a decision of a magistrate who had held that the Corporation was not immune from criminal liability and had found the charges proven.[703]

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700 Section 5 OHSA, EPSA, DGA and RTDGA. The corresponding provisions in the other States are s.118 NSW Act, s.4 Qld Act, s.5 SA Act, s.4 Tas Act and s.4 WA Act.

701 See Creighton, B. & Rozen, P., 1997, p.180ff

702 Hogg, P.W., *Liability of the Crown*, 2nd ed, LBC, North Ryde, 1989, p.234

703 *Roads Corporation v. Morris Gerkens* (unreported, Supreme Court of Victoria, Eames J, 28 May 1993); and see discussion of that case in Creighton, B. & Rozen, P., 1997, pp.181-2.

1885. The appeal was dismissed. In relation to s.5 of the OHSA, Eames J said:[704]

> *"This legislation concern[s] the health and well-being of all workers in the State. The Crown, in right of the State, and also the Commonwealth, through their many departments and corporations, is probably the largest employer in the State. There is every reason to believe that in providing, by s.5, that the Act applied to the Crown, the Parliament intended that section to ensure the application to the Crown of those provisions which imposed criminal liability just as much as those creating civil liability."*

1886. His Honour went on to say:[705]

> *"One might suppose that any legislation which lays down an industrial regime which may be costly to employers but the disregard of which may cause loss of life or serious injury must be capable of being enforced in the face of defiance and disinterest. The equivalent English legislation, the Health and Safety at Work Act 1974, specifically exempted the Crown from liability to criminal prosecution; this legislation, however, expressly states that it applies to the Crown and provides no express limitation as to that scope of operation. Parliament could, very easily, have stipulated that s.5 was intended to apply only with respect to civil liability."*[706]

1887. In his Honour's view,[707] there was:

> *"no reason to conclude that Parliament intended that the Crown would be exempted from the full scope of this important legislation. An intention to bind the Crown, for all purposes, would be consistent with the subject matter of the legislation, its purpose and policy and with the clear terms of s.5."*

1888. It follows that, as the OHS legislation currently stands, the Crown is both bound by it and liable to prosecution if it contravenes that legislation. I would nevertheless recommend that express words be used in the OHS legislation (along the lines of the NSW Act) to make it plain that the Crown can be criminally liable for a contravention. The legislation should also adopt the provisions contained in Division 3 of Part 7 of the NSW Act, again to clarify the procedure to be followed in cases where the Crown is prosecuted under the OHS legislation.

Prosecutions against the Crown

1889. As I noted in the Discussion Paper,[708] government agencies have seldom been prosecuted under the OHSA. According to data obtained from the Authority, there have been six such prosecutions in the past five years.

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704 *Roads Corporation v Morris Gerkens*, 1993 at30-31.

705 *Roads Corporation v Morris Gerkens* at32-3.

706 His Honour referred to s.6 of the then *Industrial Relations Act* 1988 (Cth), which was in similar terms to s.11 of the Cth Act to which I have already referred.

707 *Roads Corporation v Morris Gerkens* at 33.

1890. As to the policy relating to the criminal liability of government agencies under OHS legislation, Eames J in *Gerkens* said[709]:

> *"Whilst much of the work of government today is conducted by its statutory corporations they have, to varying degrees, significant independence from government. Many such corporations compete with private enterprise; they charge fees for service to other corporations or government departments. Their relative independence means that they are capable of evincing differing degrees of concern for the safety of their employees. The sting and notoriety (and the consequent impact on its budget of a fine) of prosecution and conviction may more readily today be regarded as being intended by Parliament to apply to recalcitrant employer corporations than may have been thought likely in the time when Cain v. Doyle was decided. Bropho, in my view, reflects that changed awareness."*

1891. Axiomatically, OHSA applies with equal force to public sector employers as to private. The exercise by the Authority of its discretion whether or not to enforce the OHS legislation against a dutyholder cannot be affected by the fact that the dutyholder is a government department or agency.

1892. Inevitably, there are tensions when the Authority looks to enforce the OHS legislation against another department or agency. But the Authority must be impervious to such tensions. OHSA must, of course, be administered and applied with equal rigour to all dutyholders.

1893. The Authority certainly takes this view. In 2000, WorkSafe initiated a proactive regulatory strategy to improve the OHS performance of the Victorian public sector. This led to an increased enforcement of the OHS legislation against public sector dutyholders. In the financial year ended 30 June 2000, 13 improvement notices were issued by WorkSafe to the three largest government departments. In the financial year ended 30 June more than 200 notices were issued to the same departments.

A protocol for prosecutions

1894. In my view, it is important that there be in place a protocol, which in clear terms sets out the guidelines that are to be followed by the Authority and another government agency where that agency is to be prosecuted by the Authority for an offence under the OHS legislation.

1895. A protocol for litigation between government departments and authorities has been in place in New South Wales since 1997.[710] The NSW guidelines, which apply to both civil and criminal proceedings, are "based on the general principle that litigation

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708 At para 489.

709 At 33-4.

710 Premier's Department, New South Wales, "Litigation Involving Government Authorities", Memorandum No.97-26 (Memorandum to Ministers) issued 8 October 1997

between Government authorities is undesirable and should be avoided whenever possible." Importantly, however, the guidelines recognise that:

> *"in some circumstances, the only appropriate course is to commence prosecutions against Government authorities as a way of enforcing compliance with environmental, safety and other standards. The guidelines are not intended to interfere with the normal prosecution discretion of Government authorities."*

1896. The NSW guidelines apply to all government departments, agencies, instrumentalities and bodies. The aims of the guidelines are to ensure that (so far as possible):

(a) in the prosecution of one government authority by another the cost to the public purse is kept to a minimum;

(b) only appropriate prosecution action is taken;

(c) inappropriate or irrelevant defences are not pleaded;

(d) the Court's time spent in resolving prosecutions or disputes involving government authorities is kept to a minimum;

(e) responsible Ministers are kept informed of pending prosecutions and possible disputes between government authorities; and

(f) government authorities act, so far as possible, as model litigants in proceedings before the Court.

1897. Central to the NSW guidelines is the requirement for consultation between the Government prosecuting agency and the Government defendant. The guidelines stipulate that the consultation process "is not meant to imply that Government authorities are treated any more favourably than other defendants."[711] Nor are the guidelines meant to "interfere with the normal prosecution discretion as to whether or not the commence prosecution proceedings or to discontinue prosecution proceedings."[712]

1898. I note that under ss.48(5) and (6) of the OHSA, the Authority is required to issue general guidelines "for or with respect to the prosecution of offences under [that] Act", and must publish those guidelines in the Government Gazette. The guidelines issued by the Authority under s.48(5) of the OHSA are silent in relation to criminal proceedings brought against the Crown.

1899. In my view, it is desirable for a protocol along the lines of the NSW guidelines to be incorporated into the guidelines issued by the Authority under s.48(5) of the OHSA.

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711 Premier's Department, New South Wales, "Litigation Involving Government Authorities", Memorandum No.97-26 (Memorandum to Ministers) issued 8 October 1997, para 2.5.

712 Para 2.2.

1900. As I have sought to make clear, nothing in what I am recommending is intended to suggest that the Crown as employer is different from any other employer, or that it is to be treated any differently so far as enforcement is concerned. Public sector employers are subject to OHSA in the same way as all other employers, and must be subjected with equal vigour to the application of the Authority's enforcement policies. This is but one further aspect of the important role of the public sector as an OHS exemplar, as discussed in Chapter 23.

PART 9: PUBLIC ACCOUNTABILITY

Chapter 38: Internal Review of Decisions

1901. Conformably with the Robens model, OHSA confers on the regulator strong powers of enforcement, both coercive and prohibitory. For example -

- an inspector[713] or a health and safety representative[714] can require the immediate cessation of a particular activity or - if necessary - of all activities at a workplace;
- an inspector[715] or a health and safety representative[716] can require a person to remedy a contravention of the Act, and can give directions as to the remedial measures which must be taken.[717]

1902. A person who fails to comply with such a requirement or such a direction commits a criminal offence.[718]

1903. No-one has suggested that these powers should be restricted, let alone removed. Nor should they be. The importance of workplace safety makes it essential that there be power to intervene in a workplace whenever risks are identified.

1904. What has, however, emerged clearly in the consultations is the need to provide an accessible, transparent system for review of the decisions by which such requirements are imposed. (In what follows, I deal only with review of decisions by the Authority, including in particular the decisions of inspectors. Mechanisms for challenging an exercise of power by a health and safety representative are discussed separately.

1905. The following examples were given in the Discussion Paper to illustrate the need for a responsive review mechanism:

- a newly-elected health and safety representative (HSR) has drawn to her attention by a workmate what is said to be an immediate risk to health and safety. She is unfamiliar with the operation of the plant in question but considers that, to avoid any risk of injury, she should direct a cessation of work under s.26(2). She gives the direction, and work stops. The employer, who does know how the plant operates, is convinced that the concern is unfounded and that there is in fact no risk. The employer is also very concerned about the economic impact of the stop-work, and wants an

713 Under s.44(1).
714 Under s.26(2).
715 Under s.43(1).
716 Under s.33(1).
717 Sections 44(1), 34(1).
718 Sections 44(3), 33(3).

inspector to intervene urgently (under s.26(5)) to determine whether the stop-work direction was justified or not. The inspector decides to issue a prohibition notice, and the employer wishes to contest that decision immediately;

- a WorkSafe inspector forms the opinion that an activity in a workplace involves an immediate risk to health and safety, and issues a prohibition notice under s.44(1). The employer complies with the notice but wishes to contest the basis of it, on the ground that the activity in question is entirely safe;

- an elected HSR forms the opinion that the Act is being contravened, or is likely to be contravened, and issues a provisional improvement notice under s.33(1). A WorkSafe inspector, having been required by the employer to do so pursuant to s.35(1), "inquires into the circumstances relating to the notice"[719] and decides that there is no contravention. The notice is cancelled. The HSR, and the members of the designated workgroup whom she represents, remain very concerned about the safety issue and wish to contest the inspector's decision.

1906. At present, there is provision for external review of, or appeal from, certain of the Authority's decisions. Those processes are outlined in the next chapter.

1907. There is, however, no proper system of internal review of decisions by the Authority. At present, such internal review as occurs is ad hoc, unrecorded and unaccountable. This is unsatisfactory for all concerned. Individual VWA managers are not equipped to deal with the requests they receive whether from employers, unions and HSRS to review some action – or inaction – of an inspector. On the other hand, for many who are affected by decisions there is no recourse to internal review at all.

1908. There is, in my view, an overwhelming case for the establishment of a procedure for internal review of the decisions which inspectors make. (Procedures for internal review exist under the NSW legislation[720] and, to varying degrees, in every other State). It should be a pre-condition of recourse to external review – that is, to VCAT – that the decision in question should first have been reviewed internally.

1909. In the remainder of this Chapter, I deal with the reasons for, and the necessary elements of, a system of internal review. In the next Chapter, I recommend that VCAT have exclusive jurisdiction for external review.

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719 Section 35(3).

720 Section 96.

Internal review of decisions

1910. Given that an inspector's decision is a decision of the Authority, internal review of inspectors' decisions provides in substance an opportunity for the Authority to reconsider its own decision – whether on request or of its own motion.

1911. In my view, a system of internal review must have the following characteristics:

(a) it must be transparent. The procedures and time lines must be set out in the Act, and there must be publication of the names of the persons appointed to manage the internal review process and their contact details, and of the procedures to be followed.

(b) It must be quick. Of course, the degree of urgency will vary from case to case, but there must be a capacity within the Authority to deal with urgent matters urgently. The best example is a prohibition notice which is challenged by an employer. In most instances, the urgency results from the employer's wish to recommence operations as soon as possible. A guarantee of speedy review reinforces the "if in doubt, prohibit" approach by inspectors which the interests of safety dictate.[721]

(c) There should be a right to review both an affirmative decision to exercise a power, and a decision not to exercise a power.[722]

(d) The right of review should be exercisable not only by dutyholders – typically when a power has been exercised – but also by health and safety representatives – typically when an inspector has refused to exercise a power, or has cancelled a PIN (which amounts to the same thing).[723]

(e) The Authority should be able to review an inspector's decision of its own motion. (This is equivalent to a power to revoke or rescind).[724]

(f) On review, the Authority should be able to make any decision which the inspector could have made and exercise any power which the inspector could have exercised.[725]

(g) The reviewing officer/body should give reasons for the decision arrived at on the review.

(h) The inspector should be a full participant in the review process and should, of course, be informed of the outcome and of the reasons for it.

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721 See paras 1915-6 below.

722 See by way of comparison the definition of "decision" in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), where the word "decision" is defined very broadly to include doing or refusing to do any act or thing.

723 See *Commonwealth Act* s.48 for an example of the HSR's right of review.

724 cf. *Interpretation of Legislation Act* 1984 (Vic) s.41A.

725 cf. *VCAT Act* 1998, s.51(1).

(i) The decision made on review becomes, for all purposes, the relevant decision, so that any subsequent proceeding for external review is a proceeding with respect to the review decision, not the primary decision.[726]

The scope of internal review

1912. The internal review should not, however, involve a complete remaking of the decision, of the kind which occurs in a proceeding for merits review before VCAT. Where legislation provides for VCAT review, the Tribunal "stands in the shoes" of the primary decision-maker, is provided with all the relevant information and then makes its own decision, as if it were the primary decision-maker. The only difference is that the Tribunal acts on the material available at the date of the hearing.

1913. Internal review is, by contrast, more in the nature of an appeal. That is, the purpose of the internal review is to examine the original decision, and the material on which it is based, in order to decide if any error was made. Thus, the basic materials for review would be the inspector's description of the circumstances, and his/her reasons for the decision arrived at, and such material as the party seeking review wishes to place before the reviewing officer.

1914. The question for the reviewing officer would, therefore, be whether the decision under review was correct at the time it was made.[727] It follows that, except in exceptional circumstances, the reviewing officer would not be expected to make an inspection of the workplace, as would be required if he/she were obliged to make a fresh decision, although this could be done if it were deemed necessary. The published information about the review processes would need to make clear the scope and limits of the review.

The need for speed

1915. A related issue is the need for speedy hearings in circumstances of urgency, of the kind identified earlier. The various powers conferred by OHSA, which enable work to be stopped or activity prohibited where there is assessed to be an immediate risk to health and safety, are powers which should, of course, be exercised sparingly. At the same time, it seems to be generally agreed that the importance of eliminating risk means that it is reasonable to take a precautionary approach, that is, to approach the exercise of these powers on the basis of "if in doubt, require the activity to be stopped". What does it matter if six such directions are given where a risk has, in fact, been overestimated if the seventh such direction saves a life?

1916. The corollary of this "abundance of caution" approach is, as I have suggested above, that an employer who considers that the risk identification – and therefore the

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726 Examples of such a process are readily to be found in the social security legislation.

727 cf. *Strange-Muir v. Corrective Services Commission of New South Wales* (1986) 5 NSWLR 234 at 250, referred to in *McDonald v Guardianship Board* [1993] 1 VR 521 at 528.

stopping of the activity – is wrong should be able to have the decision reviewed speedily.

The benefits

1917. The benefits of a strong, efficient system of internal review will be many. The fact – and the appearance – of transparency will greatly enhance the Authority's standing with workplace parties, and at the same time give inspectors confidence that their views will be listened to.

1918. More substantively, this system will mean that a bad decision can be changed quickly, and a good decision affirmed with equal speed. Either way, uncertainty and controversy should be minimised.

1919. Finally, there will be benefits internally, in that systematic internal review will –

(a) enhance quality control over inspectors' activities;

(b) identify legal or practical issues about which the Authority should publish a ruling or a guideline; and

(c) enable Authority managers to insist that any person seeking to challenge or criticise an inspector's decision must take the matter up with internal review.

Chapter 39: External Review of Decisions

Current procedures for appeal and review

1920. Under the OHS legislation, provision is made for appeals against, or applications for review of, various decisions and determinations, and for the resolution of disputes. Those appeals, applications and disputes are dealt with either by the Industrial Division of the Magistrates' Court[728] or by the Victorian Civil and Administrative Tribunal (VCAT).[729]

1921. The Industrial Division was created by s.181 of the *Employee Relations Act* 1992.[730] The jurisdiction conferred on the Industrial Division under the OHSA (as from 1 January 1997) was formerly exercised by the Employee Relations Commission.

1922. Of the Acts and regulations that make up the OHS scheme, only the OHSA confers jurisdiction on the Industrial Division. Apart from the OHSA, jurisdiction is conferred on the Industrial Division under the *Long Service Leave Act* 1992 and the *Outworkers (Improved Protection) Act* 2003.

1923. VCAT was established by s.8 of the *Victorian Civil and Administrative Tribunal Act* 1998. Its predecessor was the Administrative Appeals Tribunal. VCAT has three divisions – Civil, Administrative and Human Rights. The Administrative Division has five lists, including the General List and the Occupational and Business Regulation List.

1924. OHS legislation within the jurisdiction of VCAT's General List includes DGA, EPSA, OHSA and RTDGA. OHS legislation within the jurisdiction of VCAT's Occupational and Business Regulation List includes DGA and OHSA.[731]

1925. In some instances, decisions of the same type are reviewable by the Industrial Division under the OHSA, and by VCAT under another Act. One example is a decision of an inspector to issue an improvement notice or a prohibition notice. Section 46(1) of the OHSA provides that an appeal against a notice of either kind is to be made to the Industrial Division. On the other hand, a decision of that type made under EPSA is reviewable by VCAT.[732] Similarly, s.17C of DGA provides that a

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728 Sections 26(7), 32(3), 36(1), 40(4)&(5) and 46(1), OHSA.

729 Section 10(6), OHSA; r.16(4), OHS (Noise) Regs; r.28, OHS (Certification of Plant Operators & Users) Regs; r.415, OHS (Hazardous Substances) Regs; r.202, OHS (Major Hazards Facilities) Regs; r.418, OHS (Asbestos) Regs; ss.10A, 17C, 22 and 25, DGA; ss.17 and 25, EPSA; s.7 RTDGA (together with ss.30 and 33 of the *Road Transport Reform (Dangerous Goods) Act 1995* (Cth).

730 Now known as the *Long Service Leave Act* 1992. The name of the Act was amended by the *Commonwealth Powers (Industrial Relations) Act* 1996.

731 Section 59(6), OHSA.

732 Section 25.

decision of an inspector to issue a direction to remedy a contravention is reviewable by VCAT.[733]

1926. Another example is the review of a decision of an inspector to take possession of any plant or thing (made under s.40 of OHSA) and a decision of an inspector to take possession of any equipment or thing (made under s.17 of EPSA). The first decision is reviewable by the Industrial Division; the second by VCAT.

The need for consolidation

1927. I can see no justification for maintaining this bifurcation of jurisdiction. On the contrary, it would seem sensible for one body to have jurisdiction to review administrative decisions made by the Authority under the various pieces of safety legislation which it administers.

1928. A number of stakeholders have referred to the need for courts and tribunals dealing with OHS matters – whether administrative or criminal – to be "educated" about the legislation. They should be well-informed, both generally and at a level of detail, about how workplaces of different kinds function, and about the practicalities of such things as hazard identification and the assessment and elimination of risk.

1929. Clearly, consolidation of OHS jurisdiction in one place would greatly enhance the opportunities for the development of a specialist division, the members of which could be given appropriate initial training – for example, under the auspices of the Judicial College of Victoria – and would, by dint of their specialisation, develop a body of knowledge and understanding of OHS issues.

VCAT should have exclusive administrative review jurisdiction

1930. The jurisdiction which s.46 of OHSA confers on the Magistrates' Court, like the jurisdiction which s.17C of DGA confers on VCAT, is a jurisdiction to conduct a "merits review" of an inspector's decision. When conducting a review of this kind, the reviewing body "stands in the shoes" of the original decision maker. Typically, the reviewing body has available to it all the powers which were available to the primary decision-maker, and its task is to make the "correct or preferable" decision on the basis of the information available.

1931. In Victoria, jurisdiction to conduct administrative review of this kind has, since the establishment of the Administrative Appeals Tribunal, been conferred on the Tribunal (now VCAT). The same model operates at the Commonwealth level, where

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733 See also s.7 of the RTDGA and s.30 of the *Road Transport Reform (Dangerous Goods) Act 1995* (Cth), which, read together, provide that an application for review of a decision to issue a notice to remedy a contravention, or a notice to eliminate or minimise a danger, is made to VCAT.

jurisdiction to review administrative decisions is conferred on the Administrative Appeals Tribunal.[734]

1932. That model should apply equally to decisions of the Authority. It follows, in my view, that VCAT should be invested with exclusive jurisdiction to review administrative decisions made by the Authority (including by inspectors) where such a right of review is conferred.

1933. That is the very function for which the Tribunal was established, and it now has very considerable experience in conducting merits reviews of a wide range of decisions by public officials and statutory authorities.[735] The Magistrates' Court, on the other hand, is established as a court and functions as such, deciding disputed issues between adversarial parties. Its current, limited, jurisdiction to conduct a merits review of certain administrative decisions under OHSA is anomalous.

1934. VCAT is, moreover, well-versed in dealing with urgent applications to stay decisions. In its business licensing jurisdiction, the Tribunal is regularly asked to grant urgent interim stays of decisions revoking licences. This machinery would be well able to accommodate an urgent application from a dutyholder dissatisfied with a prohibition notice.

1935. The case for specialised training for members of VCAT who will hear applications for review of Authority decisions is, in my view, just as strong as for those Magistrates who would constitute the OHS panel (discussed in Chapter 36).

Review "as at" the original date

1936. The conventional position in administrative review is that the tribunal makes its decision on the basis of the information available as at the date of the review. In the case of some, at least, of the reviewable decisions under OHSA, that would not seem to be appropriate.

1937. For example, on a review of a decision under s.44(1) to issue a prohibition notice, the critical question would be whether the decision was correct on the information available at the time the decision was made. The same will be true of a decision to issue an improvement notice: was the inspector correct in forming the view at that time that a contravention had occurred? The fact that the contravention might have been remedied subsequently would be irrelevant to whether the decision was the "correct or preferable" one at the time it was made.

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734 See *Administrative Appeals Tribunal Act* 1975 (Cth).

735 See for example s.77(1) *Transport Accident Act* 1986, which gives VCAT jurisdiction to review decisions of the Transport Accident Commission under that Act.

Review of prosecutorial discretion

1938. Where any person believes that an offence has been committed, but no prosecution is instituted for a period of six months after the relevant event, s.49 enables that person to request the Authority to prosecute. The Authority must respond within three months and, if a decision has been made not to prosecute, the Authority must give reasons for that decision.

1939. In that event, the person may (under s.49(2)) require the Authority to refer the matter to the DPP, who is then obliged to give an opinion on whether a prosecution should be brought.

1940. In my view, this is a strong accountability mechanism, but it would be further enhanced if s.49 were amended to require the Authority –

(a) in a case where no investigation has been conducted by the Authority – to carry out an investigation before deciding (and advising the person making the request) whether or not it will prosecute;

(b) if it decides not to follow an advice from the DPP under s.49(3) that it should prosecute – to give reasons for that decision; and

(c) to publish – on its website and/or in the annual report – by reference to the reporting period:

- the number of s.49 requests received;
- the number and nature of the Authority's responses to s.49 requests (ie. prosecute or not prosecute);
- the number of requests for referral to the DPP of a decision by the Authority not to prosecute; and
- the number and nature of the DPP's responses.

APPENDIX: TERMS OF REFERENCE

Update of the Occupational Health and Safety Act 1985
Terms of Reference

Introduction

The Government made an election commitment to update the *Occupational Health and Safety Act 1985* (the Act) to ensure Victoria has the leading occupational health and safety legislation in Australia and to examine the effectiveness of the existing penalties and consider options for more effective penalties. Ensuring consistency and efficacy in the enforcement of the legislation is also a key priority of the update.

The Act has been in operation for almost twenty years and it is now timely to update it to ensure it effectively meets modern employment conditions. The update will consider current arrangements including an examination the legislative framework, including Regulations, Codes of Practice and Guidelines, to ensure it meets the changing patterns of risk emerging from current trends in work and the consequent changes in injury and ill health.

Several Australian jurisdictions have undertaken updates of the OHS legislative framework. This update will be conducted in the context of those updates. The Productivity Commission is currently undertaking a update to assess possible models for establishing national frameworks for worker's compensation and OHS arrangements.

Scope of the update
This update will consider and provide recommendations on any changes that are needed to the existing legislative framework:-

1. to better secure the health, safety and welfare of persons at work, to protect them against risks to health and safety and secure safe and healthy work environments; particularly in view of the:

    - changing nature of work;
    - changing nature of employment arrangements;
    - new and emerging risks and issues;

2. to increase the involvement of employees and employers and their representatives in the formulation and implementation of health and safety standards, particularly:

    - requirements for consultation;
    - the role, rights and responsibilities of health and safety representatives; and
    - the role of representative organisations;

3. to remove unnecessary duplication and unnecessary regulatory burden on business, without compromising safety;

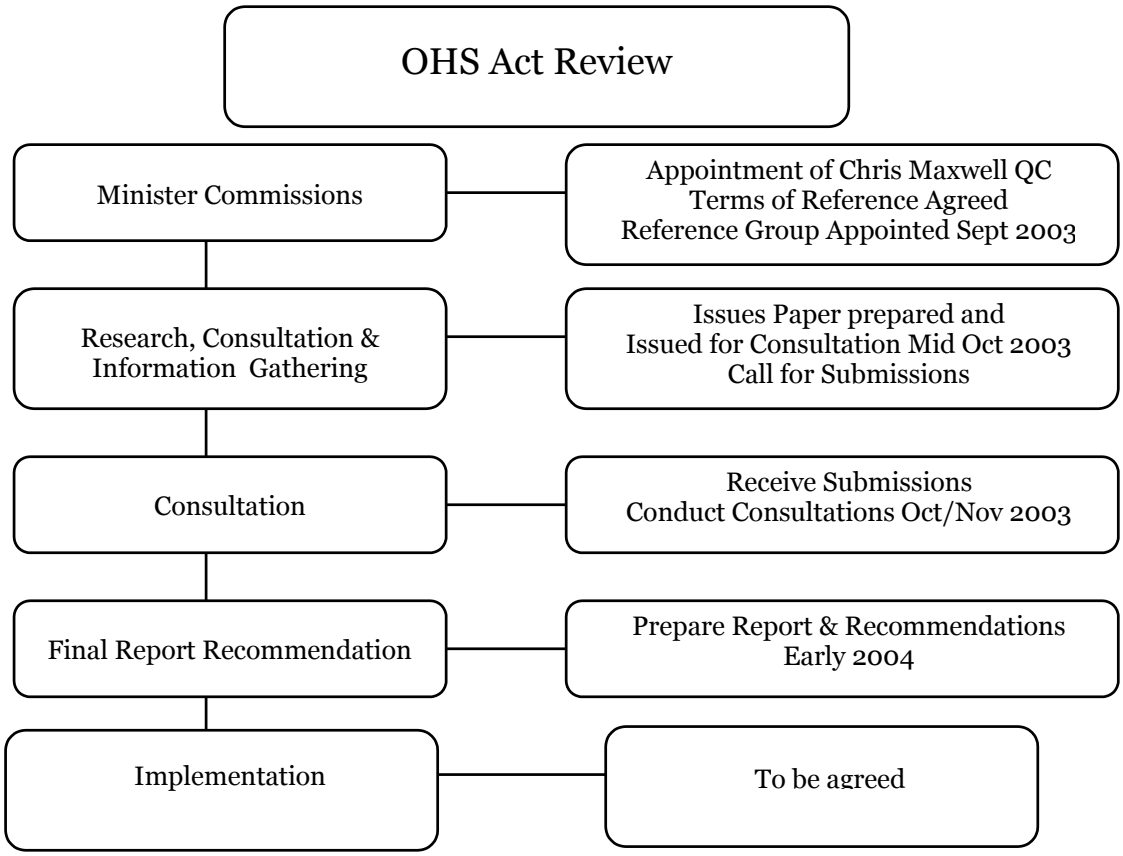
4. to ensure rights, responsibilities and duties are clearly understood by employers and employees and other duty holders, including appropriate standard setting through Regulations, Codes, Guidance and other information; to improve compliance with the legislation and recommendations on the level and types of penalties to achieve deterrence objectives and influence and promote health and safety outcomes;

5. to ensure consistency, transparency and address duplication in the enforcement of legislative obligations under the OHS Act and other health and safety legislation.

Methodology
The update will be undertaken by Chris Maxwell QC supported by a Secretariat resourced by the VWA. Chris Maxwell QC will meet and consult on a structured and regular basis with a stakeholder reference group.

The following approach will be taken to the update:

Phase 1 - Information gathering, research and consultation with key stakeholders– September 2003
Phase 2 - Publish discussion paper and invite submissions – mid October 2003
Phase 3 - Conduct formal consultation phase – late October to mid November 2003
Phase 4 - Issue final report and recommendations – early 2004.



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